

COMMENT

A CALL TO REFORM LOUISIANA CODE OF CRIMINAL PROCEDURE ARTICLE 882:

ELIMINATING THE ERROR PATENT REVIEW OF ILLEGALLY LENIENT FINES

I. INTRODUCTION	314
II. THE ORIGINS OF LOUISIANA APPELLATE COURTS’ REVIEW OF CRIMINAL SENTENCES.....	318
A. SENTENCING PROCEDURE IN LOUISIANA	319
1. TRIAL COURT’S SENTENCING PROCESS	319
2. A DEFENDANT’S RIGHT TO APPEAL	321
3. PROCEDURAL ASPECTS BEHIND THE APPELLATE REVIEW OF SENTENCING.....	322
B. APPELLATE COURTS’ REVIEW FOR ERRORS PATENT.....	325
1. HISTORY OF THE ERRORS PATENT DISCUSSION.....	325
2. APPELLATE PROCESS IN THE 1980S—THE “ <i>JACKSON-FRASER</i> ” LINE OF CASES.....	327
3. <i>STATE V. WILLIAMS</i> AND ITS RESULTING PRECEDENTIAL INCONSISTENCIES	331
C. FEDERAL LAWS AND PRECEDENT RELATING TO LA. C.CR.P. ART. 882	335
III. ANALYSIS OF LOUISIANA APPELLATE COURT JURISPRUDENCE.....	339
A. POST- <i>WILLIAMS</i> INCONSISTENCIES IN THE FOURTH CIRCUIT COURT OF APPEALS.....	339
B. INCONSISTENCIES IN OTHER LOUISIANA APPELLATE CIRCUITS	346
IV. A CALL TO REFORM ARTICLE 882.....	347
A. PROTECTING THE DEFENDANT’S CONSTITUTIONAL RIGHT TO APPEAL.....	348
B. PROTECTING THE DEFENDANT’S DUE PROCESS RIGHTS	349

C. FOSTERING JUDICIAL ECONOMY AND EFFICIENCY.....	350
D. A PROPOSED UNIFORM APPROACH FOR HANDLING ILLEGALLY LENIENT FINES ACROSS THE LOUISIANA APPELLATE CIRCUITS	350
E. SETTING THE STANDARD OF A TRULY MANDATORY FINE	351
V. CONCLUSION.....	353

I. INTRODUCTION

Consider Lance, a criminal defendant recently convicted by a trial court judge.¹ Found guilty for a crime he did not commit, he plans to appeal certain issues from the conviction, including the excessive sentence. The district court judge sentenced him to imprisonment but chose not to apply a fine after taking into account many factors learned at trial. Lance has struggled with the decision of whether to appeal the sentence, worrying about the extra costs, time, and burdens placed on his family. Nevertheless, he decides to go through with the appeal. The appellate court not only denies his appeal, but the court also chooses to impose a severe monetary fine on Lance in addition to his jail sentence. Lance is shocked. After all of his worries over appealing his conviction, he never thought that the court would impose a harsher sentence on him, especially because the district attorney did not raise that issue on appeal. In Louisiana, it appears that criminal defendants considering an appeal must also consider extraneous factors such as the parish in which the arrest occurred because appellate courts can *sua sponte* impose an increased sentence by the application of a statutorily “mandated”² fine.

1. This hypothetical scenario is based loosely on *State v. Volgamore*, 38,054-KA (La. App. 2 Cir. 1/28/04); 865 So. 2d 237, where the defendant was convicted after a bench trial and sentenced to ten years hard labor. *Id.* at 238. Defendant appealed, contending the trial court imposed an excessive sentence, *inter alia*. *Id.* The appellate court held that, not only was defendant’s sentence not constitutionally excessive, but it also imposed *sua sponte* a \$5,000 fine on him in addition to the trial court’s original sentence. *Id.* at 241-42. *See also* *State v. Presson*, 43,215, p. 14 (La. App. 2 Cir. 6/4/08); 986 So. 2d 843, 851-52 (amending the trial court sentence by imposing additional \$5,000 fine *sua sponte*); *State v. Sermons*, 41,746, p. 17-18 (La. App. 2 Cir. 2/28/07); 953 So. 2d 958, 968.

2. Mandated is in quotations here because both this author and courts in

A change is needed to prevent the recurring due process violations that result from the improper sentence review of criminal defendants by Louisiana appellate courts.³ Defendants should not suffer from the *sua sponte* imposition of judicially mandated, harsher fines after exercising their right to appellate review guaranteed by the Constitution of the State of Louisiana.⁴ This appellate court practice is currently allowed through a “review for errors patent,” in which the reviewing court may determine issues not raised on appeal if it can do so without inspecting the evidence.⁵ However, this violates the Due Process Clause by dissuading some defendants from exercising their right to appeal, fearful of a forthcoming sentence more unfavorable to them.⁶ Clashing interpretations of articles 882 and 920 in the Louisiana Code of Criminal Procedure and thirty years of corresponding case precedents need clarification and reform to protect the defendant’s right to an appeal.⁷

To understand how the law has evolved, it is important to trace its history. In 1980, voters approved an amendment to the Louisiana constitution that transferred criminal appellate jurisdiction from the Louisiana Supreme Court to the five state courts of appeal.⁸ This amendment, effective July 1, 1982, alleviated the burdensome criminal docket of the Louisiana Supreme Court by spreading criminal appeals to the lower courts.⁹ Once appellate courts began to review criminal appeals, a question quickly arose regarding their proper course of action upon noticing *sua sponte* that the trial court’s sentence was illegally lenient. Would the appellate court choose to enhance the sentence on its own, remand the case to the trial court with instructions to enhance the sentence, or simply leave it

different circuits in the state of Louisiana have varying interpretations of what constitutes a truly mandatory fine.

3. This Comment will focus specifically on the appellate court practice of finding an error patent for an illegally lenient fine. Any references to appellate review of illegal “sentences” should be read in the narrow context of an illegal fine.

4. *Sua sponte* is the key term here—this article has no issues with appellate courts increasing illegally lenient sentences if the state raises that error on appeal.

5. LA. CODE CRIM. PROC. ANN. art. 920 (2008).

6. See *infra* Part II.C.

7. See *infra* Part III.

8. Steven R. Plotkin, *History*, STATE OF LOUISIANA, COURT OF APPEAL, FOURTH CIRCUIT, <http://la4th.org/History.aspx> (last visited May 13, 2014); LA. CONST. art. V, §§ 5(E), 10.

9. Plotkin, *supra* note 8; LA. CONST. art. V, §§ 5(E), 10.

unchanged?¹⁰ Within a year of the amendment's effective date, differing opinions on the answer to this question raised the issue of whether the appellate court has the authority to review sentencing issues unfavorable to the defendant when the defendant alone appeals, and the state does not raise that issue on appeal.¹¹ Similar scenarios have arisen frequently over the past thirty years, creating discrepancies among the appellate courts and questionable discernments of court precedent.¹²

Erick Anderson eerily predicted some negative side effects of the July 1982 amendment, while acknowledging the temporal and economical benefits of this amendment.¹³ Considering the future ramifications of five separate appellate courts handling sentencing review, Mr. Anderson perceptively noted that "the future effectiveness of the judiciary as a viable means for controlling sentence disparity may be curtailed correspondingly if the appellate courts' application of sentencing policies becomes incohesive."¹⁴ Following Mr. Anderson's advice, reviewing courts should take advantage of their sentencing discretion to unify sentencing policy.¹⁵ This approach will prevent the review process from becoming arbitrary while providing the trial court with guidance for future sentencing problems.¹⁶ In fact, appellate courts must protect against the "arbitrary and capricious application of criminal sanctions."¹⁷ Unfortunately, in the thirty

10. Cheney C. Joseph, Jr., *Post Conviction Procedure*, 45 LA. L. REV. 485, 491 (1984).

11. See *State v. Williams*, 439 So. 2d 387, 388 (La. 1983) (holding that the penalty provision for simple arson was "only a maximum fine, not minimum" and the sentencing court was not required to impose any additional fine); see also *State v. Napoli*, 437 So. 2d 868 (La. 1983) ("When the defendant alone seeks review of a conviction and sentence, the court of appeal should review only those issues raised by the defendant and any patent errors favorable to defendant."); *State v. Goodley*, 423 So. 2d 648, 652 (La. 1982) (finding that the court's sua sponte discovery of an error patent penalized the defendant for pursuing his right to appeal).

12. The fourth circuit in *State v. Williams*, 2003-0302, p. 4 n.2 (La. App. 4 Cir. 10/6/03); 859 So. 2d 751, 754 n.2, echoed this same sentiment in a footnote, calling this "a significant issue of law on which the judiciary has voiced conflicting views and which the Louisiana Supreme Court should revisit."

13. Erick V. Anderson, *Appellate Review of Excessive Sentences in Non-Capital Cases*, 42 LA. L. REV. 1080, 1081, 1098 (1982). For example, Anderson suggested this amendment would create a less burdensome caseload on the Louisiana Supreme Court. *Id.* at 1081.

14. *Id.*

15. *Id.* at 1087.

16. *Id.* at 1097.

17. Anderson, *supra* note 13, at 1097.

years since the amendment, appellate courts have veered off course and continue to struggle with the same problems Mr. Anderson predicted on the issue of illegally lenient sentences.

This Comment thoroughly examines Louisiana's sentencing procedure authorizing appellate review of criminal sentences and further analyzes the corresponding jurisprudence in order to explain the pressing need for reform of Louisiana Code of Criminal Procedure article 882. Section II discusses the procedural aspects of sentencing in the trial court and the procedure of error review in the appellate court, offering background law to explain the function of both levels of the judiciary as they relate to sentencing. Subsection A introduces the relevant statutes, code articles, and their important amendments. Subsection B then details the appellate practice of a review for errors patent, highlighting court precedent that illustrates the legislative discrepancies, including the game-changing 2001 Louisiana Supreme Court decision in *State v. Williams* that departed from years of jurisprudence in the *Jackson-Fraser* line of cases.¹⁸ Subsection C contrasts the Louisiana decisions to federal law and jurisprudence, emphasizing the incongruity between the 2001 *Williams* decision and the 2008 United States Supreme Court opinion, *Greenlaw v. United States*. Section III traces and analyzes the disparate line of Louisiana jurisprudence on this issue, focusing on the tumultuous microcosm of cases in the Louisiana Fourth Circuit Court of Appeal and comparing those cases to inconsistent post-*Williams* decisions by other circuit courts around Louisiana. Finally, Section IV proposes that the legislature should revise article 882, instructing reviewing courts to refrain from their current practice of correcting trial court sentences on a *sua sponte* error patent review for an illegally lenient fine when the state neglects to raise the issue on appeal. Furthermore, the legislature should amend article 882 because both the article and Louisiana jurisprudence interpreting it are outdated in light of the 2008 United States Supreme Court decision in *Greenlaw*, holding that an appellate court may not order an increase in a

18. *State v. Jackson*, 452 So. 2d 682 (La. 1984), *superseded by statute*, Act of June 9, 1999, No. 94, 1999 La. Acts 841 (codified at LA. REV. STAT. § 15:301.1 (1999)); *State v. Fraser*, 484 So. 2d 122 (La. 1986), *superseded by statute*, Act of June 9, 1999, No. 94, 1999 La. Acts 841 (codified at LA. REV. STAT. § 15:301.1 (1999)); *see also* *State v. Heim*, 2003-0957, p. 3-4, (La. App. 4 Cir. 3/10/04); 870 So. 2d 335, 337-38.

defendant's sentence by its own initiative.¹⁹

II. THE ORIGINS OF LOUISIANA APPELLATE COURTS' REVIEW OF CRIMINAL SENTENCES

In 1984, the legislature amended Louisiana Code of Criminal Procedure article 882²⁰ (article 882) by authorizing “an appellate court on review” to correct an illegal sentence, vesting even greater power in the appellate courts.²¹ Before this amendment only “the court that imposed the sentence” had the power to correct an illegal sentence.²² Almost thirty years removed from these amendments, it is evident that article 882 needs another revision. Most importantly, the legislature should amend this article to provide clarity to the appellate courts' sentence review practices because the Louisiana Supreme Court does not appear poised to revisit the subject.²³ Ideally, article 882 would only authorize appellate courts to correct *sua sponte* illegally excessive sentences, taking away the courts' power to amend any illegally lenient sentences—including fines in particular—when the state does not raise that issue on appeal. This would pose no risk to the criminal justice system's reputation, as the state would still retain the authority to raise the issue of an illegal sentence on appeal. Part II(A) provides the background law and procedure for both the trial court's and the reviewing court's authority to impose and amend criminal sentences. Part II(B) delves deeper into the process behind the Louisiana appellate court's practice of

19. *Greenlaw v. United States*, 554 U.S. 237, 240 (2008).

20. LA. CODE CRIM. PROC. ANN. art. 882 (2008).

21. LA. CODE CRIM. PROC. ANN. art. 882(A)-(B)(1) (2008) states:

A. An illegal sentence may be corrected at any time by the court that imposed the sentence or by an appellate court on review.

B. A sentence may be reviewed as to its legality on the application of the defendant or of the state:

(1) In an appealable case by appeal

Id.; see also *State v. Samuels*, 471 So. 2d 883, 884-85 (La. Ct. App. 1985) (discussing different approaches taken by courts of appeal after the 1984 amendment to C.Cr.P. art. 882); *State v. Robertson*, 459 So. 2d 581, 582 (La. Ct. App. 1984) (discussing the 1984 amendment to C.Cr.P. art. 882).

22. *Samuels*, 471 So. 2d at 885. All citations to articles in the Louisiana Code of Criminal Procedure will hereafter be cited in the text as “C.Cr.P.” per LA. CODE CRIM. PROC. ANN. art. 1 (2003).

23. See generally *State v. Price*, 2005-2514, p. 21 (La. App. 1 Cir. 12/28/06); 952 So. 2d 112, 124 (“The Louisiana Supreme Court, as a whole, has not recognized ‘patent error’ since [2004].”); *State v. Haynes*, 2004-1893 (La. 12/10/04); 889 So. 2d 224 (per curiam) (issuing its last opinion on the scope of error patent review by the appellate court).

reviewing trial court judgments for errors patent, tracing both law and jurisprudence over the past three decades. Finally, Part II(C) compares and contrasts relevant federal law and jurisprudence to this Louisiana precedent, showcasing the need for reform of article 882 to align itself with the federal model.

A. SENTENCING PROCEDURE IN LOUISIANA

A brief discussion of the law and mechanics behind the sentencing of criminal defendants will provide the necessary backdrop for this Comment's proposal. First, this section will discuss the trial court's sentencing procedure and guidelines, explaining the phrase "illegally lenient sentence." After examining the right to an appeal granted by the Louisiana constitution, this section covers the appellate court's sentencing procedure—including the breadth of appellate review governed by Code of Criminal Procedure articles 882 and 920.

1. TRIAL COURT'S SENTENCING PROCESS

A cursory understanding of the sentencing process is necessary before delving into the problems behind current articles 882 and 920 and their corresponding case precedent. The state district court provides the mechanics for the properly functioning criminal justice system in Louisiana. Under the Louisiana constitution, district courts have original jurisdiction over all criminal matters and exclusive original jurisdiction of felony cases.²⁴ After a defendant's conviction, plea of *nolo contendere*, or guilty plea, the district court judge will sentence the defendant for the crime committed.²⁵

The Louisiana Revised Statutes contain sentencing guidelines for most crimes, specifying ranges for both the amount of monetary fines and duration of incarceration.²⁶ Sometimes

24. LA. CONST. art. V, § 16.

25. LA. CODE CRIM. PROC. ANN. art. 871 (2008). Article 779 of the Louisiana Code of Criminal Procedure provides the threshold of potential sentence severity for whether a judge or jury tries the defendant. Regardless, the judge has the final say in the sentencing process. The mechanics behind the process are far less informal in day-to-day practice. Usually, with the intention of avoiding an unpredictable jury panel, the defendant will accept a plea bargain from the state through the assistant district attorney and plead guilty, all with minimal input from the judge. Only in the final stage does the state inform the judge of defendant's sentence; and due to congested dockets and long days, the judge relies on the state for accuracy, often resulting in mechanical errors.

26. *See* LA. REV. STAT. ANN. § 15:529.1 (2012).

these ranges will include mandatory minimums, maximums, or both, but the legislature vests the trial judge with wide latitude in issuing sentences.²⁷ Considering the size of the criminal docket and the sheer number of criminal defendants, a pervasive problem exists in the criminal system where the court either intentionally or mistakenly does not abide by the sentencing guidelines set forth in the statute.²⁸ The problem of excessive sentences will not be discussed in this Comment because many have written about that important constitutional issue.²⁹ Instead, this Comment will focus on appellate court review of illegally lenient fines because those defendants often lack the means for proper legal assistance to prevent unfavorable sentence review.³⁰

The trial court imposes an “illegally lenient sentence” when its sentence falls under the statutory minimum.³¹ Illegally lenient sentences originate most often in two situations: (1) the sentencing court’s omission of the phrase “without benefit of probation, parole, or suspension of sentence”³² and (2) the sentencing court’s omission of a fine deemed to be “mandatory.”³³ The 1999 enactment of Louisiana Revised Statute § 15:301.1 rectified the first problem by automatically correcting the trial

27. *State v. Wiltturner*, 2003-0719, p. 5 (La. App. 3 Cir. 11/5/03); 858 So. 2d 743, 746. Judges typically self-police their vast discretion by researching precedent on the sentences of similarly situated criminal defendants, often considering the guidelines set forth by the Louisiana Sentencing Commission. *See generally* LA. REV. STAT. ANN. § 15:321 (2005).

28. *See generally* § 15:321; *State v. Smith*, 93-0402, p. 3-4 (La. 7/5/94); 639 So. 2d 237, 240.

29. *See, e.g.*, Shelley L. Poore, *State v. Young: The Louisiana Supreme Court Resolves A Split in the Circuits on the Issue of Appellate Review of Sentences Imposed Under Plea Agreements*, 71 TUL. L. REV. 1609 (1997); Bidish J. Sarma et al., *Struck by Lightning: Walker v. Georgia and Louisiana’s Proportionality Review of Death Sentences*, 37 S.U. L. REV. 65 (2009); John F. Stinneford, *The Illusory Eighth Amendment*, 63 AM. U. L. REV. 437 (2013); Julia L. Torti, Note, *Accounting for Punishment in Proportionality Review*, 88 N.Y.U. L. REV. 1908 (2013).

30. *State v. Williams*, 489 So. 2d 286, 291 (La. Ct. App. 1986) (“Sentencing judges are vested with wide discretion in determining the initial punishment in a particular case and consider many factors including the defendant’s financial condition.”); *State v. Campbell*, 08-1226, p. 8 (La. App. 5 Cir. 5/26/09); 15 So. 3d 1076, 1081 (“Since that time, this Court has used that authority to notice the failure of the trial court to impose a mandatory fine and our authority to remand the matter to the trial court for imposition of a mandatory fine. However, often in indigent defender matters, we have decided not to use that authority.”).

31. *State v. Jones*, 10-281, p. 6 (La. App. 5 Cir. 10/26/10); 51 So. 3d 792, 796.

32. *Id.* at 799.

33. *Id.* at 796.

court's imposition of an illegally lenient jail sentence,³⁴ however, the issues raised by trial court's omission of a "mandatory" fine has received little legislative guidance, resulting in the current inequities by the appellate court's system of review addressed in this Comment.³⁵ Courts disagree on what constitutes a "mandatory" fine requirement under many statutes, creating inconsistencies in the appellate review of sentences in situations when the trial court fails to impose a fine.³⁶ Specifically, the unclear question is whether the phrase "shall be fined not more than" a given amount should be treated as "mandatory" fine under the statute.³⁷

2. A DEFENDANT'S RIGHT TO APPEAL

To prevent these imbalances in the justice system, Louisiana has implemented certain constitutional protections. In theory, Louisiana law protects its criminal defendants by offering them every opportunity for a higher court to review their cases.³⁸ Unfortunately, appellate court practices have not always protected this right, even though the right to an appeal is a constitutional right in Louisiana.³⁹ Specifically, the Louisiana constitution grants the courts of appeal jurisdiction over "all criminal cases triable by a jury," but that appellate jurisdiction "extends only to questions of law."⁴⁰ The defendant has a right of appeal or review in all criminal cases.⁴¹ This right expounds upon Article I, § 19 of the Louisiana constitution, which states that "[n]o person shall be subjected to imprisonment or forfeiture of rights or property without the right of judicial review based

34. LA. REV. STAT. ANN. § 15:301.1 (2005). La. Rev. Stat. § 15:301.1 provides guidance for sentences imposed "without benefit of probation, parole, or suspension of sentence" and will be discussed later. *Id.*

35. *See State v. Williams*, 2000-1725, p. 10 (La. 11/28/01); 800 So. 2d 790, 799 (finding that La. Rev. Stat. § 15:301.1 "self-activates the correction and eliminates the need to remand for a ministerial correction of an illegally lenient sentence").

36. *See infra* Part III.

37. This problem is crucial to this argument and will be given appropriate coverage later. *See infra* Part III; *see also supra* note 2.

38. LA. CONST. art. V, § 10(C); LA. CONST. art. I, § 19.

39. *State v. Simmons*, 390 So. 2d 504, 506 (La. 1980); *see also State v. Goodley*, 423 So. 2d 648, 651 (La. 1982) ("Appeals have always been favored in the law of [Louisiana].").

40. LA. CONST. art. V, § 10. This article lists one exception to the jurisdiction of the courts of appeals—when "the defendant has been convicted of a capital offense and a penalty of death actually has been imposed." LA. CONST. art. V, §§ 5(D), 10.

41. LA. CONST. art. V, § 10(C).

upon a complete record of all evidence upon which the judgment is based.”⁴² Specifically, Louisiana statutes authorize the defendant to appeal from a judgment in a criminal case triable by jury, while both the Constitution of the State of Louisiana and the Code of Criminal Procedure grant the right of judicial review by application to the court of appeal for a writ of review.⁴³

3. PROCEDURAL ASPECTS BEHIND THE APPELLATE REVIEW OF SENTENCING

The appeals process begins once the sentencing court enters a judgment against the defendant.⁴⁴ Within the statutorily mandated timeframe, either the state, through the district attorney, or the defendant may appeal the judgment.⁴⁵ The state can either appeal what it alleges to be a sentencing error, such as an illegally lenient sentence, or it may raise an appeal on other grounds not pertaining to the sentence.⁴⁶ The Louisiana Code of Criminal Procedure provides that the state may appeal the district court’s sentence only if the sentence does not comply with statutorily mandated requirements *and* if the state objected to the sentencing at the proper time.⁴⁷ The state has a clear procedural mechanism to seek appellate review of a defect in sentencing; if the state does not abide by these provisions, it cannot seek appellate review of the illegal sentence.⁴⁸ Just as the

42. LA. CONST. art. I, § 19.

43. LA. CODE CRIM. PROC. ANN. art. 912.1(B)(1), (C)(1) (2008). For a recent case that recognized this distinction, see *State v. Castillo*, which states:

In Louisiana, a criminal defendant only has a right of direct appeal from his conviction if his case is triable by a jury. La. Const. Art. V, § 10; La. C. Cr. P. art. 912.1. Misdemeanors punishable by more than six months imprisonment are triable by a jury, but all other misdemeanors are tried by the court. La. C. Cr. P. art. 779.

State v. Castillo, 2009-1358, p. 3 (La. 1/28/11); 57 So. 3d 1012, 1013-14 (footnotes omitted).

44. LA. CODE CRIM. PROC. ANN. art. 912 (2008).

45. LA. CODE CRIM. PROC. ANN. art. 911 (2008).

46. See, e.g., *State v. Bourda*, 10-1553, p. 1, 9 (La. App. 3 Cir. 6/8/11); 70 So. 3d 82, 83, 89 (noting the illegal sentence was an error patent, the court vacated defendant’s fourteen year sentence and imposed a sentence of life imprisonment).

47. LA. CODE CRIM. PROC. ANN. art. 881.2(B) (2008). It is important to note the conjunctive in this article. If the state fails to object to the sentence when it was imposed, it may also file a motion asking the sentencing court to reconsider the sentence under C.Cr.P. art. 881.1.

48. LA. CODE CRIM. PROC. ANN. art. 881.1(E) (2008) (“Failure to make or file a motion to reconsider sentence . . . shall preclude the state or the defendant from raising an objection to the sentence or from urging any ground not raised in the motion on appeal or review.”).

state may appeal, the defendant also has the right to a judicial review of sentencing by way of appeal.⁴⁹ However, jurisprudential inconsistencies have confused whether the defendant may appeal other parts of his conviction without raising these sentencing issues.⁵⁰

Once the appeal is lodged in the appropriate court of appeal, the 1984 amendment to article 882 becomes relevant.⁵¹ According to current Louisiana Supreme Court authority, even if the state does not raise the issue of an illegally lenient fine on appeal, the court of appeal has the authority to do so *sua sponte* on an error patent discussion.⁵² This review for errors patent is a common practice of appellate courts in Louisiana where courts may review issues outside the scope of the criminal appeal.⁵³

As the law stands today, if the appellate court finds any grounds on which to set aside the sentence, the court must remand it to the trial court for resentencing, while it has the option to “give direction to the trial court concerning the proper sentence to impose.”⁵⁴ The trial court may also correct its own

49. LA. CODE CRIM. PROC. ANN. art. 881.2(A)(1) (2008). Here, it must be noted that the defendant and the state can bring post-sentencing motions to the trial court, before the case reaches the appellate level. See *State v. Griffin*, 41,946, p. 3 (La. App. 2 Cir. 5/2/07); 956 So. 2d 199, 201, where the defendant appealed with his first assignment of error of an illegally lenient sentence. Apparently, defendant attempted to nullify his entire plea bargain by arguing that the trial court erred in *not* fining him. *Id.* The court found that, in accordance with article 881.2(A)(2), “[a] defendant cannot appeal or seek review of a sentence imposed in conformity with a plea agreement which was set forth in the record at the time of the plea.” *Id.*

50. See *infra* Part III.

51. See *supra* notes 20-23 and accompanying text. Current interpretations of this amendment by Louisiana appellate courts in conjunction with Patent Error Review are the bases for this Comment. The courts use “Patent Error” and “Error Patent” interchangeably.

52. *State v. Decrevel*, 2003-0259, p. 1 (La. 5/16/03); 847 So. 2d 1197 (per curiam) (“The court of appeal had the authority on its own motion to correct the sentence imposed by directing the court to add the mandatory fine.”). *But see* *State v. Haynes*, 2004-1893 (La. 12/10/04); 889 So. 2d 224 (per curiam) (“[T]he court of appeal exceeded the scope of error patent review by amending the amount [of the illegally lenient fine] *sua sponte* instead of remanding the case to the trial court for resentencing.”). This is the faulty precedent with which the Comment’s author takes issue. See *supra* note 18 and accompanying text.

53. Courts derive this power from both the jurisprudence and from La. C.Cr.P. art. 920. LA. CODE CRIM. PROC. ANN. art. 920 (2008).

54. LA. CODE CRIM. PROC. ANN. art. 881.4 (2008); see also LA. REV. STAT. ANN. 15:301.1(B) (2005) (“If a sentence is inconsistent with statutory provisions . . . the sentencing court shall amend the sentence to conform to the applicable statutory provisions.” (emphasis added)). The holding in *Decrevel* appears to directly

sentence upon discovery that it exceeds the statutory maximum “[o]n motion of the state or the defendant, or on its own motion, at any time.”⁵⁵ In practice today, if the appellate court determines that the sentence is illegally lenient, it corrects the error in one of three ways: (1) remands it to the trial court with instructions for resentencing, (2) amends the sentence on appeal, or (3) simply allows the sentence to go uncorrected.⁵⁶ This Comment contends that appellate courts should not disturb a trial court’s sentencing on a *sua sponte* finding of error patent for an illegally lenient fine, unless the state took the proper procedural steps to raise that issue on appeal.

Two statutes in the Code of Criminal Procedure vest the Louisiana appellate courts with the authority to correct sentences on review. Code of Criminal Procedure article 920 (article 920) provides the breadth of appellate review, allowing only two instances where the appellate court may review an issue on appeal: (1) if the error is “designated in the assignment of errors” and (2) if the error “is discoverable by a mere inspection of the pleadings and proceedings and without inspection of the evidence.”⁵⁷ While article 920 illustrates the scope of appellate authority, article 882 expands the authority of both the sentencing and appellate courts regarding the legality of sentencing, providing that “[a]n illegal sentence may be corrected at any time by the court that imposed the sentence *or by an appellate court on review.*”⁵⁸ Article 882 then states that “[a] sentence may be reviewed as to its legality on the application of the defendant or of the state.”⁵⁹

As previously explained, the legislature amended article 882(A) in 1984 by adding the phrase “or by an appellate court on review.”⁶⁰ Louisiana legislative history from the 1980s provides

contradict article 881.4, which has created precedential issues because many appellate courts have relied on *Decrevel’s* authority. *See Decrevel*, 847 So. 2d at 1197.

55. LA. CODE CRIM. PROC. ANN. art. 881.5 (2008). Note that this statute and its counterparts refer to excessive sentences, not illegally lenient sentences.

56. Sentencing discretion concerns come into play if the appellate court amends the sentence *sua sponte* per *Decrevel*, especially if the reviewing court does not simply give the statutory minimum.

57. LA. CODE CRIM. PROC. ANN. art. 920 (2008).

58. LA. CODE CRIM. PROC. ANN. art. 882(A) (2008) (emphasis added to show the 1984 amendment to this article). *See supra* notes 20-22 and accompanying text.

59. LA. CODE CRIM. PROC. ANN. art. 882(B) (2008).

60. Act of July 12, 1984, No. 587, 1984 La. Acts 1378; *see also supra* notes 20-23 and accompanying text.

little on this issue other than the legislature's desire to give the appellate courts the authority to correct an illegal sentence.⁶¹ The Official Revision Comment (1966) illustrates the authority the legislature desired to give the trial court to correct the sentences.⁶² Written before the 1982 amendment to the Louisiana Constitution that gave appellate courts criminal jurisdiction, the revision comment explained that "the supreme court will not directly correct an illegal sentence."⁶³ Instead, the legislature intended for the reviewing court to remand the case to the trial judge, who would then enter a legal sentence.⁶⁴ The 1984 amendment to article 882 specifically authorizing appellate courts to correct illegal sentences has created procedural problems over the past thirty years, which the legislature should remedy by a revision of the article.

B. APPELLATE COURTS' REVIEW FOR ERRORS PATENT

As mentioned in the previous section, appellate courts currently have authority via a review for errors patent to impose a fine on a defendant *sua sponte*, even if the state does not raise the issue of an illegally lenient fine on appeal. This section traces the background of the "errors patent discussion," focusing on the 1982 amendment to the Constitution of the State of Louisiana and the resulting line of cases in the 1980s that removed appellate court authority to review for errors patent unfavorable to the defendant when the defendant alone appealed. Next, this section discusses the enactment of Louisiana Revised Statute § 15:301.1 and the problems resulting from appellate court interpretation of this statute.

1. HISTORY OF THE ERRORS PATENT DISCUSSION

Louisiana appellate courts often undertake an errors patent discussion to review an issue *sua sponte* when the state fails to raise said issue on appeal, such as the defendant's illegally

61. Act of July 12, 1984, No. 587, 1984 La. Acts 1378.

62. LA. CODE CRIM. PROC. ANN. art. 882 cmt. (b). *See generally* Dale E. Bennett, *The 1966 Code of Criminal Procedure*, 27 LA. L. REV. 175, 225-30 (1967).

63. LA. CODE CRIM. PROC. ANN. art. 882 cmt. (b); Plotkin, *supra* note 8; LA. CONST. art. V, § 10.

64. LA. CODE CRIM. PROC. ANN. art. 882 cmt. (b) ("Under [article 882] the trial judge is empowered whenever and at whatever stage of the proceedings he discovers his error, to directly correct the illegal sentence.").

lenient fine.⁶⁵ This review for errors patent is a common practice that dates back over 150 years.⁶⁶ Louisiana courts' application of this phrase is unique, with seemingly no other state or federal courts across the country using similar terminology.⁶⁷ Since at least 1859, Louisiana courts have used the term "error patent,"⁶⁸ and even as early as 1868, courts in Louisiana have monitored appeals for any errors patent.⁶⁹ Judge Welch, with the aid of Black's Law Dictionary, defined the term patent in the legal sense as "open," "manifest," or "evident."⁷⁰ Although the Louisiana Code of Criminal Procedure makes no reference to the phrase "error patent,"⁷¹ appellate courts derive this practice from Code of Criminal Procedure article 920.⁷² Cases have also referred to this discussion as reviewing for "errors patent on the face of the record."⁷³ Stated simply, a review for errors patent is a standard appellate court practice to analyze issues not briefed

65. *See supra* notes 1, 52.

66. *See generally* State v. Swift, 14 La. Ann. 827, 828 (1859). Note that the reviewing court refused to discuss errors patent unfavorable to the defendant for long over a century—that is a much more recent practice.

67. Louisiana courts' errors patent discussion is similar, but not directly comparable, to a "plain error" or "harmless error" analysis under FED. R. CRIM. P. 52. The Louisiana Supreme Court has warned against equating a patent error review with plain error. *See* State v. Thomas, 427 So. 2d 428, 432-34 (La. 1982). *See also*, State v. Price, 2005-2514, p. 1 (La. App. 1 Cir. 12/28/06); 952 So. 2d 112, 125 (McDonald, J., agreeing in part and concurring), where Judge McDonald explained the difference between plain and patent error:

However, there is a distinction between patent error [referring to C.Cr.P. art. 920(2)] and plain error. Federal law provides for plain error; Louisiana law does not. Federal Rules of Criminal Procedure, Rule 52(b) provides that "[A] plain error that affects substantial rights may be considered even though it was not brought to the court's attention." Thus, a plain error is such that requires reversal because it is so fundamentally prejudicial to the due process rights of the defendant.

Id. at 125 (last alteration in original).

68. Price, 952 So. 2d at 123 (citing State v. Swift, 14 La. Ann. 827 (1859)).

69. *Id.* ("[E]rrors [patent must] be apparent on the face of the record." (quoting State v. Behan, 20 La. Ann. 389 (1868))).

70. Price, 952 So. 2d at 126 & n.1 (Welch, J., concurring in part and dissenting in part) (citing BLACK'S LAW DICTIONARY 1013 (5th ed.)).

71. *See* LA. CODE CRIM. PROC. ANN. art. 920 (2008) (stating, without using the phrase "error patent," that error "discoverable by a mere inspection of the pleadings and proceedings and without inspection of the evidence" can be considered on appeal). The comments to art. 920 explain that the phrase "is taken from former R.S. 15:503 which defined an error 'patent on the face of the record.'" LA. CODE CRIM. PROC. ANN. art. 920 cmt. (c).

72. Price, 952 So. 2d at 124.

73. *Id.* at 123 (noting that C.Cr.P. art. 920 "makes no reference to the errors for review as 'patent'" and titled its discussion as a "Review for Error").

by either party on appeal by reviewing the pleadings and proceedings without any inspection of the evidence.⁷⁴ In the past decade, each of the five Louisiana appellate courts has reviewed records for errors patent with no clear approach or common method used to handle an illegally lenient fine.⁷⁵

2. APPELLATE PROCESS IN THE 1980S—THE “*JACKSON-FRASER*” LINE OF CASES

State v. Williams is the natural result of Louisiana Supreme Court precedent over the previous twenty years, starting with the 1982 amendment to the Louisiana Constitution, the 1984 amendment to article 882, and the *Jackson-Fraser* line of cases that followed in the 1980s. Before the 1984 amendment to article 882, a reviewing court did not have the authority to review for errors patent unfavorable to the defendant when the defendant alone appealed.⁷⁶ Additionally, appellate courts could not remand a case for resentencing on a finding that the sentencing court failed to impose a statutorily “mandated” fine.⁷⁷ Less than a month before the amendment to article 882, the Louisiana Supreme Court reviewed in detail the procedure for correcting an error patent in sentencing, holding in *State v. Jackson* that it was “inappropriate for an appellate court to correct the sentence when the defendant alone seeks appellate review.”⁷⁸ In *State v. Fraser*,

74. *State v. LaFleur*, 448 So. 2d 884, 885 (La. Ct. App. 1984).

75. *See, e.g.*, *State v. Celestine*, 11-1403, p. 2 (La. App. 3 Cir. 5/30/12); 91 So. 3d 573, 575 (“[A]ll appeals are reviewed for errors patent on the face of the record.”); *State v. Shaw*, 12-686, p. 12 (La. App. 5 Cir. 1/16/13); 108 So. 3d 1189, 1197 (“Examination of the record for errors patent on its face is a routine part of [the fifth circuit’s] review.”).

76. LA. CODE CRIM. PROC. ANN. art. 882 (2008) (“An illegal sentence may be corrected at any time by the court that imposed the sentence or by an appellate court on review.”); *see also* *State v. Napoli*, 437 So. 2d 868 (La. 1983) (per curiam) (“When the defendant alone seeks review of a conviction and sentence, the court of appeal should review only those issues raised by the defendant and any patent errors favorable to defendant.”); *State v. Samuels*, 471 So. 2d 883, 885 (La. Ct. App. 1985).

77. *See* *State v. Williams*, 439 So. 2d 387, 388 (La. 1983). Courts vary on what constitutes a mandatory minimum fine. *See supra* text accompanying notes 36-37; *see also infra* Part III.B. The issue is whether a fine of “not more than” a certain dollar amount sets a minimum of \$0. *See infra* Part III.A. This Comment will argue that the fine is only statutorily mandated when the statute sets a minimum of more than \$0. *See infra* Part IV.

78. *State v. Jackson*, 452 So. 2d 682, 684 (La. 1984), *superseded by statute*, Act of June 9, 1999, No. 94, 1999 La. Acts 841 (codified at LA. REV. STAT. § 15:301.1 (1999)) (discussing pre-amendment C.Cr.P. art. 882 and C.Cr.P. art. 920, claiming a “fundamental precept in appellate procedure that . . . the appellate court should not, by taking cognizance of an issue not properly raised by either the appellant or the

the court examined the effect that the 1984 amendment to article 882 had on its holdings in *Jackson* and prior cases.⁷⁹ Although this addition to article 882 seemingly authorized appellate courts to amend sentences for the error patent of an illegally lenient sentence, *Fraser* held that appellate courts may not “notice and correct an undesignated error when the correction is more onerous to the only party seeking review.”⁸⁰ Clarifying the amendment, the court reasoned:

Nothing in the amendment suggests that an appellate court may correct an illegally lenient sentence of which the prosecutor has not complained. . . . [and t]here is no codal or statutory authority for an appellate court to search the record for patent sentencing errors to the detriment of the only party who sought review by the appellate court.⁸¹

A closer analysis of the *Jackson-Fraser* line of cases further illustrates how the Louisiana Supreme Court in *Williams* went too far in its granting of power to the appellate court to *sua sponte* amend sentences in a review for errors patent.

The Louisiana Supreme Court in *Jackson* held that the appellate court may not amend an illegal sentence so that the defendant is worse off for having exercised his right to appeal.⁸² However, the amendment to article 882 gave authority to the appellate court to correct an illegal sentence at any time.⁸³ A statutory interpretation of article 882(A), standing alone,

appellee, render a judgment on appeal which is less favorable to the appellant than the judgment from which the appeal was taken”). The legislative intent, found in the editors’ notes of LA. REV. STAT. ANN. § 15:301.1 (2005), states that the provisions “legislatively overrule” *Jackson*, although this statute discusses sentences imposed without benefit of probation, parole, or suspension of sentence. The Louisiana Supreme Court decided *Jackson* a mere three weeks before the legislature’s amendment to article 882; however, nothing in the legislative history or the court’s precedent indicates that the authorization of an appellate court to correct a sentence on review was a byproduct of a legislature unhappy with *Jackson*. See generally *State v. Jackson*, 452 So. 2d 682 (La. 1984). One plausible explanation is that the issue of *sua sponte* appellate review of sentencing was novel enough after the 1982 constitutional amendment to warrant swift and necessary change.

79. *State v. Fraser*, 484 So. 2d 122 (La. 1986).

80. *Id.* at 124-25.

81. *Id.* at 124. The Court concluded that the amendment to C.Cr.P. art. 882 does not modify its holding in *Jackson*; and if neither party appeals under C.Cr.P. art. 882, C.Cr.P. art. 920 governs the scope of appellate review in an errors patent review. *Id.* at 125.

82. *Id.* at 123; *Jackson*, 452 So. 2d at 684 (La. 1984).

83. LA. CODE CRIM. PROC. ANN. art. 882(A) (2008).

assumedly grants appellate courts the power to amend the sentence on review, yet reading Paragraphs (A) and (B) together indicates that the state must apply to have the legality of a sentence reviewed.⁸⁴ Although *Fraser* held the amendment to article 882 did not affect the holding in *Jackson*, the enactment of Louisiana Revised Statute § 15:301.1 fifteen years later combined with the statute's interpretation in *Williams* accomplished this and more.

Two years after *Jackson*, the Louisiana Supreme Court strengthened its decision in *State v. Fraser*.⁸⁵ Overruling the appellate court,⁸⁶ the court in *Fraser* held it is not the duty of the appellate court to correct every illegal sentence because that is not the "proper allocation of functions between the prosecutor and the appellate court during the appeal."⁸⁷ The Louisiana Supreme Court went on to state that if neither party appeals under article 882, then article 920 restricts the scope of appellate review because nothing in article 882 says the appellate court can correct an illegally lenient sentence of which the prosecutor has not complained.⁸⁸ The court pronounced this in the face of the 1984 amendment to article 882 by logically analyzing the totality of that statute, finding that article 882(B) "still require[d] an application for review of an illegal sentence by either the

84. LA. CODE CRIM. PROC. ANN. art. 882(A)-(B)(1) (2008) states:

A. An illegal sentence may be corrected at any time by the court that imposed the sentence or by an appellate court on review.

B. A sentence may be reviewed as to its legality on the application of the defendant or of the state:

(1) In an appealable case by appeal . . .

Id. This interpretation begs the additional question of why the appellate courts began remanding illegally lenient sentences to the trial court. See *infra* text accompanying note 155 for a proposal that previous interpretations of C.Cr.P. art 882 have been incorrect because it was neither read as a whole nor read in conjunction with C.Cr.P. art 881.1 and 881.2.

85. *State v. Fraser*, 484 So. 2d 122 (La. 1986).

86. *State v. Fraser*, 471 So. 2d 769, 775-76 (La. Ct. App. 1985), *overruled by* 484 So. 2d 122 (La. 1986). The appellate court incorrectly held that the defendant does not have a right to an illegal sentence and that the illegal sentence can be corrected on appeal by the appellate court, even if the corrected sentence is more onerous to the defendant.

87. *Fraser*, 484 So. 2d at 124.

88. *But see infra* text accompanying note 112 for analysis in which the *Williams* Court progressed from LA. REV. STAT. ANN. § 15:301.1 to LA. CODE CRIM. PROC. ANN. art. 882, granting the appellate court authority in its review for errors patent to remand the case for resentencing.

defendant or the prosecutor.”⁸⁹ Furthermore, article 882 should be read in conjunction with Louisiana Code of Criminal Procedure articles 881.1(E) and 881.2, which spell out the procedure for the state seeking review of a sentence.⁹⁰ Thus, it is clear that any analysis of article 882(A), standing alone, is not enough to grant appellate courts authority to correct sentences *sua sponte*.

The *Jackson-Fraser* line of cases governed until the Louisiana legislature enacted Louisiana Revised Statute § 15:301.1 in 1999, specifically overruling *Jackson* and “any other case which is contrary to the provisions of this act.”⁹¹ Even though the legislature overturned *Jackson* and its progeny with the enactment of this statute, it is likely the statute exceeded its scope, as *Jackson*’s holding is more akin to pre-amendment article 882 regarding the authority of appellate courts to correct an illegal sentence on review. Further bolstering this argument, *Fraser* held that the amendment to article 882 did not modify the Louisiana Supreme Court’s holding in *Jackson*.⁹²

Nevertheless, since the passage of Louisiana Revised Statute 15:301.1, appellate review for errors patent for illegally lenient sentences has been confusing and inconsistent.⁹³ These inconsistencies only worsened at the turn of the millennium as the appellate courts widely disagreed how to interpret the reversal of precedent after *Williams*.⁹⁴ The Louisiana Supreme Court in *Williams* focused almost exclusively on Louisiana Revised Statute § 15:301.1 but broadly decreed that “appellate court decisions inconsistent with the views expressed in this opinion are overruled.”⁹⁵ This broad pronouncement affected a

89. *State v. Fraser*, 484 So. 2d 122, 124 (La. 1986); *see also State v. Robertson*, 459 So. 2d 581, 583 (La. Ct. App. 1984) (“Art. 882 . . . seems to indicate that an *application* is necessary, particularly if the two pertinent sentences of the article are read together. Regardless, the prosecution had not made adequate application here; and while we recognize the illegally lenient sentence imposed on Robertson, we are hesitant to correct it without having formally been asked to do so.”).

90. *See supra* notes 46-48 and accompanying text.

91. LA. REV. STAT. ANN. § 15:301.1 (2005). The broad pronouncement of overruling “any other case” contrary creates confusion and presents the question of whether the overruled cases must discuss sentences without the benefit of probation, parole, or suspension of sentence.

92. *Fraser*, 484 So. 2d at 125.

93. *See infra* Part III.

94. *State v. Williams*, 2000-1725 (La. 11/28/01); 800 So. 2d 790; *see infra* Part III.

95. *Williams*, 800 So. 2d at 802.

large number of appellate cases, while seemingly producing no effect on the more important *Fraser* case.⁹⁶ To this day, the Louisiana Supreme Court has not provided any guidance for lower courts to establish any unity in sentencing regarding illegally lenient fines raised in an appellate courts' review for errors patent.

3. *STATE V. WILLIAMS* AND ITS RESULTING PRECEDENTIAL INCONSISTENCIES

The legislature enacted Louisiana Revised Statute § 15:301.1, entitled *Sentences without benefit of probation, parole, or suspension of sentence; correction*, which was effective August 15, 1999.⁹⁷ The plain language of the statute is clear and allows courts to amend those sentences that fail “to specifically state that all or a portion of the sentence is to be served without benefit or probation, parole, or suspension of sentence.”⁹⁸ In 2001, the Louisiana Supreme Court revisited the effects of Louisiana Revised Statute § 15:301.1 and article 882 as they relate to errors patent in the landmark case on this issue, *State v. Williams*.⁹⁹ After a detailed statutory discussion of Louisiana Revised Statute § 15:301.1, *Williams* held that it “simply provide[d] for the correction of illegally lenient sentences” and remanded the case back to the district court for imposition of a “mandatory” fine.¹⁰⁰ The Louisiana Supreme Court verified the accuracy of the legislature’s statement that this statute changed the law in *Jackson* and then overruled other “appellate court decisions

96. *See infra* Part III.

97. *See* Act of June 9, 1999, No. 94, 1999 La. Acts 841 (codified at LA. REV. STAT. § 15:301.1 (1999)). The governor of Louisiana signed into law Act No. 94 of the 1999 Regular Session.

98. LA. REV. STAT. ANN. § 15:301.1(A) (2005) states in full:

When a criminal statute requires that all or a portion of a sentence imposed for a violation of that statute be served without benefit of probation, parole, or suspension of sentence, each sentence which is imposed under the provisions of that statute shall be deemed to contain the provisions relating to the service of that sentence without benefit of probation, parole, or suspension of sentence. The failure of a sentencing court to specifically state that all or a portion of the sentence is to be served without benefit of probation, parole, or suspension of sentence shall not in any way affect the statutory requirement that all or a portion of the sentence be served without benefit of probation, parole, or suspension of sentence.

99. *State v. Williams*, 2000-1725 (La. 11/28/01); 800 So. 2d 790, 802.

100. *Id.* at 800, 802. In this case, the fine was truly mandatory under LA. REV. STAT. ANN. § 14:98(D)(1). However, this Comment takes issue with the court’s logic in reaching this holding, which will be analyzed later.

inconsistent with the views expressed in this opinion.”¹⁰¹ These broad pronouncements have resulted in numerous contrasting appellate court decisions over the past decade regarding the scope of error patent review of illegally lenient sentences.¹⁰²

Williams expounded upon the section of Louisiana Revised Statute § 15:301.1 that allowed courts to amend sentences that failed to make specific statements providing certain restrictions on sentencing. The court noted that it “is clear from the statutory language that this proviso is *self*-activated, [and] eliminates the remand for ministerial correction of sentence, and requires no notice to the defendant.”¹⁰³ In Paragraph (C), the legislature clarified its intent in enacting this statute, stating that it “shall apply to each provision of law which requires all or a portion of a criminal sentence to be served without benefit of probation, parole, or suspension of sentence, or . . . any substantially similar provision or combination of substantially similar provisions.”¹⁰⁴ Nevertheless, appellate courts, citing *Williams*, have often drifted from the plain language of this statute and applied it as authority to correct illegal sentences outside of the scope of Louisiana R.S. § 15:301.1.¹⁰⁵

The Louisiana Supreme Court in *Williams* misinterpreted Louisiana Revised Statute § 15:301.1 in reaching its holding that changed the scope of appellate review of sentencing. Ever since the 1999 enactment of the statute and its 2001 interpretation in *Williams*, appellate courts have inconsistently referenced the holding in *Williams* as it relates to errors patent review and the coexistence of articles 882 and 920.¹⁰⁶ This is likely due to the Louisiana Supreme Court’s broadening of Louisiana Revised Statute § 15:301.1(B) to include any sentence inconsistent with the statute.

The supreme court in *Williams* broadened the intended scope

101. *State v. Williams*, 2000-1725, p. 17 (La. 11/28/01); 800 So. 2d 790, 802. See note 5 in *Williams*, which states that “[a]lthough the Legislature used the word ‘overrule,’ the correct terminology should have been the Legislature ‘changed the law’ as the Legislature does not act as a court and has no authority to ‘overrule’ a case.” *Id.* at 797 n.5.

102. *See infra* Part III.

103. *Williams*, 800 So. 2d at 801.

104. LA. REV. STAT. ANN. § 15:301.1(C) (2005).

105. *See infra* Part III.

106. *See infra* Part III.

of Louisiana Revised Statute § 15:301.1(B) by authorizing the appellate court to remand the case to the trial court for the imposition of a “mandatory” fine.¹⁰⁷ First, *Williams* detailed the procedural background with a statutory analysis of Louisiana Revised Statute § 15:301.1(B)¹⁰⁸:

A close examination of the language of Paragraph (B) shows that its provisions are activated by the sentencing court or the district attorney. If the district attorney is unable to have the sentencing court amend a sentence that is inconsistent with statutory provisions in the trial court, Paragraph (B) further allows an appellate court to amend such a sentence *if* the district attorney has invoked appellate review or applied for supervisory relief.¹⁰⁹

This reasoning is consistent with Louisiana Code of Criminal Procedure articles 881.1 and 881.2, and implies that this review is outside of the authority of the appellate court unless the state seeks review of the illegal sentence.¹¹⁰ Because neither the state nor the trial court followed the proper procedure to amend the sentence, the appellate court should leave the sentence unchanged.¹¹¹ Yet, what followed is quite perplexing. Although it appears that the Court in *Williams* was poised to leave the

107. *State v. Williams*, 2000-1725, p. 17 (La. 11/28/01); 800 So. 2d 790, 802.

108. LA. REV. STAT. ANN. § 15:301.1(B) (2005) states in full:

If a sentence is inconsistent with statutory provisions, upon the court's own motion or motion of the district attorney, the sentencing court shall amend the sentence to conform to the applicable statutory provisions. The district attorney shall have standing to seek appellate or supervisory relief for the purpose of amending the sentence as provided in this Section.

The second sentence in that section reiterates LA. CODE CRIM. PROC. ANN. art. 881.2 (2008), which mandates that the state raise the issue on appeal. This second sentence of section 15:301.1(B) clearly states its application is for amending these specific sentences where the sentencing court omits “without benefit of probation, parole, or suspension of sentence.” LA. REV. STAT. ANN. § 15:301.1(B) (2005).

109. *Williams*, 800 So. 2d at 802 (emphasis added). It should also be noted that the entirety of Paragraph (B) is unnecessary since *Williams* held that Paragraph (A) is self-activating.

110. *See supra* notes 46-48 and accompanying text (discussing the state's sentence review procedure).

111. *See State v. Spell*, 461 So. 2d 654, 655 n.1 (La. Ct. App. 1984). Prior to 1999, appellate courts cited *Jackson* to acknowledge their lack of authority to correct sentences that failed to include that the defendant was not eligible for probation. This created a pressing issue which the legislature corrected with LA. REV. STAT. ANN. § 15:301.1. However, the *Williams* decision broadened this to include illegally lenient fines, which was not discussed in *Jackson* except for a single footnote. *State v. Jackson*, 452 So. 2d 682, 684 n.4 (La. 6/25/84).

defendant's sentence unchanged, it suddenly departed from its logical progression and took a leap of faith, tying Louisiana Revised Statute § 15:301.1 into article 882 and authorizing the appellate court to remand the case for resentencing.¹¹² In departing from a clear line of precedent with a problematic statutory analysis, *Williams* has created challenges for criminal defendants, their attorneys, and trial courts in predicting appellate court procedure as it relates to the error patent review of illegally lenient sentences.

Appellate court analyses of Revised Statute § 15:301.1 with articles 882 and 920 is particularly troublesome. Courts find that collectively, these provisions grant them the authority to increase sentences that are illegally lenient, regardless of whether the increased sentence—in particular a fine—is truly mandated. Legislative history shows this was not the intention of the legislature, as indicated by the printed digest accompanying House Bill 109, explaining the focus of the proposed law's provisions and neglecting to discuss any illegally lenient sentences other than those where the sentencing court omitted that the “sentence is to be served without benefit of probation, parole, or suspension of sentence.”¹¹³

Appellate courts cite to Louisiana Revised Statute § 15:301.1 and articles 882 and 920 as authority to correct illegally lenient sentences.¹¹⁴ After the Louisiana Supreme Court in *Williams* held that Louisiana Revised Statute § 15:301.1 is self-activating, lower courts have, for the most part, consistently interpreted and corrected such sentencing omissions in a fair manner.¹¹⁵

112. *State v. Williams*, 2000-1725, p. 17 (La. 11/28/01); 800 So. 2d 790, 802.

113. Windhorst, et al., H.B. 109: Digest (1999), LA B. Dig., Engrossed, 1999 Reg. Sess. H.B. 109 (Westlaw). Admittedly, the digest “constitutes no part of the legislative instrument”; however, the fact that neither the digest, the statute itself, nor any legislative history discusses sentencing fines corroborates this opinion.

114. LA. CODE CRIM. PROC. ANN. art. 920 (2008) states that only two matters shall be considered on appeal: (1) an “error designated in the assignment of errors” and (2) an “error that is discoverable by a mere inspection of the pleadings and proceedings and without inspection of the evidence.”

115. Courts hold that § 15:301.1 is self-activating, so if the trial court omits the part of the sentence where the “statute requires that all or a portion of a sentence imposed for a violation of that statute be served without benefit of probation, parole, or suspension of sentence,” then the appellate court proceeds as if the trial court had not omitted it in the first place. See LA. REV. STAT. ANN. § 15:301.1(A) (2005). This issue has been resolved. However, the issue of how appellate courts should proceed when the trial court omits a fine (mandatory or not) has not been resolved and is the focus in this Comment.

However, the same cannot be said for the courts' interpretation of C.Cr.P. art. 882 and 920, as the varying interpretations and inconsistent precedential analyses have placed a burden on the defendant's right to appeal.

After *Williams*, the number of errors patent discussions by appellate courts has risen, but the "Louisiana Supreme Court, as a whole, has not recognized 'patent error' [since 2004]."¹¹⁶ However, more recent Louisiana Supreme Court cases have signaled a shift in direction for the reviewing courts, as the Louisiana Supreme Court in those two cases did not consider procedural defects "that are not inherently prejudicial to the defendant" as reversible "patent error."¹¹⁷ Even though some reviewing courts have reached the correct conclusion in their review for errors patent and interpretation of precedent, the issue of appellate court authority to amend sentences for illegally lenient fines will remain until the legislature codifies this proper reading of articles 882.

C. FEDERAL LAWS AND PRECEDENT RELATING TO LA. C.CR.P. ART. 882

One must appreciate the federal history upon which the legislature relied in enacting the 1984 amendment to C.Cr.P. art. 882 to understand the legislature's possible motives behind the amendment and the appellate courts' current practice of errors patent review. The Eighth Amendment to the United States

116. *State v. Price*, 2005-2514, p. 21 (La. App. 1 Cir. 12/28/06); 952 So. 2d 112, 124 ("[W]e do not ignore patent errors favorable to the defendant when the State does not complain about them." (quoting *State v. Campbell*, 2003-3035, p. 5 (La. 7/6/04); 877 So. 2d 112, 116)). In *Campbell*, the Louisiana Supreme Court remanded the case back to the trial court to determine whether the convicted defendant could keep his car instead of having it seized. *Campbell*, 877 So. 2d at 119. The supreme court explained it was abiding by the terms of La. R.S. 14:98 D(2)(a), although that statute places the impetus to impound the car on the "discretion of the prosecuting district attorney." LA. REV. STAT. ANN. § 14:98D(2)(a) (2012). See, *State v. Haynes*, 2004-1893 (La. 12/10/04); 889 So. 2d 224 (per curiam), for the short per curiam opinion that discusses the scope of error patent review.

117. See generally *State v. Jackson*, 2004-2863, p. 14-15 (La. 11/29/05); 916 So. 2d 1015, 1023 (reversing the appellate court's finding of an error patent); *State v. Jones*, 2005-0226, p. 6-7 (La. 2/22/06); 922 So. 2d 508, 513 (failing to find reversible patent error). In *State v. Price*, the first circuit cited both of these cases. *Price*, 952 So. 2d at 124 (holding that the court "limit[s] [its] review under La. Code Crim. P. art. 920(2) to errors that inherently prejudice the defendant"). *Price* is important because the first circuit noticed the supreme court's change in direction and declined to correct an illegally lenient sentence because the error was not objected to nor raised on appeal by the state. *Id.* at 124-25.

Constitution prohibits cruel and unusual punishment and the United States Supreme Court has ruled this applies to the states through the Fourteenth Amendment's Due Process Clause.¹¹⁸ The Louisiana constitution of 1921 used the same wording as the federal government.¹¹⁹ However, when Louisiana adopted its new state constitution in 1974, it amended the Eighth Amendment's language by adding the word "excessive," thus prohibiting "cruel, excessive, or unusual punishment."¹²⁰ Assumedly, this change to the new state constitution was done purposefully, giving an important status to the word "excessive," whether it applies to sentences or fines.¹²¹ This impliedly gave more power to the trial and appellate courts to alter a sentence considered excessive, but it is unlikely that it bestowed upon the courts the jurisdiction to alter a lenient sentence.¹²²

The founders of this country created the Bill of Rights and, eventually, the Due Process clause to protect its citizens—criminal defendants included.¹²³ It follows that the Louisiana constitution adopted this clause for the same or similar purpose. However, when appellate courts attempt to impose a harsher sentence on defendants, it violates defendants' due process rights.¹²⁴ Most importantly, this violation can affect the defendant's decision to take an appeal, as the fear of a harsher sentence deters the defendant from taking the appeal in the first place.¹²⁵

The landmark case, *State v. Williams*, relies heavily on the United States Supreme Court decision, *Bozza v. United States*.¹²⁶ In *Williams*, the Louisiana Supreme Court increased a

118. U.S. CONST. amend. VIII.

119. Anderson, *supra* note 13, at 1085.

120. *Id.* at 1084-85; LA. CONST. art. I, § 20.

121. Anderson, *supra* note 13, at 1085.

122. *See id.*

123. Arthur Schlesinger, Jr., *Multiculturalism and the Bill of Rights*, 46 ME. L. REV. 189, 203 (1994) ("[T]he purpose of the Bill of Rights is to protect rights for individuals.").

124. This argument will be addressed in detail later. *See infra* Parts IV.A-B.

125. *See infra* Part IV.A.; *see also* LA. CONST. art. I, § 2.

126. *State v. Williams*, 2000-1725, p. 9 (La. 11/28/01); 800 So. 2d 790, 797-98 ("In *Bozza*, a Federal judge sentenced the defendant under a federal statute which carried a minimum mandatory penalty of imprisonment and fine. Although the sentencing judge initially only imposed imprisonment, he subsequently summoned the defendant back into court and imposed the mandatory fine." (citing *Bozza v. United States*, 330 U.S. 160, 165-66 (1947))).

defendant's sentence on appeal by imposing a fine not raised at the trial level. The court had due process concerns with the increase in sentence and looked to *Bozza* for federal authority to alleviate its reservations.¹²⁷ Although *Bozza* discusses the omission of a fine and its corresponding due process ramifications, Louisiana courts must recognize that it is factually distinguishable from these issues concerning the scope of appellate review for the error patent of an illegally lenient fine.¹²⁸ *Williams's* reliance on *Bozza* to authorize an appellate court to *sua sponte* increase defendant's fine is wholly misplaced. In *Bozza*, the trial judge discovered his mistake a mere five hours after sentencing and corrected it himself by imposing the mandatory fine as soon as the court recalled the defendant.¹²⁹ In *Williams*, the defendant pled guilty but reserved his right to appeal. The trial court failed to impose any fine on the defendant. However, when Mr. Williams took an appeal with the first circuit, it not only affirmed his conviction, but also remanded his case to the trial court to increase his sentence by imposing a fine.¹³⁰ That distinction, albeit subtle, is all-important in the context of the defendant's right to appeal. Mr. Williams utilized his right to appeal under the Louisiana constitution, after which the court chose to further penalize him. The facts in *Bozza* did not implicate that defendant's right to appeal, for his sentence was increased without him even leaving the courthouse. Thus, *Williams* wrongly relied on *Bozza* to allay its constitutional worries.

Not only is *Bozza* distinguishable, but a more recent United States Supreme Court case has called its holding into question.¹³¹ In 2008 the Court in *Greenlaw v. United States* reversed the Eighth Circuit Court of Appeal's reliance on the "plain-error rule,"¹³² holding that an appellate court, absent a Government appeal, may not act on its own initiative and order an increase in

127. *State v. Williams*, 2000-1725, p. 9 (La. 11/28/01); 800 So. 2d 790, 797-98.

128. *Bozza v. United States*, 330 U.S. 160, 165-66 (1947) (holding that the trial judge's recall of the defendant only a few hours after the original sentencing to impose an omitted fine was not double jeopardy).

129. *Id.*

130. *State v. Williams*, 2000-1725, p. 9 (La. 11/28/01); 800 So. 2d 790, 793-94.

131. *Greenlaw v. United States*, 554 U.S. 237, 240 (2008). Note that *Greenlaw* was decided sixty-one years after *Bozza*.

132. FED. R. CRIM. P. 52(b); *see supra* note 67 (discussing the difference between error patent and plain error).

a defendant's sentence.¹³³ The Court explained that it has never "applied plain-error doctrine to the detriment of the petitioning party."¹³⁴ Following the cross-appeal rule¹³⁵ and the principle of party presentation,¹³⁶ the Court further reasoned that "an appellate court may not alter a judgment to benefit a nonappealing party."¹³⁷

Interestingly, an amicus argued for the government in *Greenlaw* that the provision in the Criminal Code governing appellate review of criminal sentences overrides the cross-appeal rule and requires the reviewing court to remand the case if the sentence was "imposed 'in violation of law.'"¹³⁸ The majority disagreed with this argument and held that Congress "did not expose a defendant to a higher sentence in response to his own appeal."¹³⁹ The majority then reasoned that the decision to correct an illegal sentence should not be left to an appellate panel ruling arbitrarily, but rather to the prosecutor authorized to raise such issues on appeal.¹⁴⁰

The government's unpersuasive argument in *Greenlaw* is analogous to the same faulty reasoning of Louisiana courts that *sua sponte* imposed a harsher sentence on a defendant after the defendant alone appealed the original sentence. After a close reading of *Greenlaw*, one could infer that the legislature (both Congress and Louisiana) drafted these criminal procedure articles to protect the defendant's right to appeal—not to dissuade an appeal because of a potentially harsher sentence.

133. *Greenlaw v. United States*, 554 U.S. 237, 242-43, 247, 254 (2008). Resolving a circuit split, the Supreme Court held the appellate court could not *sua sponte* increase the duration of defendant's jail sentence to the statutorily mandated minimum. *Id.* at 247, 254. If the appellate court could not amend a sentence to satisfy the statutory minimum, surely the enhancement of monetary fines by Louisiana courts cannot be authorized.

134. *Id.* at 247.

135. *Id.* at 244 ("The cross-appeal rule, pivotal in this case, is both informed by, and illustrative of, the party presentation principle. Under that unwritten but longstanding rule, an appellate court may not alter a judgment to benefit a nonappealing party.").

136. Under the principle of party presentation, courts "rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present." *Id.* at 243.

137. *Id.* at 243-44.

138. *Greenlaw v. United States*, 554 U.S. 237, 249-50 (2008) (discussing 18 U.S.C. §3742 (2012)).

139. *Id.* at 251.

140. *Id.* at 254 n.9.

Thus, the Louisiana Supreme Court should revisit its opinion in *Williams*, especially its broad pronouncement overruling precedent to the contrary, as its reliance on the federal jurisprudence in *Bozza* is both misplaced and outdated.

III. ANALYSIS OF LOUISIANA APPELLATE COURT JURISPRUDENCE

All five Louisiana courts of appeal expressed inconsistent opinions on the appellate review of illegally lenient fines. First, this Section details multiple fourth circuit rulings, because the differing opinions best illustrate the court's struggles. However, the fourth circuit is not the only intermediate Louisiana court with inconsistent opinions on this issue—a split among the circuits exists as well, as discussed in subsection (B).

A. POST-*WILLIAMS* INCONSISTENCIES IN THE FOURTH CIRCUIT COURT OF APPEALS

The Louisiana Fourth Circuit Court of Appeals provides an ideal microcosm of contradictory opinions present today, the epitome of which lies with its 2003 en banc decision *State v. Williams*,¹⁴¹ which distinguished and raised doubt regarding the Louisiana Supreme Court's 2001 decision *State v. Williams*.¹⁴² Many cases have cited to the fourth circuit's decision in *Williams* to support their own errors patent discussion; however, this Comment suggests that many of these opinions have misinterpreted the Louisiana Supreme Court's decision in *Williams*.¹⁴³ The inconsistent precedent of the Louisiana fourth circuit on this issue illustrates the troublesome analysis of precedent by all intermediate courts. Furthermore, a proper, consistent interpretation of statutes imposing "mandatory" fines that contain a "not more than" clause will alleviate a great amount of confusion once applied correctly.¹⁴⁴

In the fourth circuit's 2003 *Williams* decision, the defendant pled guilty to possession of cocaine in an amount more than two

141. *State v. Williams*, 2003-0302 (La. App. 4 Cir. 10/6/03); 859 So. 2d 751. Unfortunately, these two crucial cases have the same name. To provide clarity, this note will refer to the fourth circuit's decision as "2003 *Williams*."

142. *State v. Williams*, 2000-1725 (La. 11/28/01); 800 So. 2d 790.

143. *E.g.*, *State v. Watts*, 2009-0912, p. 8 (La. App. 4 Cir. 6/16/10); 41 So. 3d 625, 632.

144. *See infra* Part IV.

hundred grams but less than four hundred grams.¹⁴⁵ His conviction required that he “be sentenced to imprisonment and shall be fined ‘not less than one hundred thousand dollars, nor more than three hundred fifty thousand dollars.’”¹⁴⁶ The trial court sentenced defendant only to imprisonment, absent any objection from the State as to the illegality of the fine, even though the statute expressly mandated a minimum fine of \$100,000.¹⁴⁷ The defendant then appealed a completely separate issue, and the state did not raise the issue of the illegally lenient fine on appeal.¹⁴⁸ The court noted a conflict in the Louisiana fourth circuit and submitted the issue for an en banc vote to determine whether or not the law required it to remand the case to the trial court for the imposition of the “mandatory” fine.¹⁴⁹ Following its own precedent set forth in *Legett*¹⁵⁰ and *Hall*,¹⁵¹ the court of appeals remanded the case finding that the fine was truly mandatory because the statute had a defined minimum fine.¹⁵² Citing the Louisiana Supreme Court as precedent, the *Williams* court found that “an appellate court may correct an illegally lenient sentence by remanding to impose a mandatory fine.”¹⁵³

The problem with the 2003 *Williams* decision is no different than in the Supreme Court’s 2001 *Williams* decision—the reviewing court *sua sponte* ordered an imposition of a fine to the defendant after reviewing the record for errors patent, even though the state did not raise the issue of an illegally lenient fine on appeal.¹⁵⁴ Under this Comment’s proposed revision of article

145. *State v. Williams*, 2003-0302, p. 1 (La. App. 4 Cir. 10/6/03); 859 So. 2d 751, 752 (“Mr. Williams plead guilty to . . . a violation of La. R.S. 40:967(F)(1)(b).”).

146. *Id.* at 753 (quoting LA. REV. STAT. ANN. § 40:967(F)(1)(b) (2012)).

147. *Id.* Here, this fine was truly “mandatory.”

148. *Id.*

149. Oddly enough, the 2003 *Williams* decision does not cite the 2001 Louisiana Supreme Court decision in *Williams* until the footnotes, where it only was cited because other supreme court cases cited to it. *State v. Williams*, 2003-0302, p. 4 (La. App. 4 Cir. 10/6/03); 859 So. 2d 751, 753 n.2. Regardless, the 2001 *Williams* decision is the origin of this broad appellate authority and marks the turning point in this issue.

150. *State v. Legett*, 2002-0153, p. 3-4 (La. App. 4 Cir. 5/22/02); 819 So. 2d 1104, 1105-06.

151. *State v. Hall*, 2002-1098, p. 4-6 (La. App. 4 Cir. 3/19/03); 843 So. 2d 488, 493-94.

152. *See State v. Williams*, 2003-0302, p. 3 (La. App. 4 Cir. 10/6/03); 859 So. 2d 751, 753.

153. *Id.* (citing *State v. Decrevel*, 2003-0259 (La. 5/16/03); 847 So. 2d 1197).

154. The 2003 *Williams* case involved two defendants—one who is the focus of the

882, the correction of an illegal sentence is not allowed without the application of the state in accordance with articles 882, 881.1(E), and 881.2(B).¹⁵⁵ However, a critique of this analysis indicates that the fines in both *Williams* decisions were truly mandatory under the statute (i.e., the statute had a defined minimum more than \$0) and may fall under the broad scope of article 920, which gives appellate courts authority to conduct reviews for errors patent.¹⁵⁶ Additionally, the truly mandatory fine may be analogized to the sentencing court's omission of the phrase "without probation, parole, or suspension of sentence," whereby a ministerial correction that strictly abides by the statute is self-activating under Louisiana Revised Statute § 15:301.1 and its interpretation by 2001 *Williams*.¹⁵⁷ Nevertheless, the legislature never intended for Louisiana Revised Statute § 15:301.1 to cover sentence errors due to illegally lenient fines, and including this authority under the auspices of an article 920 review for errors patent too greatly enlarges the appellate court's power.

The most troubling example of the Louisiana fourth circuit's misapplication of precedent involves the interpretation of its own 2003 *Williams* decision in *State v. Watts*.¹⁵⁸ In the 2010 *Watts* decision, the court relied on its earlier decision in *Williams* but reached an inconsistent result by remanding the case to the trial court for the imposition of a fine because of an error patent of an illegally lenient sentence.¹⁵⁹ The court stated:

A review for errors patent on the face of the record reveals one. The penalty for failure to register as a sex offender under La. R.S. 15:542.1.4 mandates a *fine of not more than one thousand dollars* in addition to a term of incarceration. However, in sentencing the defendant, the trial court failed to impose a fine. Accordingly, the defendant's sentence is illegally lenient. In *State v. Williams*, 03-0302 (La. App. 4 Cir. 10/6/03), 859 So. 2d 751, this court held that a reviewing court must remand cases for the imposition of a mandatory fine where the trial court failed to do so. Thus, this case

court's error patent discussion and the other who received no fine and no review for error patent, apparently because her fine was not "mandatory." *Id.* at 753.

155. *See infra* Part IV.

156. LA. CODE CRIM. PROC. ANN. art. 920 (2008).

157. *State v. Williams*, 2000-1725, p. 10 (La. 11/28/01); 800 So. 2d 790, 799.

158. *State v. Watts*, 2009-0912, p. 8 (La. App. 4 Cir. 6/16/10); 41 So. 3d 625, 632.

159. *Id.*

must be remanded to the trial court for the imposition of the mandatory fine.¹⁶⁰

The egregiousness of *Watts* stems from its statutory reading of what constitutes a mandatory fine. The statute under which the trial court convicted Mr. Watts did not express a mandatory minimum fine—it only stated that the defendant be fined “not more than one thousand dollars.”¹⁶¹ Regardless, the appellate court remanded the case with orders to impose a “mandatory” fine, even though the fine was not truly “mandatory.”¹⁶² The *Watts* court explained that it followed the 2003 *Williams* decision, even though the statute in *Williams* clearly had a mandatory minimum fine.¹⁶³ This problem lies at the heart of this Comment and directly shows the necessity of a new amendment to article 882.

Prior to both *Watts* and the 2003 *Williams* decision, the Louisiana fourth circuit clarified its distinction of “mandatory” fines, demonstrating the proper handling of a proposed error patent for illegally lenient sentences.¹⁶⁴ In *Legett*, the trial court convicted the defendant under two separate charges.¹⁶⁵ His first charge for possession of marijuana with the intent to distribute mandated a fine of “not more than fifty thousand dollars,”¹⁶⁶ which the trial court failed to give.¹⁶⁷ The charge and sentence were identical to the Louisiana fourth circuit’s decision in *Course*, so the *Legett* court precisely abided by that decision, issued just a few months earlier.¹⁶⁸ In *Course*, the court held that the statute did not mandate any minimum fine to be imposed by the trial court, and therefore, the trial court had discretion to omit the fine without committing an error patent.¹⁶⁹

Although *Legett* clearly explained the proper procedure for handling a statute with no mandatory minimum fine, it

160. State v. Watts, 2009-0912, p. 8 (La. App. 4 Cir. 6/16/10); 41 So. 3d 625, 632.

161. *Id.*

162. *Watts*, 41 So. 3d at 632.

163. *Id.*

164. State v. Legett, 2002-0153, p. 3-4 (La. App. 4 Cir. 5/22/02); 819 So. 2d 1104, 1105-06.

165. *Id.* at 1105.

166. *Id.* at 1106; LA. REV. STAT. ANN. § 40:966(B) (2012).

167. State v. Legett, 2002-0153, p. 3 (La. App. 4 Cir. 5/22/02); 819 So. 2d 1104, 1105-06.

168. *Id.* at 1106.

169. State v. Course, 2001-1812, p. 6 (La. App. 4 Cir. 1/30/02); 809 So. 2d 488, 492.

unfortunately remained consistent with the Louisiana Supreme Court's 2001 *Williams* decision regarding sentences with truly mandatory fines.¹⁷⁰ The defendant's second charge in *Legett* under Louisiana Revised Statute § 40:967(F)(1)(a)¹⁷¹ included a statutory minimum fine of at least \$50,000 and not more than \$150,000.¹⁷² On that charge, the Louisiana fourth circuit remanded the case to the trial court to correct its illegally lenient sentence.¹⁷³ Because the second charge in *Legett* was identical to the charge in the 2003 *Williams* decision, 2003 *Williams* court correctly adhered to precedent by remanding the case for resentencing.

In the 2003 *Williams* decision, the Louisiana fourth circuit also cited *Hall* in deciding to remand the case to the trial court for the imposition of the mandatory fine.¹⁷⁴ Decided two months apart, *Hall* and *Legett* discussed Louisiana Revised Statutes §§ 40:981.3 and 40:967 that were truly mandatory and included expressly stated statutory minimums.¹⁷⁵ Unsurprisingly, this court remanded the case to correct the sentence, requiring the trial court to abide by the minimum fines in the statutes.¹⁷⁶

Another Louisiana fourth circuit case, *State v. Albercht*, followed the practice of *Course*, *Legett*, *Hall*, and the 2003 *Williams* decision.¹⁷⁷ In fact, the *Albercht* and *Course* opinions are almost identical.¹⁷⁸ The *Albercht* court's discussion of the

170. *State v. Legett*, 2002-0153, p. 3 (La. App. 4 Cir. 5/22/02); 819 So. 2d 1104, 1106; *State v. Williams*, 2000-1725, p. 16-17 (La. 11/28/01); 800 So. 2d 790, 802.

171. LA. REV. STAT. ANN. § 40:967(F)(1)(a) (2012) states that the defendant "shall be sentenced to serve a term of imprisonment at hard labor of not less than five years, nor more than thirty years, and to pay a fine of not less than fifty thousand dollars, nor more than one hundred fifty thousand dollars."

172. *Legett*, 819 So. 2d at 1106.

173. *Id.*

174. *State v. Williams*, 2003-0302, p. 3 (La. App. 4 Cir. 10/6/03); 859 So. 2d 751, 753.

175. *State v. Hall*, 2002-1098, p. 5-6 (La. App. 4 Cir. 3/19/03); 843 So. 2d 488, 493-94. The court then addressed that LA. REV. STAT. ANN. § 15:301.1(A) (2005) statutorily corrects the illegally lenient fine of \$50,000 under LA. REV. STAT. ANN. § 40:981.3 (2012), so it is unnecessary for the court to remand that charge. *Id.* at 494. It noted, however, "as La. R.S. 40:967 provides a range of fines to be imposed, the matter must be remanded for the imposition of the fine on the cocaine charge." *Id.*

176. *Id.*

177. *State v. Albercht*, 2001-1664, p. 8 (La. App. 4 Cir. 1/30/02); 809 So. 2d 472, 477.

178. *See id.*; *State v. Course*, 2001-1812, p. 6 (La. App. 4 Cir. 1/30/02); 809 So. 2d

trial court's discretion to impose fines clearly delineates the issue:

In the present case the trial court has the discretion to determine the amount of the fine up to \$5,000. Although a maximum fine is provided, the minimum fine is not delegated by the statute, La. R.S. 40:966(B)(2). Therefore, the trial court has discretion to impose a fine with no minimum up to \$5,000. Where there is no minimum fine, the trial court did not abuse its discretion in deciding to omit the fine, and no error patent exists.¹⁷⁹

The *Watts* court was not the first to break with this long line of Louisiana fourth circuit precedent. The fourth circuit often departed from the proper application of the 2003 *Williams* decision, *Hall*, *Legett*, *Course*, and *Albercht* by remanding sentences issued under statutes that do not include a statutory minimum fine—but instead have a “not more than” clause.¹⁸⁰ These decisions broke from the Louisiana fourth circuit's decision in *Legett*, where the court held that the failure of the trial court to impose a fine for the defendant's first charge, a statutorily mandated fine of “not more than fifty thousand dollars,”¹⁸¹ was not an error patent and required no remand.¹⁸²

The Louisiana fourth circuit has misapplied its own holding when attempting to support its reasoning on this issue. In its 2007 opinion in *State v. Copelin*, the court claimed to follow the 2003 *Williams* decision and *Hall* as precedent but again misinterpreted Mr. Copelin's fines as “mandatory.”¹⁸³ In *Copelin*, the trial court convicted the defendant under Louisiana Revised Statute § 40:966 (B)(2)—the same statute involved in *Course* and *Legett*—which allows for a fine of “not more than \$50,000.”¹⁸⁴ However, the *Copelin* court held that the statutory fine was mandatory and remanded the case for the fine to be imposed.¹⁸⁵ Clearly, both the 2003 *Williams* decision and *Hall* are factually

488, 492.

179. *State v. Albercht*, 2001-1664, p. 8 (La. App. 4 Cir. 1/30/02); 809 So. 2d 472, 477.

180. *E.g.*, *State v. Cook*, 2009-0311, p. 3-4 (La. App. 4 Cir. 8/12/09); 19 So. 3d 15, 16-17; *State v. Copelin*, 2007-0790, p. 3-4 (La. App. 4 Cir. 12/12/07); 974 So. 2d 49, 51.

181. LA. REV. STAT. ANN. § 40:966(B) (2012).

182. *State v. Legett*, 2002-0153, p. 3-4 (La. App. 4 Cir. 5/22/02); 819 So. 2d at 1105, 1106.

183. *Copelin*, 974 So. 2d at 51.

184. *Id.*

185. *Id.*

distinguishable from *Copelin* because those earlier cases involved statutes that include expressly mandated fine ranges of \$100,000–\$350,000 and \$50,000–\$150,000, respectively, while the statute in *Copelin* plainly provides for a fine of “not more than \$50,000.”¹⁸⁶

The confusion triggered by the *Copelin* court led to a similar result by the Louisiana fourth circuit in 2009 in *State v. Cook*.¹⁸⁷ The trial court convicted the defendant for possessing a firearm while committing a crime,¹⁸⁸ which contained no mandatory fine.¹⁸⁹ Nevertheless, the court referenced *Copelin* and remanded the case because of the failure to impose the mandatory fine.¹⁹⁰

The Louisiana fourth circuit in *Watts* cited only the 2003 *Williams* decision, attempting to apply its precedent;¹⁹¹ however, it followed the same misguided path laid by *Cook* and *Copelin* and misapplied the 2003 *Williams* court’s precedent.¹⁹² The fourth circuit should abrogate *Copelin*, *Cook*, and *Watts* in favor of the approach represented by *Albercht*, *Course*, *Legett*, *Hall*, and 2003 *Williams*. In conjunction with revising article 882 for clarity, abrogation will unite its precedent and clarify its reasoning as guidance for lower courts.¹⁹³

186. *State v. Copelin*, 2007-0790, p. 3-4 (La. App. 4 Cir. 12/12/07); 974 So. 2d 49, 51; *State v. Williams*, 2003-0302, p. 3 (La. App. 4 Cir. 10/6/03); 859 So. 2d 751, 753; *State v. Hall*, 2002-1098, p. 5 (La. App. 4 Cir. 3/19/03); 843 So. 2d 488, 493.

187. *State v. Cook*, 2009-0311, p. 3-4 (La. App. 4 Cir. 8/12/09); 19 So. 3d 15, 16-17.

188. LA. REV. STAT. ANN. § 14:95(E) (2012) states:

If the offender uses, possesses, or has under his immediate control any firearm, or other instrumentality customarily used or intended for probable use as a dangerous weapon, while committing or attempting to commit a crime of violence or while in the possession of or during the sale or distribution of a controlled dangerous substance, the offender shall be fined not more than ten thousand dollars and imprisoned at hard labor for not less than five nor more than ten years without the benefit of probation, parole, or suspension of sentence. Upon a second or subsequent conviction, the offender shall be imprisoned at hard labor for not less than twenty years nor more than thirty years without the benefit of probation, parole, or suspension of sentence.

189. *Cook*, 19 So. 3d at 16 n.1.

190. *Id.* at 16-17.

191. *State v. Watts*, 2009-0912, p. 8 (La. App. 4 Cir. 6/16/10); 41 So. 3d 625, 632.

192. *Id.*; see also *State v. Cook*, 2009-0311, p. 3-4 (La. App. 4 Cir. 8/12/09); 19 So. 3d 15, 16-17; *State v. Copelin*, 2007-0790, p. 3-4 (La. App. 4 Cir. 12/12/07); 974 So. 2d 49, 51.

193. Even though *Albercht*, *Course*, *Legett*, *Hall*, and 2003 *Williams* overstepped their bounds governed by C.Cr.P. art. 882, looking to them for precedent will begin to rectify these injustices.

B. INCONSISTENCIES IN OTHER LOUISIANA APPELLATE CIRCUITS

The Louisiana fourth circuit is not the only intermediate Louisiana court with inconsistent opinions on this issue—a split among the circuits exists as well. In 2005, in *State v. Clemons*, the Louisiana Fifth Circuit held that the trial court, by not imposing a fine when Louisiana Revised Statute § 14:95(E) included a fine of “not more than \$10,000,” imposed an illegally lenient sentence and remanded the case to impose the fine.¹⁹⁴ Neither the state nor the defendant had raised the error of illegally lenient sentence on appeal; instead, it was noticed on the court’s own motion as an error patent.¹⁹⁵

Clemons, however, was not remanded solely because of the failure to impose a fine.¹⁹⁶ The trial court also did not “inform defendant that his sentence [was] to be served without benefit of parole, probation, or suspension of sentences or completely advise defendant of the prescriptive period for filing post-conviction relief.”¹⁹⁷ This decision thus created difficulties for future courts that looked to *Clemons* for a rule on illegally lenient sentencing, as it is unknown whether the fifth circuit would have remanded the case solely for the imposition of the fine.

In 2006, in *State v. Francois*,¹⁹⁸ the Louisiana third circuit rendered a contradictory ruling to *Clemons*. The trial court convicted the defendant under the penalty provision for Louisiana Revised Statute § 15:34.5(B)(2) that stated the defendant be fined “not more than \$1,000,” but the court failed to impose any fine upon defendant.¹⁹⁹ Citing precedent from the fourth and fifth circuits, the third circuit held that the trial court’s failure to impose a fine is not an error patent as an illegally lenient sentence, because the trial court may “impliedly impose[] a fine of \$0.”²⁰⁰ The fourth circuit reached the same conclusion in *State v. Legett*.²⁰¹

194. *State v. Clemons*, 01-1032, p. 2-3 (La. App. 5 Cir. 2/26/02); 811 So. 2d 1047, 1049-50.

195. *Id.* at 1049.

196. *Id.* at 1050.

197. *Id.*

198. *State v. Francois*, 06-788, p. 7 (La. App. 3 Cir. 12/13/06); 945 So. 2d 865, 870.

199. *Id.* at 869.

200. *Id.* at 870.

201. *State v. Legett*, 2002-0153, p. 3 (La. App. 4 Cir. 5/22/02); 819 So. 2d 1104,

Recently, the second circuit agreed with the *Francois* ruling and “conclude[d] that where no minimum fine is provided by statute, the district court did not abuse its discretion in omitting the fine” and found that no patent error existed.²⁰² Not all courts have adopted this legislative interpretation, however. In *State v. Favorite*, the fifth circuit held that the “not more than” language does require a mandatory fine.²⁰³ In its footnotes, the court denotes the cases where it is mandated²⁰⁴ and is not mandated.²⁰⁵ Ultimately, the fifth circuit chose a third option, noticing the fine omission as an error, but electing not to remand the case for proper sentencing, seemingly due to the indigent status of the defendant.²⁰⁶

IV. A CALL TO REFORM ARTICLE 882

To remedy the inconsistent jurisprudence and subsequent due process violations, the legislature should amend article 882 by inserting a clarifying clause that only authorizes appellate courts to correct illegally excessive sentences *sua sponte* and forbidding appellate courts from amending any illegally lenient fines, unless the state raises that sentencing issue on appeal. This proposal will promote, rather than compromise, the defendant’s due process rights. Furthermore, this amendment will no longer chill the defendant’s right to appeal; instead it will effectively align with Louisiana public policy by encouraging appeals of problematic criminal sentences, as addressed by Chief Justice Calogero’s dissenting opinions.²⁰⁷ This change may also foster economic benefits, for the amount of cases appealed and remanded because of this issue should decrease, thus reducing litigation costs. Lastly, this reform will rectify the general

1105.

202. *State v. Frith*, 46,832, p. 4 (La. App. 2 Cir. 12/14/11); 109 So. 3d 907, 910 (citing *State v. Francois*, 06-788 (La App. 3 Cir. 12/13/06); 945 So. 2d 865); *see also* *State v. Turner*, 46,683, p. 25 (La. App. 2 Cir. 12/14/11); 82 So. 3d 449, 463.

203. *State v. Favorite*, 11-1075, p. 12 (La. App. 5 Cir. 5/31/12); 97 So. 3d 1057, 1065.

204. *Id.* at 1065 n.17 (citing *State v. Clemons*, 01-1032, p. 2 (La. App. 5 Cir. 2/26/02); 811 So. 2d 1047, 1049).

205. *Id.* at 1065 n.18 (citing *State v. Kerlec*, 06-838, p. 8 (La. App. 5 Cir. 4/11/07); 957 So. 2d 810, 815).

206. *Id.* at 1065.

207. *See* *State v. Phillips*, 2002-0866, p. 3 (La. 11/22/02); 834 So. 2d 972, 973 n.1 (mem.) (Calogero, C.J., dissenting); *State v. Williams*, 2000-1725, p. 1 (La. 11/28/01); 800 So. 2d 790, 803 (Calogero, C.J., dissenting); *State v. Williams*, 03-0302, p. 4 (La. App. 4 Cir. 10/6/03); 859 So. 2d 751, 753 n.2.

inequities that result from Louisiana appellate courts' disparate rulings on this issue, improving both the general fairness and effectiveness of the intermediate courts.

A. PROTECTING THE DEFENDANT'S CONSTITUTIONAL RIGHT TO APPEAL

A reviewing court denies the defendant's constitutional rights given by Article I, § 19 of the Constitution of the State of Louisiana by amending a sentence to make it more unfavorable to the defendant when the State has not challenged the illegality of the sentence on appeal.²⁰⁸ This due process violation chills the right to appeal.²⁰⁹ Procedural discrepancies should never become the basis of a defendant's decision to forego his right to appeal. Unfortunately, this denial of fair justice in a criminal trial happens far too often under the current interpretation of article 882 and its corresponding precedent. The legislature needs to step in and enact this proposed reform because the Louisiana Supreme Court has indicated it will not do so.²¹⁰ Appellate courts are more concerned with the issue raised on appeal, consistently overlooking the due process violation inherent in *sua sponte* enhancement of a defendant's sentence.²¹¹ Because of this denial of due process, appellate courts should never raise the issue of the leniency of a sentence in an errors patent discussion.

The supreme court's 2001 decision in *Williams* highlights

208. See *State v. Williams*, 2000-1725, p. 8-9, 12 (La. 11/28/01); 800 So. 2d at 797-801 (citing *Bozza v. United States*, 330 U.S. 160 (1947)); see also *State v. Williams*, 2000-1725, p. 1 (La. 11/28/01); 800 So. 2d 790, 803 (Calogero, C.J., dissenting) ("In sum, I believe the court of appeal lacked the authority to vacate the defendant's sentence and remand the case to the district court when the state did not object, appeal, or seek writs in this court. Such an action, in my view, was unconstitutional; therefore, the sentence cannot be modified in that fashion.")

209. *State v. Williams*, 2000-1725, p. 1 (La. 11/28/01); 800 So. 2d 790, 803 (Calogero, C.J., dissenting).

210. See *supra* note 23 and accompanying text.

211. See *supra* Part II.C. Often, Louisiana appellate courts rely on their "central staff" of lawyers who propose drafts of opinions on criminal appeals. ROGER A. STETTER, LOUISIANA CIVIL APPELLATE PROCEDURE § 1:60 (2013 ed.), available at Westlaw La. Prac. Civ. App. § 1:60. Judicial clerks to the appellate judges will overlook the perceived minutia of an errors patent discussion, focusing solely on the main issue. See ROGER A. STETTER, LOUISIANA CIVIL APPELLATE PROCEDURE § 1:88 (2013 ed.), available at Westlaw La. Prac. Civ. App. § 1:88; ROGER A. STETTER, LOUISIANA CIVIL APPELLATE PROCEDURE § 1:79 (2013 ed.), available at Westlaw La. Prac. Civ. App. § 1:79. This issue may deserve its own comment. Regardless, it further points to the necessity of the legislature to reform C.Cr.P. art. 882.

this inequity. In *Williams*, the first circuit affirmed the defendant's conviction for his third offense of operating a vehicle while intoxicated, but it remanded the matter to the trial court for resentencing because of an error patent of an illegally lenient sentence.²¹² The trial court failed to correctly impose the penalty statute, Louisiana Revised Statute § 14:98(D), which mandates the offender "be fined two thousand [\$2,000] dollars."²¹³ As discussed in detail above, the supreme court relied on a thorough statutory reading of Louisiana Revised Statute § 15:301.1²¹⁴ and article 882(A)²¹⁵, and upheld the first circuit's decision, noting its legality even though the State failed to raise the issue of the illegally lenient sentence on appeal.²¹⁶

B. PROTECTING THE DEFENDANT'S DUE PROCESS RIGHTS

Chief Justice Calogero's dissent raised the important issue of the adverse effect on the defendant's constitutional rights.²¹⁷ He found that if "the defendant alone takes the appeal and the state neither lodges an objection at the time of sentencing in the district court nor thereafter seeks appellate review to correct the error," the reviewing court cannot modify the sentence to make it unfavorable to the defendant.²¹⁸ The courts noted this dissent, discussing and citing it in both *State v. Phillips*²¹⁹ and the 2003 *Williams* decision.²²⁰ Chief Justice Calogero reiterated his statement in his dissent from a writ denial in *Phillips*, finding "that the majority's result creates a chilling effect on a defendant's exercise of his constitutional right to appeal and offends La. Const. art. I, § 19, which guarantees Louisiana citizens a right to judicial review."²²¹

212. *State v. Williams*, 2000-1725, p. 2 (La. 11/28/01); 800 So. 2d 790, 793-94.

213. *Id.* at 793; LA. REV. STAT. ANN. § 14:98(D)(1)(a) (2012).

214. LA. REV. STAT. ANN. § 15:301.1(B) (2005).

215. LA. CODE CRIM. PROC. art. 882(A) (2008) ("An illegal sentence *may* be corrected at any time by the court that imposed the sentence or by an appellate court on review.") (emphasis added).

216. *See Williams*, 800 So. 2d at 794-96, 802. It should be noted that Justice Lobrano's concurring opinion also discussed article 920. *Id.* at 803 (Lobrano, J., concurring).

217. *Id.* at 803 (Calogero, C.J., dissenting).

218. *Id.*

219. *State v. Phillips*, 2002-0866, p. 2 (La. 11/22/02); 834 So. 2d 972, 973 (mem.) (Calogero, C.J., dissenting).

220. *State v. Williams*, 2003-0302, p. 4 (La. App. 4 Cir. 10/6/03); 859 So. 2d 751, 753 n.2.

221. *State v. Phillips*, 2002-0866, p. 2 (La. 11/22/02); 834 So. 2d 972, 973 (mem.)

C. FOSTERING JUDICIAL ECONOMY AND EFFICIENCY

The current reading of article 882 creates a burden on the administrative side of the courts, overworking those in the trial court's sentencing process when these cases come back down on remand. A change will "hopefully foster judicial economy and greater uniformity in sentencing."²²² Additionally, as a California judge suggested, courts must be mindful of "the potential costs to the justice system of reviewing such cases" and must be willing to discuss how "[t]he economic cost of litigation is a significant factor in our justice system."²²³ These costs incurred when the appellate court remands such cases outweigh any potential benefits.²²⁴

D. A PROPOSED UNIFORM APPROACH FOR HANDLING ILLEGALLY LENIENT FINES ACROSS THE LOUISIANA APPELLATE CIRCUITS

Reforming article 882 will clarify any discrepancies across the five Louisiana appellate courts arising from the legislature's rising number of statutes with mandatory sentences. Currently, when the trial court sentences defendants below the statutory requirement with no objection by the state, the appellate court, in an attempt to follow precedent, enhances the sentence on its own motion or remands it back to the trial court with instructions to correct the sentence. Far too often, this results in a harsher punishment to the defendant, usually in the form of a monetary fine.²²⁵

This amendment to article 882 would create uniformity in sentencing among the Louisiana appellate circuits. This Comment proposes that, in order to rectify the discrepancies between the legislation and inconsistent precedent, Louisiana appellate courts should not review cases for the error patent of an

(Calogero, C.J., dissenting).

222. Anderson, *supra* note 13, at 1098.

223. State v. Castillo, 2009-1358, p. 11 (La. 1/28/11); 57 So. 3d 1012, 1018 (citing People v. Wong, 93 Cal. App. 3d 151, 155-56 (Cal. Ct. App. 1979) (Files, J., concurring)).

224. Finding empirical data on the actual costs of remand and the frequency of the issue proved too daunting of a task for the scope of this Comment. Thus, this Comment lacks the information to support this argument, but it is a logical concern.

225. See, e.g., State v. Clemons, 01-1032, p. 2-3 (La. App. 5 Cir. 2/26/02); 811 So. 2d 1047, 1049-50 (remanding the case "to the district court for imposition of an appropriate fine").

illegally lenient fine when the State neither objects to nor raises that issue on appeal. All five courts would align with the third circuit's interpretation, holding that an "illegal sentence is correctable at any time, whereas an illegally lenient sentence may be corrected only if raised by the defendant or the State."²²⁶ This should become codified as law across all reviewing courts in Louisiana. Furthermore, precedent from the Louisiana fourth and fifth circuits that follow the former reasoning that "[a]n appellate court has the authority under C.Cr.P. art. 882 to correct an illegally lenient sentence at any time, even if the issue of an illegal sentence was not raised by the defendant or the State,"²²⁷ would be invalidated by the legislative amendment. Consistency among the appellate courts will also cure the current problems regarding unfairness and ineffectiveness that arise when circuits rule differently on the same factual situations. Currently, the result of a defendant's appeal depends on where the trial court decision is appealed. For example, a defendant appealing to the third circuit does not have to worry about that court increasing his fine as long as the State did not raise that issue, while a defendant appealing to the fifth circuit has to consider that risk before lodging his appeal. No longer will the defendant be prejudiced depending on the location in which he was arrested and tried.

E. SETTING THE STANDARD OF A TRULY MANDATORY FINE

To further clarify the inconsistent appellate court precedent and criminal procedure articles on this issue, this amendment must make a distinction between offenses that contain a statutory minimum amount in the fine and those that do not before remanding such cases after a review for errors patent. Appellate courts should review trial court decisions under the presumption that the trial judge chose not to include a fine after careful consideration, not that he failed to impose a fine. Thus, regardless of a truly mandatory minimum fine (i.e., those fines that have a base of more than zero dollars), the appellate court cannot enhance any fine *sua sponte*.

Courts should never interpret statutes that express the

226. State *ex rel.* S.M., 11-271, p. 2 (La. App. 3 Cir. 6/8/11); 67 So. 3d 1274, 1276.

227. State v. Shaw, 12-686, p. 13-14 (La. App. 5 Cir. 1/16/13); 108 So. 3d 1189, 1198 (citing State v. Campbell, 08-1226, p. 8 (La. App. 5 Cir. 5/26/09); 15 So. 3d 1076, 1081). Even after this statement, the fifth circuit declined to exercise its authority to correct the fine because the state did not appeal the error.

defendant “shall be fined not more than” a certain amount as a “mandatory” fine, especially when the legislature has included no minimum fine.²²⁸ In that case, even though the legislature elected to use the phrase “shall be fined,” which mandates the court adhere to what follows next, courts shall presume that a zero dollar fine is wholly valid.²²⁹ The Louisiana Supreme Court has already alluded to this exact issue, albeit in a footnote in a dissent.²³⁰ Although not expressly ruling on the issue, it notes that when the statute provides that the offender be fined “not more than ten thousand dollars,” it does not mandate a fine in some minimum amount.²³¹ In that case, Chief Just Calogero argued that a fine of \$0 does qualify as “not more than \$10,000.”²³² Considering that reasoning in light of the proposed reform to article 882, courts should never consider fines with no clearly denominated floor “mandatory” fines.

The restriction on appellate courts from considering evidence in a review for errors patent renders these courts ill-equipped to *sua sponte* impose any additional fines not imposed by the trial court. Trial courts consider many factors when determining whether or not to impose a fine upon a convicted defendant, and reviewing courts do not have the opportunity to access this information in an errors patent review. Moreover, additional problems persist because appellate courts do not have any firm guidance on what exactly they may discover in an errors patent discussion, although *State v. Price* mentions over twenty different iterations.²³³ One noted error is a sentence “which does not conform to the maximum or minimum terms set forth in the statute” because such an error is easily discoverable without inspection of the evidence.²³⁴ Certainly, if the error is unfavorable to the defendant (i.e., exceeds the statutory limits), then the appellate court should review it as an error patent.

228. See, e.g., *State v. Cook*, 2009-0311, p. 3-5 (La. App. 4 Cir. 8/12/09); 19 So. 3d 15, 16 & n.1, 17. Although the fourth circuit found that there was no “mandatory minimum fine,” the court still incorrectly found the fine to be “mandatory” and therefore remanded for “imposition of the mandatory fine.” *Id.* (emphasis added).

229. *State v. Turner*, 46,683, p. 25 (La. App. 2 Cir. 12/14/11); 82 So. 3d 449, 463 (citing *State v. Francois*, 06-788, p. 7 (La. App. 3 Cir. 12/13/06); 945 So. 2d 865, 870).

230. See *State v. Phillips*, 2002-0866, p. 3 (La. 11/22/02); 834 So. 2d 972, 973 n.1 (mem.) (Calogero, C.J., dissenting).

231. See *id.*

232. *Id.*

233. *State v. Price*, 2005-2514, p. 19 (La. App. 1 Cir. 12/28/06); 952 So. 2d 112, 123.

234. Joseph, *supra* note 10, at 491.

2014] **Review of Illegally Lenient Fines** 353

However, this Comment's proposed amendment to article 882 would ensure that the reviewing court will not enhance any sentence or fine to the defendant when the defendant is the only party taking an appeal.

V. CONCLUSION

Not only should the legislature amend article 882 for guidance and clarity, but the discrepancies in Louisiana fourth circuit cases and among the Louisiana appellate courts must also be rectified. Considering the intent of the legislature and a plain reading of the statutes, the Louisiana fourth circuit should follow the correct precedent from the *Jackson-Fraser* line of cases and the United States Supreme Court decision in *Greenlaw*. As scholars from Mr. Anderson to Chief Justice Calogero have warned throughout the past three decades, a change is needed to protect the rights of the criminal defendant from this unfortunate side effect of the appellate process.

Dustin C. Alonzo