own petitions he has access to other individuals who can assist him, he will have no standing to claim violation of his constitutonal right of access to the courts. If these rights are observed when prison rules are formulated they will not be struck down.[9]

JEFFREY D. DUNN

CONSTITUTIONAL LAW—RIGHT TO COUNSEL—THE INDIGENT MISDEMEANANT

The defendant, having been charged with a misdemeanor, alleged indigency and requested that the court appoint counsel for him. This request was denied and when the defendant refused to plead to the charge, the court entered a plea of not guilty in his behalf. Upon rendition of judgment against him, the defendant filed notice of appeal and application for appointment of counsel to the district court, which was denied. The Supreme Court of Minnesota on petition for alternative writ of mandamus to compel appointment of counsel held that counsel should be provided to an indigent accused in any case, whether it be a misdemeanor or not, which may lead to incarceration in a penal institution.[1]

Oddly enough the Supreme Court of the United States has never rendered a definitive decision binding on state courts when confronted with the situation presented in the instant case. In *Gideon v. Wainwright*[2] the indigent defendant had been accused of a felony. Consequently, the court's holding that he was entitled to have counsel appointed left unsettled the question of whether this right extends to non-felony cases in state courts. Immediately after this decision, the Supreme Court gave some indication that the court-appointed counsel doctrine encompassed misdemeanors. When a decision of the Court of Appeals of Maryland[3] upholding the trial court's refusal to appoint counsel for a misdemeanant reached the Supreme Court on grant of certiorari, it vacated the decision and remanded the case for further consideration in the light of *Gideon*.[4] However, on three more

9. Other articles dealing with this question may be found in the following: Gelhaus, *Prisoner Assistance On Federal Habeas Corpus Petitions*, 19 STAN. L. REV. 887 (1967); *Constitutional Rights Of Prisoners: The Developing Law*, 110 U. PITT. L. REV. 985 (1962); *Habeas Corpus—Punishment Of Criminals—Prison Management*, 18 W. REV. L. REV. 681 (1967); O'Brien, *Legal Services for Prison Inmates*, 1967 WIS. L. REV. 514.

1. State v. Borst, ___ Minn. ___, 154 N.W.2d 888 (1967).

2. Gideon v. Wainwright, 372 U.S. 335 (1963). In *Gideon*, the indigent defendant had charged with breaking and entering a poolrom with intent to commit a misdemeanor. The Court held that the due process clause of the fourteenth amendment to the Federal Constitution made it obligatory upon the states to provide the sixth amendment guarantee of the right to counsel for the accured in criminal prosecutions.

3. Patterson v. State, 227 Md. 194, 175 A.2d 746 (1961). This case was decided prior to the rendition of *Gideon v. Wainwright* and was on appeal at the time of that decision.

4. Patterson v. Warden, 372 U.S. 776 (1963).

recent occasions, that same Court has denied certiorari in cases involving the same question[5] thus not only failing to clarify its position but, in effect, increasing speculation as to what it may eventually hold. Though Mr. Justice Stewart has criticized the denial of certiorari as the non-performance of "a duty to resolve the conflict," his suggestions that the Court finally decide the issue have as yet gone unheeded.[6] Therefore, until a definite rule is established, the lack of specificity in *Gideon* will continue to leave the lower courts no alternative but to determine for themselves what the Constitution actually does require.

The question of whether the fourteenth amendment guarantees a right to counsel which applies to misdemeanors is compounded by the fact that not only is there no uniform classification of offenses, there are also great variations in the punishment assessed within the classes.[7] In the principal case, the Minnesota court chose not to allow its determination to depend on any arbitrary distinctions between misdemeanors and felonies but to decide the issue on the basis of the penalty which might be imposed.[8] This is the position recommended by the American Bar Association[9] and by the President's Commission on Law Enforcement and Administration of Justice.[10] Many courts, both state and federal, which have dealt with the problem, though not entirely basing their decision on the punishment which may be imposed, at least consider it as one of the factors in some sort of "serious offense" rule.[11] Thus, the potential penalty and the nature of the offense are considered along with other circumstances which might help conclude whether the offense comes within the serious category. Although this approach obviates any arbitrary felony-misdemeanor classification, the lack of unanimity as to what constitutes a "serious offense" prevents any desirable certainty. For precisely this reason, the Court of Appeals for the Fifth Circuit implicitly rejected the rule in *Harvey v. Mississippi*[12] and then expressly in *McDonald v. Moore*.[13] In both these decisions the court quoted with approval from an opinion of the Circuit Court for the District of Columbia[14] to the effect that an individual would be as

5. DeJoseph v. Connecticut, 385 U.S. 982 (1966); Cortinez v. Flournoy, 385 U.S. 925 (1966); Winters v. Beck, 385 U.S. 907 (1966).
6. Winters v. Beck, 385 U.S. 907, 908 (1966) (Stewart, J., dissenting opinion).
7. McKinzie, *The Indigent Defendant's Right to Councel in Misdemeanor Cases*, 19 Sw. L. J. 593 (1965).
8. State v. Borst, ___ Minn. ___, 154 N.W.2d 888 (1967); *accord*, Arbo v. Hegstrom, 261 F. Supp. 397 (D.C. Conn. 1966).
9. AMERICAN BAR ASSOCIATION, STANDARDS RELATING TO PROVIDING DEFENSE SERVICES 37 (1967).
10. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 150 (1967).
11. State v. DeJoseph, 3 Conn. Cir. 624, 222 A.2d 752 (Cir. Ct. Conn. App. Div. 1966); Patterson v. State, 227 Md. 194, 175 A.2d 746 (1961).
12. Harvey v. Mississippi, 340 F.2d 263 (5th Cir. 1965).
13. McDonald v. Moore, 353 F.2d 106 (5th Cir. 1965); *accord*, Rutledge v. City of Miami, 267 F. Supp. 885 (S.D. Fla. 1967); *accord*, Petition of Thomas, 261 F. Supp. 263 (W.D. La. 1966).
14. Evans v. Rives, 126 F.2d 633 (D.C. Cir. 1942).

much deprived of his liberty by a sentence to a year in jail for a minor offense as by a sentence to a year in jail for any other crime, however serious.

The issue considered here has not yet been the subject of litigation in the Georgia courts and no prediction is made as to the course they would follow in such a situation. The author has, however, formed a definite opinion that the reasoning of the Minnesota court in the case here noted is the most commendable and should be applied if the occasion arises. In a case where a misdemeanant may be subject to incarceration,[15] Georgia should provide counsel just as they long have done for those accused of a felony or capital offense.[16]

In a final analysis, it would appear that due to the inconsistent treatment in the state and lower federal courts, the Supreme Court must eventually promulgate binding precedent. If such action is forthcoming, and the author agrees with Mr. Justice Stewart that it should be,[17] it seems that the constitutional guarantee of the right to counsel must extend to all cases where a defendant is in jeopardy of loss of liberty.

JAMES V. HILBURN

CONSTITUTIONAL LAW—SEARCH AND SEIZURE—PHYSICAL TRESPASS NO LONGER DETERMINATIVE IN ASCERTAINING THE SCOPE OF THE FOURTH AMENDMENT

In the case of *Katz v. United States*[1] the defendant was convicted of a Violation of a federal statute prohibiting interstate transmission by wire communication of bets and wagers. The circuit court affirmed the holding of the lower court, and certiorari was granted. The Supreme Court held that the government's activities in "bugging" a public telephone booth violated the privacy upon which the defendant justifiably relied and constituted a "search and seizure" within the meaning of the fourth amendment.[2] The Court stated that the fact that the device employed to record defendant's words did not penetrate the wall of the booth was without constitutional significance.[3]

This decision is noteworthy for it greatly broadens the scope of the fourth amendment beyond a strictly literal interpretation, as there was not a technical trespass in the principal case. The controlling question the court an-

15. GA. CODE ANN. §27-2502 (Supp. 1967).
16. Fair v. Balcom, 216 Ga. 721, 119 S.E.2d 691 (1961); Delk v. State, 99 Ga. 667, 26 S.E. 752 (1896).
17. Winters v. Beck, 385 U.S. 907, 908 (1966) (Stewart, J., dissenting opinion).
1. 389 U.S. 347 (1967).
2. U.S. CONST. amend IV: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated . . . ."
3. 389 U.S. 347 (1967).