### **Table of Contents**

### CHAPTER 1. INTRODUCTION: ANALYZING CLAIMS UNDER MICHIGAN CONSTITUTION

#### I. PRINCIPLES OF CONSTRUCTION

- § 1:1 The texts involved: Article I, § 11 of the Michigan Constitution, and Amend. IV of the United States Constitution
- § 1:2 Federalism and construction of state constitutions
- § 1:3 Comparing texts and construction of Article I, § 11
- § 1:4 Constitutional Convention records and construction of Article I, § 11
- § 1:5 Michigan precedent on construction of Article I, § 11
- § 1:6 Original meaning or understanding as a method of construction
- § 1:7 Michigan antiexclusionary "proviso" and construction of Article I, § 11
- § 1:8 Article I, § 11 is presumptively construed identically to federal constructions of Amend. IV of the United States Constitution
- § 1:9 Checklist on construction of Article I, § 11

# II. THE APPROACH TAKEN HERE TO INTERPRETATION OF ARTICLE I, § 11 OF THE MICHIGAN CONSTITUTION, AND AMEND. IV OF THE UNITED STATES CONSTITUTION

- § 1:10 Introduction
- § 1:11 Whitebread model
- § 1:12 Bartee model
- § 1:13 The approach of the book

### CHAPTER 2. IS FOURTH AMENDMENT IMPLICATED?

### I. THE GOVERNMENTAL CONDUCT REQUIREMENT

- § 2:1 Introduction
- § 2:2 Searches by private citizens
- § 2:3 Searches by private guards
- § 2:4 Searches by "nonlaw enforcement" government officials
- § 2:5 Government involvement in private search
- § 2:6 Government search after private search
- § 2:7 Checklist on private or governmental search

### II. THE REASONABLE EXPECTATION OF PRIVACY REQUIREMENT

§ 2:8 Introduction

- § 2:9 Katz v. United States: what did it decide?
- § 2:10 Expectations of privacy must relate to "persons, houses, papers and effects"
- § 2:11 Expectations of privacy must be actual and justifiable
- § 2:12 Checklist on expectation of privacy

### III. APPLICATIONS OF THE EXPECTATION OF PRIVACY TEST

- § 2:13 Introduction—When has a search occurred?
- § 2:14 Abandonment
- § 2:15 Checklist on abandonment
- § 2:16 Trash searches
- § 2:17 Open view; aiding senses
- § 2:18 Open view; text message exchange and trespass
- § 2:19 Open view; aiding senses—Cell tower information
- § 2:20 Checklist on open view and aiding senses
- § 2:21 Open fields; technical trespasses
- § 2:22 Technical trespasses; "knock and talk"
- § 2:23 Checklist on open fields
- § 2:24 Abandoned or condemned dwellings
- § 2:25 Expectations that society will recognize as justifiable
- § 2:26 Probationers and parolees and expectations of privacy
- § 2:27 Lifetime electronic monitoring and expectations of privacy

#### IV. CONSENT SEARCHES

- § 2:28 Invasions of privacy and the question of consent
- § 2:29 Waiver of right or voluntariness?
- § 2:30 Factors with regard to voluntariness; "ruse" entries and revocation of consent
- § 2:31 Permissible scope of consent search
- § 2:32 Revocation of consent once given
- § 2:33 Third-party consent; apparent authority
- § 2:34 Third-party consent; disagreement by co-tenants on consent
- § 2:35 Implied and tacit consent
- § 2:36 Implied consent of licensed drivers and testing for blood-alcohol
- § 2:37 "Once removed" consent
- § 2:38 Checklist on consent
- § 2:39 Form—Consent to search

#### V. STANDING

- § 2:40 Introduction
- § 2:41 Concept of standing
- § 2:42 Demise of "automatic" standing
- § 2:43 Standing and guests
- § 2:44 Standing and rental vehicles
- § 2:45 Standing and the improper use of subpoenas

#### Table of Contents

- § 2:46 Standing and the use of an alias
- § 2:47 Standing and text messages
- § 2:48 Standing; examples
- § 2:49 Checklist on standing

### CHAPTER 3. THE WARRANT REQUIREMENT

### I. APPROACHES TO DETERMINING WHEN A WARRANT IS REQUIRED

- § 3:1 Introduction
- § 3:2 The "preference/exceptions" approach
- § 3:3 The "seizure-directed" search approach

### II. THE PROBABLE CAUSE REQUIREMENT

- § 3:4 Introduction
- § 3:5 Probable cause defined
- § 3:6 The use of hearsay to establish probable cause; United States Supreme Court cases
- § 3:7 The use of hearsay to establish probable cause; the Michigan statute and Michigan cases
- § 3:8 Corroborating hearsay information to establish probable cause
- § 3:9 The use of declarations against penal interest to establish probable cause
- § 3:10 The use of a trained sniffing dog to establish probable cause
- § 3:11 The use of a controlled buy to establish probable cause
- § 3:12 The use of otherwise privileged information to establish probable cause
- § 3:13 Probable cause and "stale" information
- § 3:14 "Anticipatory" search warrants and probable cause
- § 3:15 Experience of police officers and establishing probable cause
- § 3:16 Checklist on establishing probable cause

### III. THE REQUIREMENT THAT THE PLACE TO BE SEARCHED BE PARTICULARLY DESCRIBED

- § 3:17 Introduction
- § 3:18 The general rule; multiple occupancy problems; severability
- § 3:19 Particularity and inclusion of an erroneous address
- § 3:20 Defective description in warrant; cure
- § 3:21 Use of one warrant for multiple locations
- § 3:22 Particularity and unattached garages; curtilage
- § 3:23 Particularity and automobiles on premises
- § 3:24 Personal effects found on premises
- § 3:25 Persons found in premises to be searched; general rule
- § 3:26 Persons found in places of public accommodation to be searched
- § 3:27 Persons found in private places to be searched
- § 3:28 Body searches; body cavity searches

§ 3:29 § 3:30	Use of force to achieve body search Checklist on description of premises to be searched	
	THE REQUIREMENT THAT THE THINGS TO BE EIZED BE PARTICULARLY DESCRIBED	
\$ 3:31 \$ 3:32 \$ 3:33 \$ 3:34 \$ 3:35	Introduction Statutory requirements on what may be seized Items to be seized listed in warrant; need for particularity Particularity and warrants to search cell phones The particularity requirement limits a second and warrantless search of a cell phone after a warranted search of the cell phone for different items Items not named in warrant; plain view doctrine	
V. OBTAINING AND EXECUTING SEARCH WARRANTS		
\$ 3:37 \$ 3:38 \$ 3:39 \$ 3:40 \$ 3:41 \$ 3:42 \$ 3:43 \$ 3:45 \$ 3:45 \$ 3:46 \$ 3:47 <b>VI. A</b> \$ 3:48 \$ 3:49 \$ 3:50 \$ 3:51 \$ 3:52 \$ 3:53	Introduction The neutral magistrate requirement; nonlawyer magistrates The Michigan statute on magistrates Geography and warrants Use of electronic means to obtain search warrants Checklist on neutral magistrate Obtaining warrant to search premises of nonsuspect Execution of warrant; knock and announce Execution of warrant; taking third parties into premises Checklist on knock and announce Detaining persons on premises when warrant executed  TTACKS ON SEARCH WARRANTS  Introduction Burden of proof; method of hearing Signature problems Going behind face of warrant; informant production Choice of law; intersection of federal law Supplementing the affidavit	
§ 3.53 § 3:54	Justifying search on grounds independent of the warrant	
VII.	ELECTRONIC SURVEILLANCE WARRANTS	
§ 3:55 § 3:56 § 3:57	Introduction The $Beavers$ era The demise of $Beavers$	
VIII.	ARSON WARRANTS; ADMINISTRATIVE WARRANTS	
§ 3:58 § 3:59 § 3:60 § 3:61	Introduction Historical development of administrative warrants Entries of premises for investigation of cause of fire Subsequent entries	
xii		

- § 3:62 Michigan v. Clifford, notice and searches for criminal evidence
- § 3:63 Application of *Michigan v. Clifford* in Michigan

#### IX. FORMS

- § 3:64 Form—Search warrant (MC 231)
- § 3:65 —Affidavit for search warrant (MC 231 & 231a)
- § 3:66 —Affidavit for warrant for cause and origin of fire
- § 3:67 —Return

## CHAPTER 4. EXCEPTIONS TO THE WARRANT REQUIREMENT

#### I. AUTOMOBILE INVENTORY SEARCHES

- § 4:1 Inventory searches
- § 4:2 The requirement of a valid impoundment
- § 4:3 Inventory and departmental policy; containers
- § 4:4 Checklist on automobile inventory searches
- § 4:5 Form—Impoundment and inventory searches of vehicles; statement of police department policy

### II. THE AUTOMOBILE EXCEPTION TO THE WARRANT REQUIREMENT

- § 4:6 Introduction
- § 4:7 Historical development of the automobile exception; the probable cause requirement
- § 4:8 Automobile exception does not justify entry onto curtilage
- § 4:9 Arson searches of automobiles
- § 4:10 Search of containers within vehicle
- § 4:11 Container searches and "container-specific" probable cause
- § 4:12 Checklist on the automobile exception

### III. SEARCHES OF AUTOMOBILES INCIDENT THE ARREST OF AN OCCUPANT

- § 4:13 Introduction
- § 4:14 Search of an automobile incident arrest of an occupant
- § 4:15 The passenger-compartment limitation
- § 4:16 Post-*Gant* checklist on searches of automobiles incident to arrest

#### IV. AUTOMOBILE FRISKS

§ 4:17 Automobile "frisk"

### V. SEARCHES OF PERSONS AND PREMISES INCIDENT TO ARREST

§ 4:18 Introduction

§ 4:19	Historical development of search incident to arrest principles
§ 4:20	Search incident to arrest requires the fact of an arrest
§ 4:21	Michigan and search incident to arrest for minor offenses
8 1.99	Soarch of containers and personal effects incident to arrest

- § 4:22 Search of containers and personal effects incident to arrest
- § 4:23 Search of cell phones and electronic devices incident arrest
- § 4:24 Protective sweeps of dwelling incident to arrest
- § 4:25 Accompanying arrestee into dwelling
- § 4:26 Body searches
- § 4:27 Checklist on searches incident arrest

### VI. SEARCHES OF INCARCERATED ARRESTEES AND INMATES OF CORRECTIONAL INSTITUTIONS

- § 4:28 Inventory searches of arrestees
- § 4:29 Inventory searches of arrestees; containers
- § 4:30 Strip searches of arrestees
- § 4:31 Taking DNA sample of arrestees
- § 4:32 Searches of inmates of correctional institutions

#### VII. PLAIN VIEW, PLAIN TOUCH, AND PLAIN SMELL

- § 4:33 Introduction
- § 4:34 Open view distinguished from plain view
- § 4:35 The plain-view test, and Michigan application
- § 4:36 Checklist on plain-view seizures
- § 4:37 Plain touch
- § 4:38 Plain smell; civil infractions

### VIII. EMERGENCY SEARCHES AND EXIGENT CIRCUMSTANCES SEARCHES

- § 4:39 Crime scenes and emergency searches
- § 4:40 Homicide scenes
- § 4:41 Person possibly in need of aid
- § 4:42 Entry to avert danger of fire
- § 4:43 Threat of imminent violence
- § 4:44 Crime scenes
- \$ 4:45 Caution on overuse of community-caretaking term; Caniglia v. Strom
- § 4:46 Checklist on emergency circumstances searches
- § 4:47 Exigent circumstances; threat of loss of evidence
- § 4:48 Exigent circumstances; impaired driving arrests and blood draws
- § 4:49 "Police-created" exigent circumstances

#### IX. HEAVILY-REGULATED BUSINESS SEARCHES

- § 4:50 Heavily regulated business
- § 4:51 Federal cases applying the heavily-regulated business doctrine
- § 4:52 Michigan cases applying the heavily-regulated business doctrine

#### CHAPTER 5. SEIZURES OF PERSON

### I. INTRODUCTION: CATEGORIES OF POLICE-CITIZEN ENCOUNTERS

- § 5:1 Introduction—Fourth Amendment and "seizures of person"
- § 5:2 Informational encounters
- § 5:3 Investigative encounters
- § 5:4 Full-scale arrests

#### II. CONSENSUAL ENCOUNTERS

- § 5:5 Introduction
- § 5:6 Definition of "seizure"; the detention requirement
- § 5:7 Informational encounters—Examples and factors
- § 5:8 Checklist on informational encounters and detentions

#### III. INVESTIGATIVE ENCOUNTERS

- § 5:9 Introduction
- § 5:10 *Terry* investigative detentions
- § 5:11 Reasonable suspicion test; "innocent" behavior
- § 5:12 Common sense of officer as cause for stop
- § 5:13 Experience of officer as cause for stop
- § 5:14 Informant or anonymous information as cause for stop
- § 5:15 Flight at sight of police officer as cause for stop
- § 5:16 Official information as cause for stop
- § 5:17 Facts showing reasonable belief of misdemeanor or ordinance violation
- § 5:18 Drug-courier profile as cause for stop
- § 5:19 Other factors as cause for stop
- § 5:20 Permissible scope of Terry detention—Time and geography
- § 5:21 Permissible duration of traffic stop
- § 5:22 Frisks
- § 5:23 Checklist on investigative detentions

### IV. OTHER DETENTIONS NOT BASED ON PROBABLE CAUSE

- § 5:24 Ordering occupants from stopped automobile
- § 5:25 Ordering occupants to stay inside vehicle or not to leave area
- § 5:26 Odor of alcohol; order to take sobriety tests
- § 5:27 Detention during stop for traffic violation
- § 5:28 Detention during execution of search warrant
- § 5:29 License/registration checks—Sobriety and drug checklanes
- § 5:30 Detention for interrogation
- § 5:31 Detention for identifying physical characteristic evidence
- § 5:32 Detention of luggage
- § 5:33 Border stops and searches

#### V. ARRESTS

§ 5:34 Arrests and probable cause

§ 5:35	Probable cause test—Totality of circumstances
§ 5:36	—Factors
§ 5:37	Probable cause and multiple occupants of vehicles
§ 5:38	Probable cause test and "pretext" arrests—Assessment of objective facts
§ 5:39	Probable cause and police team theory
§ 5:40	Probable cause and radio or LEIN information
§ 5:41	Checklist on probable cause
VI.	EXECUTION OF ARRESTS
§ 5:42	Warrant requirement and warrantless arrests
§ 5:43	Statutory provisions permitting warrantless arrests
§ 5:44	Arrests in public place
§ 5:45	Pursuit into home to make arrest
§ 5:46	Pursuit into home to make arrest; misdemeanors
§ 5:47	Entry into defendant's dwelling to make arrest; "constructive" entries
§ 5:48	Entry into third party's dwelling to make arrest
§ 5:49	Exigent circumstances and warrantless entries to arrest
§ 5:50	Checklist on entry of premises to accomplish arrest
§ 5:51	Execution of arrest
§ 5:52	Knock and announce—Misdemeanor arrests
§ 5:53	The use of deadly force in accomplishing an arrest
§ 5:54	The jurisdictional authority of officers accomplishing an arrest
§ 5:55	The requirement of a prompt judicial determination of probable cause after warrantless arrest
VII.	ARRESTS BY PRIVATE CITIZENS
§ 5:56	Introduction
§ 5:57	Statutory requirements for arrest by private person
§ 5:58	The use of force in accomplishing a citizen's arrest
VIII.	FORMS
§ 5:59	Felony complaint form (MC 200)
§ 5:60	Felony warrant form (MC 200)
	APTER 6. ADMINISTRATION OF LUSIONARY SANCTIONS

### I. THE GOOD-FAITH EXCEPTION

- § 6:1 Introduction
- § 6:2 The federal rule
- § 6:3 The Michigan rule
- § 6:4 Reasonable mistake of law
- § 6:5 Unreasonable mistakes of law

### II. INEVITABLE DISCOVERY; FRUIT OF THE POISONOUS TREE; INDEPENDENT SOURCE

- § 6:6 Inevitable discovery
- § 6:7 Fruit of poisonous tree; purged taint
- § 6:8 Fruit of poisonous tree doctrine
- § 6:9 Attenuation and purged taint
- § 6:10 Independent source

#### III. MINISTERIAL VIOLATIONS

§ 6:11 Ministerial violations; statutory and court rule violations

#### IV. ILLEGAL ARRESTS

- § 6:12 Introduction
- § 6:13 Jurisdiction of court not lost; suppression of evidence as sanction
- § 6:14 Application of fruit of the poisonous tree principles
- § 6:15 Entries in violations of Payton-Steagald
- § 6:16 Statutory violations and suppression sanctions

#### V. PROBATION REVOCATION PROCEEDINGS

§ 6:17 Application of exclusionary sanctions in probation revocation proceedings

### VI. USE OF ILLEGALLY SEIZED EVIDENCE IN FORFEITURE OR CIVIL PROCEEDING

- § 6:18 Admission of the "res" and proof of forfeiture
- § 6:19 Admission in civil proceedings

### VII. USE OF ILLEGALLY-SEIZED EVIDENCE AS OTHER THAN SUBSTANTIVE EVIDENCE

- § 6:20 Introduction
- § 6:21 Impeaching the defendant with illegally-seized evidence
- § 6:22 Impeaching a defense witness with illegally seized evidence

#### VIII. THE SUPPRESSION HEARING

§ 6:23 Suppression hearing and rules of evidence

**Table of Laws and Rules** 

Table of Cases

Index