

7-20-2012

Bottum v. Idaho State Police Respondent's Brief Dckt. 39772

Follow this and additional works at: [https://digitalcommons.law.uidaho.edu/
idaho_supreme_court_record_briefs](https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs)

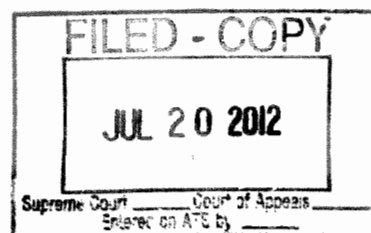
Recommended Citation

"Bottum v. Idaho State Police Respondent's Brief Dckt. 39772" (2012). *Idaho Supreme Court Records & Briefs*. 3929.
https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs/3929

This Court Document is brought to you for free and open access by Digital Commons @ UIIdaho Law. It has been accepted for inclusion in Idaho Supreme Court Records & Briefs by an authorized administrator of Digital Commons @ UIIdaho Law. For more information, please contact annablaine@uidaho.edu.

IN THE SUPREME COURT OF THE STATE OF IDAHO

RANDALL PHILLIP BOTTUM,)	
)	DOCKET NO. 39772-2012
Petitioner-Appellant,)	
)	District Court No. CV 2011-4814
v.)	
)	
IDAHO STATE POLICE, BUREAU)	
OF CRIMINAL IDENTIFICATION,)	
CENTRAL SEX OFFENDER)	
REGISTRY,)	
)	
Respondent.)	



RESPONDENT'S BRIEF

Appeal from the District Court of the First Judicial District
of the State of Idaho, in and for the County of Kootenai

Honorable Michael J. Griffin, District Judge, presiding.

LAWRENCE G. WASDEN
Attorney General
State of Idaho

STEPHANIE A. ALTIG
Deputy Attorney General
Idaho State Police
700 S. Stratford Drive
Meridian, ID 83642
Telephone: (208) 884-7050
Facsimile: (208) 884-7228
ISB No. 4620
Attorney for Respondent

FREDERICK G. LOATS
Attorney at Law
2005 Ironwood Parkway, Suite 210
P.O. Box 831
Coeur d'Alene, ID 83816-0831
Telephone: (208) 667-6424
Facsimile: (208) 664-3644
ISB # 2147

Attorney for Petitioner-Appellant

IN THE SUPREME COURT OF THE STATE OF IDAHO

RANDALL PHILLIP BOTTUM,)	
)	DOCKET NO. 39772-2012
Petitioner-Appellant,)	
)	District Court No. CV 2011-4814
v.)	
)	
IDAHO STATE POLICE, BUREAU)	
OF CRIMINAL IDENTIFICATION,)	
CENTRAL SEX OFFENDER)	
REGISTRY,)	
)	
Respondent.)	

RESPONDENT'S BRIEF

Appeal from the District Court of the First Judicial District
of the State of Idaho, in and for the County of Kootenai

Honorable Michael J. Griffin, District Judge, presiding.

LAWRENCE G. WASDEN
Attorney General
State of Idaho

STEPHANIE A. ALTIG
Deputy Attorney General
Idaho State Police
700 S. Stratford Drive
Meridian, ID 83642
Telephone: (208) 884-7050
Facsimile: (208) 884-7228
ISB No. 4620
Attorney for Respondent

FREDERICK G. LOATS
Attorney at Law
2005 Ironwood Parkway, Suite 210
P.O. Box 831
Coeur d'Alene, ID 83816-0831
Telephone: (208) 667-6424
Facsimile: (208) 664-3644
ISB # 2147

Attorney for Petitioner-Appellant

TABLE OF CONTENTS

I. NATURE OF THE CASE	1
II. FACTUAL AND PROCEDURAL BACKGROUND.....	1
III. ISSUE ON APPEAL.....	3
The issue on appeal is whether the application of the 2001 and subsequent amendments to IDAHO CODE § 18-8301(1) (definition of “aggravated offense”) and IDAHO CODE § 18-8310(1) (precluding offender convicted of an aggravated offense from relief from sex offender registration requirements) in his case amount to retroactive application of those amendments in violation of IDAHO CODE § 73-101	
	3, 4
IV. STANDARD OF REVIEW	4
V. ARGUMENT AND ANALYSIS.....	4
VI. CONCLUSION.....	10
CERTIFICATE OF SERVICE	12

TABLE OF AUTHORITIES

CASES

<i>Bryant v. City of Blackfoot</i> , 137 Idaho 307, 48 P.3d 636 (2002)	5, 6
<i>Doe v. Boy Scouts of Am.</i> , 148 Idaho 427, 224 P.3d 494 (2009)	4
<i>Esquivel v. State</i> , 128 Idaho 390, 913 P.2d 1160 (1996)	5, 6
<i>Gailey v. Jerome County</i> , 113 Idaho 430, 745 P.2d 1051 (1987)	6
<i>Overman v. Overman</i> , 102 Idaho 235 (1980)	4
<i>Ray v. State</i> , 133 Idaho 96, 982 P.2d 931 (1999)	7, 8
<i>Smith v. Doe</i> , 538 U.S. 84, 123 S.Ct. 1140 (2003)	4, 8, 10
<i>Smith v. Washington County Idaho</i> , 150 Idaho 388, 247 P.3d 615 (2010)	4, 8
<i>State v. Forbes</i> , 152 Idaho 849, 275 P.3d 864 (2012)	4, 8, 9
<i>State v. Hardwick</i> , 150 Idaho 580, 249 P.3d 379 (2011)	8, 9
<i>State v. Johnson</i> , 152 Idaho 41, 266 P.3d 1146 (2011)	4, 10
<i>State v. Joslin</i> , 145 Idaho 75, 175 P.3d 764 (2007)	7
<i>State v. Rhode</i> , 133 Idaho 459, 988 P.2d 685,(1999)	4
<i>Stuart v. State</i> , 149 Idaho 35, 232 P.3d 813 (2010)	5
<i>Unity Light & Power Co. v. City of Burley</i> , 92 Idaho 499 (1968)	4
<i>University of Utah Hospital v. Pence</i> , 104 Idaho 172, 657 P.2d 459 (1982)	6
<i>Wheeler v. Idaho Dept. of Health and Welfare</i> , 147 Idaho 257, 207 P.3d 988 (2009)	6, 7

STATUTES

IDAHO CODE § 18-1508	1, 3
IDAHO CODE § 18-8301(1)	1, 2, 3
IDAHO CODE § 18-8302	9, 10

IDAHO CODE § 18-8303	2
IDAHO CODE § 18-8303(1).....	3
IDAHO CODE § 18-8304.....	2, 9
IDAHO CODE § 18-8310	6
Idaho Code § 18-8310(1).....	2, 3, 6, 10
IDAHO CODE § 19-2604(3).....	8, 9
IDAHO CODE § 19-2719	5
IDAHO CODE § 19-4902	6
IDAHO CODE ¶ 73-101.....	passim

RULES

Idaho Criminal Rule (I.C.R.) 11(c).....	7
---	---

OTHER AUTHORITIES

1993 Idaho Sess. Laws ch. 155.....	1
1998 Idaho Sess. Laws ch. 411.....	2
2001 Idaho Sess. Laws ch. 194.....	2
Alaska Stat. § 12.63.020(a)(1)).....	8
1998 Alaska Sess. Laws Ch. 106.....	8

I. NATURE OF THE CASE

Appellant asserts that application of the 2001 and subsequent amendments to IDAHO CODE § 18-8301(1) (definition of “aggravated offense”) and IDAHO CODE § 18-8310(1) (precluding offender convicted of an aggravated offense from relief from sex offender registration requirements) in his case amount to retroactive application of those amendments in violation of IDAHO CODE § 73-101, which states “[n]o part of these compiled laws is retroactive, unless expressly so declared.”

II. FACTUAL AND PROCEDURAL BACKGROUND

As set forth in the Brief of Appellant, Appellant was sentenced for the sex offense of Lewd Conduct with a Minor Child, IDAHO CODE § 18-1508, on July 29, 1991. At the time of Appellant’s sentencing there was no sex offender registration requirement in Idaho. In 1993, the Idaho legislature passed the Sex Offender Registration Act. This act required sex offenders to register for a period of ten years after discharge from probation, parole or release from incarceration, whichever was greater. It also allowed for expungement of the sex offender registration requirements at the end of that period of time, provided that the sex offender showed by clear and convincing evidence that his duty to register had expired, he did not have a criminal charge pending nor was under criminal investigation for any crime identified as one requiring sex offender registration, and that he was not a substantial risk to commit a new sex offense. 1993 Idaho Sess. Laws ch. 155.

As Appellant recites, in 1998 the Idaho legislature repealed the 1993 Sex Offender Registration Act and replaced it with the Sexual Offender Registration Notification and Community Right-to-Know Act (hereafter “Act”). 1998 Idaho Sess. Laws ch. 411. Like its predecessor, this Act applied to convicted sex offenders who were on probation, as was Appellant, for a sex offense that required registration as of July 1, 1993. As codified, IDAHO CODE § 18-8301(1) allowed a registered sex offender to petition to be released from the registration requirements after ten years from the date the offender was released from incarceration or placed on parole, supervised release or probation, whichever was greater.

In 2001, the Act was again amended. It added the definition of “aggravated offense” to IDAHO CODE § 18-8303 in relevant part as follows:

[a]ggravated offense” means any of the following crimes as set forth in section 18-8304, IDAHO CODE: 18-1508 (lewd conduct when the victim is less than twelve (12) years of age); ... [Emphasis added]

2001 Idaho Sess. Laws ch. 194.

The 2001 amendments to the Act also amended IDAHO CODE § 18-8310(1) to preclude sex offenders convicted of an aggravated offense from eligibility for release from Idaho’s sex offender registration requirements:

Any person, other than a recidivist, an offender who has been convicted of an aggravated offense, or an offender designated as a violent sexual predator, may, after a period of ten (10) years from the date the person was released from incarceration or placed on parole, supervised release or probation, whichever is greater, petition the district court for a show cause hearing to determine whether the person shall be exempted from the duty to register as a sexual offender. [Emphasis added]

2001 Idaho Sess. Laws ch. 194.

Thus, as of July 1, 2001, when these amendments took effect, sex offenders convicted of an aggravated offense are not eligible for release from the sex offender registration requirements.

On June 15, 2011, Appellant filed a Petition to Be Released From Sex Offender Registration Requirements in the First Judicial District Court for the State of Idaho, Kootenai County. Clerk's Record ("CR"), p. 1. On June 24, 2011, the Idaho State Police, Bureau of Criminal Identification, filed a Notice and Affidavit of Ineligibility of Release from Sex Offender Registry. CR, p. 18. Based on the applicable statutory language and the information provided in the Affidavit, the district court specifically found that Appellant's "petition is not sufficient, due to the fact that he has been convicted of Lewd Conduct with a Minor Child Under the Age of Sixteen, a violation of IDAHO CODE § 18-1508, and under present statutory language, specifically, IDAHO CODE § 18-8303(1), that offense is not one in for which a petition to be exempted from the duty to register as a sexual offender may be made." CR, p. 23.

III. ISSUE ON APPEAL

The issue on appeal is whether the application of the 2001 and subsequent amendments to IDAHO CODE § 18-8301(1) (definition of "aggravated offense") and IDAHO CODE § 18-8310(1) (precluding offender convicted of an aggravated offense from relief from sex offender registration requirements) in his case amount to retroactive application of those amendments in violation of IDAHO CODE § 73-101.

IV. STANDARD OF REVIEW

The interpretation of a statute is a question of law over which this Court exercises free review.” *Smith v. Washington County Idaho*, 150 Idaho 388, 247 P.3d 615, 617 (2010), *citing Doe v. Boy Scouts of Am.*, 148 Idaho 427, 430, 224 P.3d 494, 497 (2009). “When [this] Court must engage in statutory construction, it has the duty to ascertain the legislative intent, and give effect to that intent.” *State v. Forbes*, 152 Idaho 849, 275 P.3d 864, 866 (2012), *citing State v. Rhode*, 133 Idaho 459, 462, 988 P.2d 685, 688 (1999).

Whether a law is civil or criminal is a matter of statutory construction. *State v. Johnson*, 152 Idaho 41, 266 P.3d 1146 (2011) *citing Smith v. Doe*, 538 U.S. 84, 92, 123 S.Ct. 1140 (2003). “Where a legislative restriction ‘is an incident of the State’s power to protect the health and safety of its citizens,’ it will be considered ‘as evidencing an intent to exercise that regulatory power, and not a purpose to add to the punishment.’ ” *Id.* at 93-94, 123 S.Ct at 1147 .

V. ARGUMENT AND ANALYSIS

IDAHO CODE § 73-101 states “[n]o part of these compiled laws is retroactive, unless expressly so declared.” In support of his argument before the district court, Appellant cited to footnote 1 from *Overman v. Overman*, 102 Idaho 235, 237 (1980), and *Unity Light & Power Co. v. City of Burley*, 92 Idaho 499, 504 (1968), cited for the proposition that “...unless a contrary intention clearly appears therein, a statute will not be given retrospective effect.” Respondent does not quarrel with this most basic interpretation of IDAHO CODE § 73-101, but knows that it does not apply in that way to Appellant’s request to be relieved from Idaho’s sex offender registration requirements.

The Idaho Supreme Court has consistently recognized “that where a statute is procedural or merely ‘draws upon facts antecedent to its enactment’ it will be held to be prospective in nature.” *Stuart v. State*, 149 Idaho 35, 43, 232 P.3d 813, 821 (2010), *citing Bryant v. City of Blackfoot*, 137 Idaho 307, 313, 48 P.3d 636, 642 (2002).

In *Stuart*, the Court examined the application of IDAHO CODE § 19-2719, which although it “included language making it applicable to convictions prior to the statute's enactment, but it was not, itself, ‘retroactive’ in any substantive sense.” *Stuart*, 149 Idaho at 43, 232 P.3d at 821.

The Court continued:

Because I.C. § 19-2719 applies to post-conviction relief actions rather than the underlying criminal actions, its application is prospective – operating on all post-conviction petitions submitted after the effective date of the statute. See, e.g. *Esquivel v. State*, 128 Idaho 390, 392, 913 P.2d 1160, 1162 (1996) (applying the reduced one-year statute of limitations in non-capital post-conviction proceedings prospectively from the date of enactment and finding no violation of I.C. § 73-101.

Stuart, 149 Idaho at 43, 232 P.3d at 821 (underlined emphasis added).

Appellant in the present is in a position similar to *Stuart*. The relevant amendments began to apply upon their enactment to registered sex offenders who attempted after their enactment, prospectively, to be released from sex offender registration requirements. Therefore, they are not retroactive and do not run afoul of IDAHO CODE § 73-101.

There is another reason that the relevant amendments are not retroactive. “[I]n the absence of an express declaration of legislative intent, a statute, which is remedial or procedural in nature, and which does not create, enlarge, diminish, or destroy contractual or vested rights, is generally held not to be retroactive, even though it was enacted subsequent to the events to

which it applies. *Wheeler v. Idaho Dept. of Health and Welfare*, 147 Idaho 257, 262, 207 P.3d 988, 993 (2009), citing *Gailey v. Jerome County*, 113 Idaho 430, 432, 745 P.2d 1051, 1054 (1987).

Idaho's sex offender registration laws and their subsequent amendments did not and do not apply retroactively to Appellant because he has never had a contractual or vested right to petition the court for release from the sexual offender registration requirements. Ten years had not elapsed from the date he was placed on probation (July 29, 1991) before the sex offender registration laws were amended in 2001 and became effective on July 1, 2001. See IDAHO CODE § 18-8310 (1); *Esquivel v. State*, 128 Idaho 390, 913 P.2d 1160 (1996) (holding application of amended version of IDAHO CODE § 19-4902, which reduced the time to file a post-conviction petition from five years to one year, was proper, and not retroactive); *Bryant v. City of Blackfoot*, 137 Idaho 307, 313, 48 P.3d 636, 642 (2002). ("A statute is not made retroactive merely because it draws upon facts antecedent to its enactment. . . . Changes in procedural laws are held applicable to existing causes of action because the effect of such statutes is actually prospective in nature since they relate to the procedure to be followed in the future."); *University of Utah Hospital v. Pence*, 104 Idaho 172, 657 P.2d 459 (1982) (same).

The relevant amendments to Idaho's sex offender registration laws relate to the procedures to be followed in the future from their enactment in determining whether a registered sex offender is eligible for release from registration under IDAHO CODE § 18-8310. As having been convicted of an aggravated offense, Petitioner is not eligible for such release.

As further compelling reasoning that the application of Idaho's sex offender registration laws are not retroactive are Idaho Supreme Court cases that examined the issue of retroactivity under *Ex Post Facto* clause analysis. In *Ray v. State*, 133 Idaho 96, 98-99, 982 P.2d 931, 933-934 (1999), the Idaho Supreme Court considered Ray's post-conviction claim that his guilty plea to sex abuse of a minor under sixteen was involuntary due to trial counsel's failure to inform him, before his plea, that he would be required to register as a sex offender. Ray argued on appeal that "the sex offender requirement [was] a direct consequence of his guilty plea and thus, the district judge, by failing to notify him of the requirement, violated Idaho Criminal Rule (I.C.R.) 11(c) and his guilty plea [was] thus invalid." *Id.* at 99, 982 P.2d at 934. The Idaho Supreme Court disagreed. It found the "purpose of Idaho's registration statute is not punitive, but remedial." *Id.* at 100, 982 P.2d at 935. See, *Wheeler*, 147 Idaho at 262, 207 P.3d at 993 (a statute, which is remedial or procedural in nature...is generally held not to be retroactive, even though it was enacted subsequent to the events to which it applies).

The Court concluded that the statute "provides an essential regulatory purpose that assists law enforcement and parents in protecting children and communities." *Ray v. State*, 133 Idaho 96 at 101, 982 P.2d at 936. Accordingly, the Court held that "sex offender registration is a collateral, not direct, consequence of pleading guilty." *Id.*; *State v. Joslin*, 145 Idaho 75, 86, 175 P.3d 764, 775 (2007) (sex offender registration requirement is not cruel and unusual punishment under the state constitution because "[t]he requirement that sexual offenders register does not impose punishment").

Four years after *Ray*, the United States Supreme Court similarly held that Alaska's sex offender registration requirements were not punishment. In *Smith v. Doe I*, 538 U.S. 84, 92-93, 123 S.Ct 1140, (2003), the United States Supreme Court considered whether the Alaska Sex Offender Registration Act, which is similar to Idaho's, violated the Ex Post Facto Clause of the United States Constitution. The United States Supreme Court held it did not.

Similar to the 2001 amendment of Idaho's sex offender registration laws, after Alaska's sex offender registration act was first enacted (in 1994), it was subsequently amended (in 1998) to make its registration provisions continue for life (instead of fifteen years) for sex offenders convicted of an "aggravated sex offense." 1998 Alaska Sess. Laws Ch. 106 (codified in Alaska Stat. § 12.63.020(a)(1)). With regard to Alaska's lifetime registration requirement for aggravated offenses, the United States Supreme Court opined:

The [Ninth Circuit] Court of Appeals was incorrect to conclude that the Act's registration obligations were retributive because "the length of the reporting requirement appears to be measured by the extent of the wrongdoing, not by the extent of the risk posed." 259 F.3d 90. The Act, it is true, differentiates between individuals convicted of aggravated or multiple offenses and those convicted of a single non aggravated offense. Alaska Stat. § 12.63.020(a)(1) (2000). The broad categories, however, and the corresponding length of the reporting requirement, are reasonably related to the danger of recidivism, and this is consistent with the regulatory objective.

Doe I, 538 U.S. at 104.

This Court's recent decisions in *State v. Hardwick*, 150 Idaho 580, 249 P.3d 379 (2011) and *State v. Forbes*, 275 P.3d 864 (2012) remain consistent with its previous holdings regarding application of a remedial statute. In both cases, this Court considered whether retroactive application of an amendment to IDAHO CODE § 19-2604(3), which prohibits dismissal of offenses

requiring sex offender registration, violated the ex post facto clauses of the United States Constitution and the Idaho Constitution. In each of those cases, the Court examined the Legislature's purpose for requiring sex offender legislation at IDAHO CODE § 18-8302:

The legislature finds that sexual offenders present a danger and that efforts of law enforcement agencies to protect their communities, conduct investigations and quickly apprehend offenders who commit sexual offenses are impaired by the lack of current information available about individuals who have been convicted of sexual offenses who live within their jurisdiction. The legislature further finds that providing public access to certain information about convicted sexual offenders assists parents in the protection of their children. Such access further provides a means for organizations that work with youth or other vulnerable populations to prevent sexual offenders from threatening those served by the organizations. Finally, public access assists the community in being observant of convicted sexual offenders in order to prevent them from recommitting sexual crimes. Therefore, this state's policy is to assist efforts of local law enforcement agencies to protect communities by requiring sexual offenders to register with local law enforcement agencies and to make certain information about sexual offenders available to the public as provided in this chapter.

Acknowledging this non-punitive purpose, the Court held that retroactive application of the July 1, 2006 amendment to IDAHO CODE § 19-2604(3) that a "judgment of conviction for a violation of any offense requiring sex offender registration as set forth in Section 18-8304, Idaho Code, shall not be subject to dismissal or reduction under this section" did not violate the ex post facto clauses of the United States or Idaho Constitutions because this amendment was not punitive. Although IDAHO CODE § 73-101, was raised in *Forbes*, the Court analysis in that case focused on the *Ex Post Facto* question. Nevertheless, *Hardwick* and *Forbes* are certainly instructive as the Court decides Appellant's IDAHO CODE § 73-101 retroactive application issue.

Finally, and also compelling for IDAHO CODE § 73-101 analysis, is *State v. Johnson*, 152 Idaho 41, 266 P.3d 1146 (2011). There, although in dicta, this Court emphasized:

Because SORA [the Sex Offender Registration Act] as a whole is regulatory in purpose, there is no reason to infer that the Legislature intended these “technical amendments and updates” as anything other than civil and nonpunitive. In order for the 2009 SORA amendments to violate the *ex post facto* clause, despite their civil denomination, we would have to determine that they are nonetheless punitive.

In this regard, Johnson highlights the fact that the 2009 amendments would forever preclude him from petitioning for exemption despite the apparent likelihood that he will not reoffend. The test that we must apply, however, focuses on whether the challenged statute is, “by the clearest proof,” so punitive as to override the Legislature's regulatory purpose. *Doe*, 538 U.S. at 92, 123 S.Ct. at 1146-47, 155 L.Ed.2d at 176. “The *Ex Post Facto* Clause does not preclude a State from making reasonable categorical judgments that conviction of specified crimes should entail particular regulatory consequences.” *Id.* at 103, 123 S.Ct. at 1153, 155 L.Ed.2d at 194. The U.S. Supreme Court has dismissed *ex post facto* claims “imposing regulatory burdens on individuals convicted of crimes without any corresponding risk assessment.” *Id.*, at 104, 123 S.Ct. at 1153, 155 L.Ed. at 184. Moreover, “[t]he State's determination to legislate with respect to convicted sex offenders as a class, rather than require individual determination of their dangerousness, does not make the statute a punishment under the *Ex Post Facto* Clause.” *Id.* The fact that a sexual offender, convicted of a certain class of crime, may be required to register for life is not so punitive that it overrides SORA's regulatory purpose. This is particularly so because the Legislature need not make particularized findings in the regulatory context.

Johnson, 266 P.3d at 1150-51.

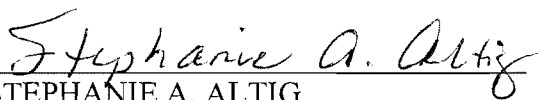
VI. CONCLUSION

Based on the foregoing, this Court should conclude that the 2001 and subsequent relevant amendments to IDAHO CODE §§ 18-8302(1) and 18-8310(1) are not retroactive and therefore do

not run afoul of IDAHO CODE § 73-101, affirm the district court's decision, and dismiss this case accordingly.

Dated this 20 day of July 2012.

OFFICE OF THE ATTORNEY GENERAL
STATE OF IDAHO


STEPHANIE A. ALTIG
DEPUTY ATTORNEY GENERAL
COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I hereby certify that on this 20 day of July 2012, I caused to be served a true and correct copy of the foregoing RESPONDENT'S BRIEF in the above-referenced matter by United States Mail, Postage paid, and addressed to the following:

Frederick G. Loats
ATTORNEY AT LAW
2005 Ironwood Parkway, Suite 210
P.O. Box 831
Coeur d'Alene, Idaho 83816-0831

☒ by U. S. MAIL

☐ by HAND DELIVERY

☐ by FACSIMILE

☐ by OVERNIGHT MAIL


STEPHANIE A. ALTIG
Deputy Attorney General

TAB

B-1