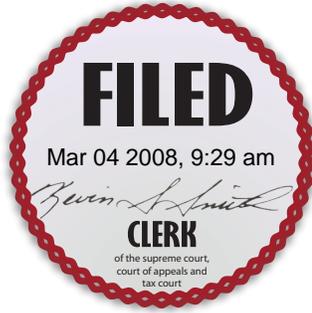


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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DONALD E. JONES,  
Appellant-Defendant,

vs.

STATE OF INDIANA,  
Appellee-Plaintiff.

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No. 47A01-0705-CR-203

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APPEAL FROM THE LAWRENCE CIRCUIT COURT  
The Honorable Richard D. McIntyre, Sr., Judge  
Cause No. 47C01-0601-FB-31

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**March 4, 2008**

**MEMORANDUM DECISION ON REHEARING – NOT FOR PUBLICATION**

**RILEY, Judge**

This case is before us on a petition for rehearing filed by the State of Indiana, requesting that we reconsider our holding in *Jones v. State*, Case No. 47A01-075-CR-203 (Ind. Ct. App. November 30, 2007). In that case, the majority concluded, in part, that the trial court had violated Jones' Sixth Amendment jury rights as defined by the Supreme Court's opinion in *Blakely v. Washington*, 542 U.S. 296 (2004), *reh'g denied*. Specifically, we concluded that since Jones' prior probation violation was not a conviction, and had not been found beyond a reasonable doubt by a jury or admitted by Jones, the trial court could not use it to enhance Jones' sentence beyond the presumptive, citing our supreme court's decision in *Duncan v. State*, 857 N.E.2d 955, 959 (Ind. 2006). *Jones*, slip op. at 4.

Jones contended in his Appellant's Brief that we reach that result, and we noted that "[t]he State makes no argument disputing Jones' contention." *Id.* Upon rehearing, the State contends that it made argument in its Appellee's Brief responding to Jones' contentions on this point. We have more closely reviewed the Appellee's Brief, and found that each of the copies submitted to our court omitted two pages of the State's argument section, while the original contains the State's argument in full. The omitted pages contained the State's argument that the trial court properly relied upon Jones' previous probation violation as an aggravating factor. We conclude that the State's omission of the two pages in the brief copies was merely a clerical error, which we should have previously noticed, and fairness requires that we consider the merits of the State's argument upon rehearing.

In *Blakely*, the Supreme Court pronounced that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory

maximum must be submitted to a jury, and proved beyond a reasonable doubt.” *Blakely*, 542 U.S. at 302. However, in *Robertson v. State*, 871 N.E.2d 280, 287 (Ind. 2007), our supreme court recently concluded that Robertson’s probation violation, although not a conviction, nor found by a jury or admitted by him, was properly relied upon by the trial court to enhance Robertson’s sentence beyond the presumptive. Our supreme court relied upon its reasoning in *Ryle v. State*, 842 N.E.2d 320, 323-25 (Ind. 2005), to conclude, since the probation violation was reported in a presentence investigation report compiled by a probation officer relying upon judicial records, the trial court properly used it as an aggravating factor under *Blakely*. See *Robertson*, 871 N.E.2d at 287.

Here, Jones’ probation violation was reported in a presentence investigation report, compiled by a probation officer and based on judicial records. Therefore, we must agree with Judge Baker, who dissented from our original opinion, and conclude that *Robertson* compels us to conclude that the trial court’s use of Jones’ previous probation violation does not run afoul of *Blakely*.

The probation violation, which we have now determined was properly used by the trial court to enhance Jones’ sentence, occurred after Jones had pleaded guilty to possession of marijuana, as a Class A misdemeanor, Ind. Code § 35-48-4-11, in 1996. It appears from the presentence investigation report that Jones’ probation violation was for failure to appear (“04/30/97: FTA, warrant issued”). (Appellant’s App. p. 26). Jones is currently appealing his conviction and sentence for child molesting, a Class B felony, I.C. § 35-42-4-3. His

actions that supported this conviction occurred sometime between December 4, 2004 and January 2005, more than seven years after his probation violation.

Additionally, in our memorandum decision, we concluded that the trial court improperly found and relied upon Jones' violation of a position of trust as an aggravating factor when sentencing him. *Jones*, slip op. at 4. We do not alter that conclusion. However we do note, although it is unclear from the record, it is probable that the trial court relied more upon its finding of Jones' violation of his position of trust than his prior probation violation when enhancing Jones' sentence, since his probation violation was so different in nature and distant from his current offense. *See Bryant v. State*, 841 N.E.2d 1154, 1156 (Ind. 2006).

In our memorandum decision, we concluded that we could not say with confidence that the trial court would have entered the same sentence absent the impermissible aggravating factors that it considered. *Jones*, slip op. at 5. In *Means v. State*, 807 N.E.2d 776, 788 (Ind. Ct. App. 2004), *trans. denied*, we explained:

When the sentencing court improperly applies an aggravating circumstance but other valid aggravating circumstances exist, a sentence enhancement may still be upheld. [] This occurs when the invalid aggravator played a relatively unimportant role in the trial court's decision, and other aggravating circumstances were sufficient to sustain the trial court's decision.

(Internal citations omitted). Although the properly considered aggravators could be sufficient to sustain the trial court's decision, it is unlikely that the violation of a position of trust aggravator, improperly relied upon by the trial court, played a relatively unimportant

role in the trial court's sentencing decision. Therefore, we again choose to remand to the trial court for a new sentencing determination consistent with this opinion.

Petition for Rehearing granted; Jones' sentence is reversed and remanded.

SHARPNACK, J. concurs.

BAKER, C.J., dissents with opinion.

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**IN THE  
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DONALD E. JONES, JR.,	)	
	)	
Appellant-Defendant,	)	
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vs.	)	No. 47A01-0705-CR-203
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

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**BAKER, Chief Judge, dissenting.**

I agree with the majority’s decision to grant rehearing on the basis that the trial court properly considered Jones’s prior probation violation to be an aggravating factor. I must respectfully dissent, however, from the majority’s conclusion that the trial court should be reversed notwithstanding two proper aggravators—Jones’s prior criminal history, which includes a felony conviction, and the probation violation. As stated in my original dissent, given these aggravators and the fact that the trial court chose not to sentence Jones to a maximum term, I would affirm the judgment of the trial court.