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# Constitutional Law -- The First Amendment Status of Commercial Advertising

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rational relation test because objective criteria existed that could have been easily utilized to make a more accurate determination of residency.<sup>68</sup>

Thus the meaning of *Salfi* is twofold. First, in the area of Social Security, the individual interest affected, even when there is a total deprivation of benefits, will be insufficient to trigger conclusive presumption analysis. This will be particularly true when the rule has a prophylactic effect, insulating the system from substantial abuse, since the governmental interest will be correspondingly great. Secondly, the Court may find a given classification to be rationally related to the legislative goal in spite of a fairly close examination of the statute. The factor crucial to such a finding is the unavailability of other methods that would clearly yield a more accurate result. Other means were not proven to be available in *Salfi*; the statute was therefore validated as a legitimate exercise of legislative discretion. To deprive Congress of the power to enact statutes, albeit admittedly imperfect, to protect public welfare systems from abuse when other effective means are unavailable would be, indeed, to quote from an earlier opinion of Mr. Justice Rehnquist, "an attack upon the very notion of lawmaking itself."<sup>69</sup>

WILLIAM H. HIGGINS

## Constitutional Law—The First Amendment Status of Commercial Advertising

In the 1942 case of *Valentine v. Chrestensen*,<sup>1</sup> the United States Supreme Court stated that the Constitution does not prohibit regulation of "purely commercial advertising."<sup>2</sup> Although the statement was not the basis for the Court's decision in that case, it spawned the widely accepted doctrine<sup>3</sup> that "commercial speech" is not protected by the first

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68. Such criteria included voter registration, driver's license, car registration, property ownership, place of filing tax returns, and year-round homes. *Id.* at 448.

69. *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. at 660 (Rehnquist, J., dissenting).

1. 316 U.S. 52 (1942).

2. *Id.* at 54.

3. *Cf. Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 384-85 (1973); *Talley v. California*, 362 U.S. 60, 71 (1960) (dissent); *Breard v.*

amendment. A broad exception to this "commercial speech" doctrine developed over the years which gave first amendment protection to commercial speech if the commercial aspect of the speech was subordinate to a "primary purpose" of religious freedom or political advocacy.<sup>4</sup> In *Bigelow v. Virginia*<sup>5</sup> the Supreme Court disposed of the "commercial speech" doctrine completely without overruling *Valentine* and then applied a standard that gives commercial speech first amendment protection if it contains "factual material of clear public interest."<sup>6</sup> In *Bigelow* the advertisement in question, which previously would have been denied first amendment protection on the ground that it was "commercial speech," was afforded first amendment protection on the basis of its informational content. This result seems to indicate a greater willingness on the part of the Court to give first amendment protection to advertisements. The Court, however, shied away from holding that commercial speech per se is protected by the first amendment and thus evidenced a further desire to subject advertising's potent message-selling powers to some degree of local governmental regulation.<sup>7</sup>

Appellant Bigelow was the managing editor of *The Virginia Weekly*, a newspaper that is published and circulated in Virginia.<sup>8</sup> The *Virginia Weekly* published a New York-based abortion-referral agency's advertisement which stated that abortions were legal in New York, that there were no residency requirements for abortion patients and that immediate placements in accredited hospitals would be made with full confidentiality for those who called the New York telephone numbers listed.<sup>9</sup> Bigelow was convicted by the County Court of Albemarle

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City of Alexandria, 341 U.S. 622, 642 (1951); *Jamison v. Texas*, 318 U.S. 413, 417 (1943); *Jones v. Opelika*, 316 U.S. 584, 597 (1942); *United States v. Hunter*, 459 F.2d 205, 211 (4th Cir. 1972); *Banzhaf v. FCC*, 405 F.2d 1082, 1101 (D.C. Cir. 1968), cert. denied, 396 U.S. 842 (1969); *Capital Broadcasting Co. v. Mitchell*, 333 F. Supp. 582, 584 (D.D.C. 1971); *Patterson Drug Co. v. Kingery*, 305 F. Supp. 821, 825 (W.D. Va. 1969) (three-judge court); *Planned Parenthood Comm. v. Maricopa County*, 92 Ariz. 231, 240, 375 P.2d 719, 725 (1962); *United Advertising Corp. v. Borough of Raritan*, 11 N.J. 144, 152, 93 A.2d 362, 366 (1952).

4. See, e.g., *NAACP v. Button*, 371 U.S. 415 (1963); *Thomas v. Collins*, 323 U.S. 516 (1945); *Martin v. City of Struthers*, 319 U.S. 141 (1943); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943).

5. 421 U.S. 809 (1975).

6. *Id.* at 822.

7. For a discussion of the problems of advertising, see *Developments in the Law—Deceptive Advertising*, 80 HARV. L. REV. 1005 (1967).

8. The *Virginia Weekly* is published by the *Virginia Weekly Associates* of Charlottesville. The appellant was convicted because he was the responsible officer of the paper. 421 U.S. at 811.

9. The advertisement in full ran as follows:

County for publishing the abortion-referral advertisement under section 18.1-63 of the Virginia Code Annotated which at that time provided<sup>10</sup> that anyone who encouraged or prompted the procural of abortion by publication, advertisement or "in any other manner" would be guilty of a misdemeanor.<sup>11</sup> He was afforded a trial de novo in the Circuit Court, wherein he was again convicted and also fined. The Supreme Court of Virginia affirmed.<sup>12</sup> On appeal, the Supreme Court of the United States vacated the holding and remanded the case for further consideration in light of the recently decided abortion cases of *Roe v. Wade*<sup>13</sup> and *Doe v. Bolton*.<sup>14</sup> On remand, the Virginia Supreme Court again affirmed<sup>15</sup> and the case went back to the United States Supreme Court on appeal. The Supreme Court finally reversed Bigelow's conviction<sup>16</sup> on the ground that the advertisement contained "factual material of clear . . . public interest"<sup>17</sup> and thus was protected by the first amendment.

The rationale of the *Bigelow* decision is best understood in light of the line of cases out of which it grew. In *Valentine v. Chrestensen* the

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"UNWANTED PREGNANCY  
LET US HELP YOU  
Abortions are now legal in New York  
There are no residency requirements.  
FOR IMMEDIATE PLACEMENT IN  
ACCREDITED HOSPITALS AND  
CLINICS AT LOW COST  
Contact  
WOMEN'S PAVILION  
515 Madison Avenue  
New York, N.Y. 10022  
or call anytime  
(212) 371-6670 or (212) 371-6650  
AVAILABLE 7 DAYS A WEEK  
STRICTLY CONFIDENTIAL. We  
will make all arrangements for you  
and help you with information and  
counselling."

*Id.* at 812.

10. The statute was amended by ch. 725, [1972] Va. Acts. In its opinion, the United States Supreme Court said that "the amended statute would *not* reach appellant's advertisement." 421 U.S. 813 n.3. Therefore, the constitutionality of the statute was not at issue in *Bigelow*.

11. The statute before amendment read:

"If any person, by publication, lecture, advertisement, or by the sale or circulation of any publication, or in any other manner, encourage or prompt the procuring of abortion or miscarriage, he shall be guilty of a misdemeanor." VA. CODE ANN. § 18.1-63 (1950).

12. 213 Va. 191, 191 S.E.2d 173 (1972). For a discussion of the opinion, see Recent Developments, *The First Amendment and Commercial Advertising: Bigelow v. Commonwealth*, 60 VA. L. REV. 154 (1974).

13. 410 U.S. 113 (1973).

14. 410 U.S. 179 (1973).

15. 214 Va. 341, 200 S.E.2d 680 (1973).

16. 421 U.S. 809 (1975) (Justices Rehnquist and White dissented).

17. *Id.* at 822.

appellant had attempted to distribute a handbill advertisement in violation of a section of the New York City Sanitary Code which forbade the distribution of advertisements on public streets. Upon being told by the Police Commissioner that he could only lawfully distribute handbills devoted to "information or a public protest,"<sup>18</sup> Chrestensen appended a "civic appeal" to the handbill, solely "with the intent, and for the purpose, of evading the prohibition of the ordinance."<sup>19</sup> Because of Chrestensen's attempt to evade the handbill law, the Court refused to consider his first amendment claim. Therefore the Court never reached the issue whether commercial speech is protected by the first amendment. In its opinion the Court acknowledged that the first amendment prohibits legislatures from unduly burdening the right of free speech but followed by saying: "We are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising."<sup>20</sup> This statement eventually came to be known as the "commercial speech" doctrine and has often been cited as authority for the contention that commercial speech does not fall within the protective embrace of the first amendment.<sup>21</sup>

A series of cases followed *Valentine* which involved speech that combined either commercial and religious aspects or commercial and political aspects. In deciding these cases, the Court looked to see which aspect was "primary." Most notable among these cases were the religious handbill cases, in which a religious organization engaged in door-to-door distribution of advertisements for religious meetings,<sup>22</sup> sold religious books and pamphlets for a nominal sum<sup>23</sup> or distributed circulars which invited people to buy religious books or contribute to the religious organization.<sup>24</sup> Similar were the political advocacy cases, in which a labor union leader advocated the union's cause to a mass of workers and then solicited new members<sup>25</sup> or a political-organization lawyer solicited clients to test issues in the courts.<sup>26</sup> The Supreme Court held that the speech in these cases fell outside of the "commercial speech" doctrine and inside the protection of the first amendment because the "primary purpose" of the speech was either religious or

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18. 316 U.S. 52, 53 (1942).

19. *Id.* at 55.

20. *Id.* at 54.

21. Cases cited note 3 *supra*.

22. *Martin v. City of Struthers*, 319 U.S. 141 (1943).

23. *Murdock v. Pennsylvania*, 319 U.S. 105 (1943).

24. *Jamison v. Texas*, 318 U.S. 413 (1943).

25. *Thomas v. Collins*, 323 U.S. 516 (1945).

26. *NAACP v. Button*, 371 U.S. 415 (1963).

political and the commercial aspect was merely incidental to that purpose. The implication of this "primary purpose" test was that speech that did have commerce as its "primary purpose" would fall squarely within the *Valentine* label of "purely commercial advertising" and therefore outside the protections afforded by the first amendment.

The Court turned away from the "primary purpose" test in the 1964 case of *New York Times Co. v. Sullivan*.<sup>27</sup> The respondent in that case claimed that a paid political advertisement in *The New York Times* was libelous and sued *The Times* for printing it. *The Times* claimed that it had a first amendment privilege to accept and print the advertisement. Although the advertisement clearly had political advocacy as its primary purpose and therefore would have received first amendment protection under the "primary purpose" test, the Court no longer looked to the "primary purpose" of the advertisement. Rather, the Court shifted its focus to the informational content of the advertisement and found that it "communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern."<sup>28</sup> Purely on the basis of the content of the advertisement, the Court found it to be deserving of first amendment protection.

The Supreme Court contrasted *Sullivan* to *Valentine* in *Pittsburgh Press Co. v. Pittsburgh Commission on Human Rights*.<sup>29</sup> In that case the Court was presented with the question whether the first amendment gives a newspaper editor the right to publish advertisements in sex-designated columns in contravention of a local ordinance. *Sullivan* was distinguished from *Valentine* on the ground that the *Valentine* advertisement did no more than propose a commercial transaction, whereas the *Sullivan* advertisement communicated information as well.<sup>30</sup> The Court in *Pittsburgh Press* ultimately found that the advertisements in question merely proposed commercial transactions and were therefore within the "commercial speech" exception to the first amendment proscription.<sup>31</sup>

The "commercial speech" doctrine was not without critics during

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27. 376 U.S. 254 (1964).

28. *Id.* at 266.

29. 413 U.S. 376 (1973).

30. *Id.* at 385.

31. *Id.* It is important to note, however, that an uncontested ordinance in *Pittsburgh Press* made discrimination in employment illegal. Since the Court reasoned that it would violate public policy to allow advertising of illegal commercial activities, it is questionable whether the Court would have reached the same conclusion if an illegal activity had not been involved. *Id.* at 388.

this period. Three Justices dissented from the holding of *Pittsburgh Press*.<sup>32</sup> Furthermore, in his concurring opinion in *Cammarano v. United States*,<sup>33</sup> Justice Douglas discussed the state of the "commercial speech" doctrine: "The [*Valentine*] ruling was casual, almost offhand. And it has not survived reflection."<sup>34</sup> "The extent to which such advertising could be regulated consistently with the First Amendment . . . has . . . never been authoritatively determined."<sup>35</sup> Thus, the "commercial speech" doctrine was overripe for review when *Bigelow v. Virginia* was appealed to the Supreme Court.

In *Bigelow* the Supreme Court reevaluated both *Valentine* and the "commercial speech" doctrine. First, the Court limited the holding of *Valentine* to apply only to the "manner in which commercial advertising could be distributed"<sup>36</sup> and not to commercial advertising per se. Thus, according to the *Bigelow* Court, *Valentine* holds that the means of distributing advertising may be regulated, but does not speak to the issue of whether commercial advertising itself may be regulated. Therefore, *Valentine* is not authority for the "commercial speech" doctrine. The Court then expressly rejected the "commercial speech" doctrine in favor of the more modern approach adopted in *Sullivan* and *Pittsburgh Press*: commercial speech "is not stripped of first amendment protection merely because it appears in that form."<sup>37</sup>

The real questions presented in *Bigelow*, however, were how much protection the first amendment affords commercial speech and under what conditions. To answer those questions, the Court developed a content test to be applied on a case-by-case basis to commercial advertisements. If the advertisement in question contains "factual material of clear public interest"<sup>38</sup> it will be afforded first amendment protection. This test was implicit in *Sullivan*, which protected the advertisement there in question because it contained "matters of the highest public interest and concern."<sup>39</sup> In *Bigelow* the Court adopted the *Sullivan* standard as part of its informational content test.

This abstract informational content test acquired concrete meaning

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32. In separate dissents, Chief Justice Burger, Justice Douglas and Justice Stewart rejected the "commercial speech" doctrine and disapproved of the majority's decision as an unwarranted extension of that doctrine. *Id.* at 393, 397, 400.

33. 358 U.S. 498, 513 (1959).

34. *Id.* at 514.

35. *Id.* at 513 n.\*.

36. 421 U.S. at 819.

37. *Id.*

38. *Id.* at 822.

39. 376 U.S. at 266.

when the Court applied it to the *Bigelow* advertisement. In applying the test, the Court “[v]iewed [the advertisement] in its entirety”<sup>40</sup> and found that it “conveyed information of potential interest and value to a diverse audience . . . .”<sup>41</sup> The Court particularly stressed the first two lines of the advertisement: “Abortions are now legal in New York. There are no residency requirements.” Also, the Court pointed out that the mere existence of abortion-referral agencies is a matter of public interest, as are abortions themselves.<sup>42</sup> Thus, the Court was willing to look, not only to the content of the body of the advertisement, but also to the subjects of public interest suggested by the advertisement.

Furthermore, the *Bigelow* advertisement lacked one important characteristic that was previously essential to a finding that an advertisement was protected by the first amendment: it did not contain an expression of religious freedom or any political grievance or advocacy.<sup>43</sup> Rather, the *Bigelow* advertisement had as its “primary purpose” the solicitation of a commercial transaction and any information “of public interest” contained in the advertisement was merely incidental to that purpose. By giving first amendment protection to the *Bigelow* advertisement, the Court indicated that application of the informational content test will result in giving commercial advertisements much more first amendment protection than has been true in the past.

By subjecting commercial advertising to a content test, however, the Supreme Court preserved the historical distinction between commercial and other forms of speech. *Bigelow* requires that commercial speech be scrutinized with regard to content, whereas, with respect to other forms of speech, the Court “has always refused to distinguish for first amendment purposes on the basis of content.”<sup>44</sup> This inquiry into the content of advertising leaves a big governmental foot in the door of first amendment protection of advertising. Although the courts may no longer reject a first amendment claim out of hand because an advertisement is the subject of the claim, they are still free to reject the claim on a case-by-case basis by finding that the content of the advertisement in question does not meet the *Bigelow* test.

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40. 95 S. Ct. at 822.

41. *Id.*

42. *Id.*

43. See text accompanying notes 22-28 *supra*.

44. 421 U.S. at 831 (dissent). Of course, there are exceptional cases in which the Court will consider content: if the content of the speech is found to be obscene (*Roth v. United States*, 354 U.S. 476, 481-85 (1957)), libelous (*Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974)), or “fighting” (*Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)), then it is stripped of first amendment protection. Normally, however, content has no relevance to the question of whether speech is protected.



Furthermore, the protection afforded an advertisement that meets the *Bigelow* content test is not absolute. The Court applied a balancing test to the competing interests at stake in *Bigelow*. When, as in *Bigelow*, the interest of an individual or a group of individuals conflicts with a state interest, the Court must balance the respective interests against each other to determine which will take precedence. When first amendment interests are involved, the Court has traditionally accorded them great weight in this balancing process.<sup>45</sup> When the private interest is in the realm of commerce, however, the Court has traditionally given that interest less weight, with the result that state regulation of commercial activity has been upheld far more readily than state regulation of first amendment interests. Since the Court gave the *Bigelow* advertisement first amendment protection, it would appear that advertising is now weighted equally with other forms of speech protected by the first amendment. The Court, however, was not at all clear on the issue. Rather than emphasizing the importance of the first amendment interest involved, the Court denigrated the state interest: "Virginia [was] really asserting an interest in regulating what Virginians may *hear* or *read* about the New York Services. . . . This asserted interest . . . was entitled to little, if any weight under the circumstances."<sup>46</sup> There is reason to believe that the *Bigelow* Court did not value the interests of advertising as highly as it has valued other first amendment interests. The *Bigelow* Court sanctioned the result of *Valentine*, wherein the state interest prevailed over the interests of advertising. The *Valentine* ordinance, prohibiting distribution of commercial handbills in the public streets, was found to be "a reasonable regulation" of advertising.<sup>47</sup> Similar ordinances pertaining to non-commercial handbills have *not* been sanctioned by the Court. For example, *Schneider v. State*<sup>48</sup> involved a similar ordinance which forbade the distribution, not just of commercial handbills, but of all handbills, in the public streets. In that case, the Court found that such a prohibition restrained free speech and therefore was an entirely unreasonable regulation. Likewise, an ordinance forbidding the distribution of anonymous handbills in the public streets was struck down as an unlawful restraint on free speech in *Talley v. California*.<sup>49</sup> The balancing standard applied to commercial adver-

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45. Cf. *NAACP v. Button*, 371 U.S. 415, 448 (1963) (dissent); *Thomas v. Collins*, 323 U.S. 516, 527 n.12 (1945).

46. 421 U.S. at 828.

47. *Id.* at 819.

48. 308 U.S. 147 (1939).

49. 362 U.S. 60 (1960).

tisements in *Valentine* and accepted by the Court in *Bigelow* is clearly less stringent than that applied in *Schneider* and *Talley*, when non-commercial speech was involved.

It remains to be seen what types of advertising will be subject to governmental regulation after *Bigelow*. Of course, any advertisement that does not meet the requirement of the threshold informational content test may be regulated. Assuming, however, that the threshold is met, it will be important to know what types of advertising will balance unfavorably against the state's interest, resulting in state regulation of speech. The *Bigelow* Court indicated its approval of regulation of advertising in the areas of electronic media communication<sup>50</sup> and professional activities,<sup>51</sup> and it described another area in which it thought there "existed a clear relationship between the advertising in question and an activity that the government was legitimately regulating."<sup>52</sup> In this area, advertising which violated United States Postal Regulations,<sup>53</sup> racially discriminatory advertising<sup>54</sup> and advertising which violated anti-block-busting laws<sup>55</sup> were prohibited. The Court further implied that regulation of deceptive or fraudulent advertising, advertising of illegal activities and advertising aimed at a captive audience will be subject to regulation.<sup>56</sup>

*Bigelow's* most important contribution to the constitutional problem of commercial advertising is its rejection of the "commercial speech" doctrine. Courts may no longer deny first amendment protection to advertisements merely because they are commercial in character. Instead, the courts must undergo a two-step process with respect to each advertisement brought before them: first, the courts must test the content of the advertisement to determine whether it contains "factual material of clear public interest." Secondly, if the advertisement passes this content test, then the courts must balance the competing interests involved before granting or denying first amendment protection. The

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50. Electronic media is an area in which advertisements have been greatly regulated. *E.g.*, *Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973).

51. Particularly in the field of medical health, the Court has often held that the state may regulate advertising. *E.g.*, *Head v. New Mexico Board*, 374 U.S. 424 (1963); *Williamson v. Lee Optical, Inc.*, 348 U.S. 483 (1955); *Semler v. Oregon State Board of Dental Examiners*, 294 U.S. 608 (1935).

52. 421 U.S. at 825 n.10.

53. *Rockville Reminder, Inc. v. United States Postal Serv.*, 480 F.2d 4 (2d Cir. 1973).

54. *United States v. Bob Lawrence Realty, Inc.*, 474 F.2d 115, 121 (5th Cir.), *cert. denied*, 414 U.S. 826 (1973).

55. *United States v. Hunter*, 459 F.2d 205 (4th Cir.), *cert. denied*, 409 U.S. 934 (1972).

56. 421 U.S. at 828.

*Bigelow* Court indicated, however, that the fulcrum used in balancing governmental interests against those of advertising will favor the government so that most of the regulation of advertising which was sanctioned before *Bigelow* will remain intact. If this proves true in the courts' post-*Bigelow* case-by-case considerations of advertisements, then the first amendment status of advertising will not be any higher after *Bigelow* than it was before. It appears that the rule allowing governmental regulation of advertising will remain in force and that advertisements receiving first amendment protection, such as the one involved in *Bigelow*, will remain the exception to the rule.

HELEN L. WINSLOW

### **Criminal Law—Testing the Credibility of Search Warrant Affidavits**

Relying upon the fourth amendment to the United States Constitution<sup>1</sup>, criminal defendants often attempt to suppress evidence being offered against them by attacking the validity of the search warrant used to obtain the evidence.<sup>2</sup> One method of challenging the warrant's validity is by attacking the affidavit upon which its issuance was based.<sup>3</sup>

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1. State court defendants actually rely on the fourth amendment as incorporated into the fourteenth amendment by *Wolf v. Colorado*, 338 U.S. 25 (1949) and *Mapp v. Ohio*, 367 U.S. 643 (1961). References to the fourth amendment in this note are made with this incorporation in mind.

2. U.S. CONST. amend. XIV states: "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The United States Supreme Court has held that most searches may be made only with a search warrant, the situation involved in this note. Warrantless searches have been permitted only when officers come across evidence in "plain view," as in *Harris v. United States*, 390 U.S. 234 (1968) (per curiam); when the search is consented to; where there are exigent circumstances, such as the possibility that evidence will be destroyed or moved, as in *Carroll v. United States*, 267 U.S. 132 (1925); or subsequent to lawful arrest, as in *Chimel v. California*, 395 U.S. 752 (1969).

When a search has been made with a warrant, possible issues are whether there was probable cause for the warrant, whether the warrant was issued in accord with statutory requirements, and whether it was executed properly.

3. Former section 15-26(b) of the North Carolina General Statutes required that "[a]n affidavit signed under oath or affirmation by the affiant or affiants and indicating the basis for the finding of probable cause must be a part of or attached to the warrant."