

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

JANUARY TERM 2006

TIMOTHY D. LESTER,

Appellant,

v.

CASE NO. 5D05-2489

STATE OF FLORIDA,

Appellee.

Opinion filed March 24, 2006

Appeal from the Circuit Court
for Marion County,
Hale R. Stancil, Judge.

James S. Purdy, Public Defender, and
Noel A. Pelella, Assistant Public
Defender, Daytona Beach, for Appellant.

Charles J. Crist, Jr., Attorney General,
Tallahassee, and Pamela J. Koller,
Assistant Attorney General, Daytona
Beach, for Appellee.

LAWSON, J.

Timothy D. Lester seeks review of an order denying his motion to correct illegal sentence filed pursuant to Florida Rule of Criminal Procedure 3.800(a). Relying on *Isaac v. State*, 911 So. 2d 813 (Fla. 1st DCA 2005), Lester alleges that his upward departure sentence upon re-sentencing is illegal under *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Lester's underlying convictions, however, became final long before

announcement of the *Apprendi* rule. We agree with Judge Kahn's well-reasoned dissent in *Isaac* that applying *Apprendi* would be a retroactive application and contrary to *Hughes v. State*, 901 So. 2d 837 (Fla. 2005). *Isaac*, 911 So. 2d at 815-16 (Kahn, J., dissenting). Accordingly, we affirm, aligning ourselves with the Second, Third and Fourth District Courts of Appeal, and certify direct conflict with *Isaac*. See, e.g., *Thomas v. State*, 914 So. 2d 27 (Fla. 4th DCA 2005); *Galindez v. State*, 910 So. 2d 284 (Fla. 3d DCA 2005); *Burrows v. State*, 890 So. 2d 286 (Fla. 2d DCA 2004), *rev. denied*, 914 So. 2d 952 (Fla. 2005).

AFFIRMED; CONFLICT CERTIFIED.

THOMPSON and SAWAYA, JJ., concur.