

IN THE SUPREME COURT OF THE STATE OF NEVADA

KIKI WASHINGTON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 34873

FILED

JUN 12 2001

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *Richard*
CHIEF DEPUTY CLERK

ORDER VACATING JUDGMENT AND REMANDING

This is an appeal from a district court order denying appellant's post-conviction petition for a writ of habeas corpus.

On April 12, 1996, the district court convicted appellant Kiki Washington, pursuant to a guilty plea, of one count each of robbery with the use of a deadly weapon and attempted murder with the use of a deadly weapon. The district court sentenced appellant to serve two consecutive terms of 6 to 15 years in prison for the robbery and two consecutive terms of 8 to 20 years in prison for the attempted murder. The district court further ordered that the sentences for the two counts be served consecutively. Washington did not file a notice of appeal from the judgment of conviction.

On December 18, 1996, Washington filed a proper person post-conviction petition for a writ of habeas corpus, challenging the sentence and claiming that he received ineffective assistance of counsel. For reasons that do not appear in the record, neither the State nor the district court ever acted on Washington's 1996 petition.

On March 16, 1999, Washington filed a proper person post-conviction petition for a writ of habeas corpus.¹ The 1999 petition raised some of the same claims as the 1996 petition and new claims challenging the district court's jurisdiction, the validity of the guilty plea, and trial counsel's failure to advise him of his right to appeal or to file a notice of appeal. The State opposed both petitions. The district court appointed counsel to represent Washington, but declined to conduct an evidentiary hearing. On September 2, 1999, the district court denied the petitions. This appeal followed.

Washington contends that this case should be remanded because the district court erred by appointing trial counsel Paul Wommer to represent him in the post-conviction proceedings. We agree.²

In this case, the district court had discretion under NRS 34.750 to appoint post-conviction counsel to represent Washington. Because appointment of counsel was discretionary, Washington was not entitled to the effective assistance of post-conviction counsel.³

Nonetheless, we conclude that the district court abused its discretion under NRS 34.750 by appointing Mr.

¹We note that because the district court never resolved the 1996 petition, it could properly treat the 1999 petition as a supplement to the 1996 petition. Accordingly, the 1999 petition would not be procedurally barred by NRS 34.726 or NRS 34.810.

²We note that Washington is represented by different counsel on appeal.

³See Crump v. Warden, 113 Nev. 293, 303, 934 P.2d 247, 253 (1997); McKague v. Warden, 112 Nev. 159, 912 P.2d 255 (1996).

Wommer to represent Washington in the post-conviction proceedings. The district court clearly determined that appointment of post-conviction counsel was warranted. But the appointment of Mr. Wommer to represent Washington in the post-conviction proceedings created an inherent conflict of interest. Trial counsel cannot reasonably be expected to zealously assert his own ineffectiveness in a post-conviction proceeding. Moreover, because Washington alleged that Mr. Wommer provided ineffective assistance, it is likely that Mr. Wommer would have been a necessary witness if the district court had ordered an evidentiary hearing. Under such circumstances, SCR 178(1), would preclude Mr. Wommer from serving as post-conviction counsel: "A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness." Accordingly, Mr. Wommer had a duty to decline the appointment or to withdraw immediately upon learning of the conflict.⁴ Given the circumstances, we conclude that the district court abused its discretion by appointing Mr. Wommer to represent Washington in the post-conviction proceedings.

The State argues that this error is harmless because Washington was not adversely affected by any aspect of Mr. Wommer's representation. We disagree. Based on the record in this appeal, we cannot conclude that all of the issues raised

⁴See SCR 166(1)(a) (providing that "a lawyer shall not represent a client or . . . shall withdraw from the representation of a client" when "[t]he representation will result in violation of the rules of professional conduct or other law"). Mr. Wommer apparently recognized this problem for the first time on appeal, when he filed a motion to withdraw.

in Washington's petitions are wholly without merit⁵ or that conflict-free post-conviction counsel would not be able to assert other meritorious issues in a supplemental pleading pursuant to NRS 34.750(3).⁶ Accordingly, we

ORDER the judgment of the district court VACATED AND REMAND this matter to the district court for the appointment of counsel and further proceedings consistent with this order.⁷

Young, J.
Young
Leavitt, J.
Leavitt
Becker, J.
Becker

cc: Hon. John S. McGroarty, District Judge
Attorney General
Clark County District Attorney
Gregory L. Denué
Paul Wommer
Clark County Clerk

⁵For example, Washington's challenge to the validity of the guilty plea may have arguable merit. See Hudson v. Warden, 117 Nev. ___, ___ P.3d ___ (Adv. Op. No. 35, May 17, 2001); State v. Freese, 116 Nev. ___, 13 P.3d 442 (2000).

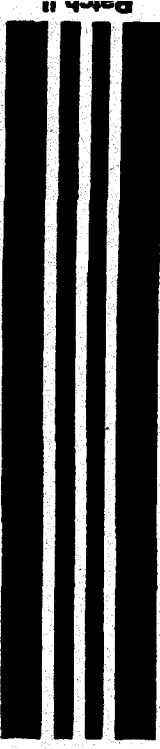
⁶For example, counsel could raise an arguable claim that previous counsel provided ineffective assistance by failing to challenge the restitution award on the ground that the district court failed to set a specific dollar amount for restitution. See Botts v. State, 109 Nev. 567, 569, 854 P.2d 856, 857 (1993) (holding that restitution statute "contemplates that the district court will set a specific dollar amount of restitution" and "does not allow the district court to award restitution in uncertain terms" (emphasis added)).

⁷This order constitutes our final disposition of this appeal. Any subsequent appeal shall be docketed as a new matter.



KOFAX

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Code 39

Code 39, also referred to as 3 of 9 Code, is an alphanumeric, self-checking, variable length code that uses five black bars and four spaces to define a character. Three of the elements are wide and six are narrow. Note that the extended version of Code 39 (full 128 character set) is not supported.

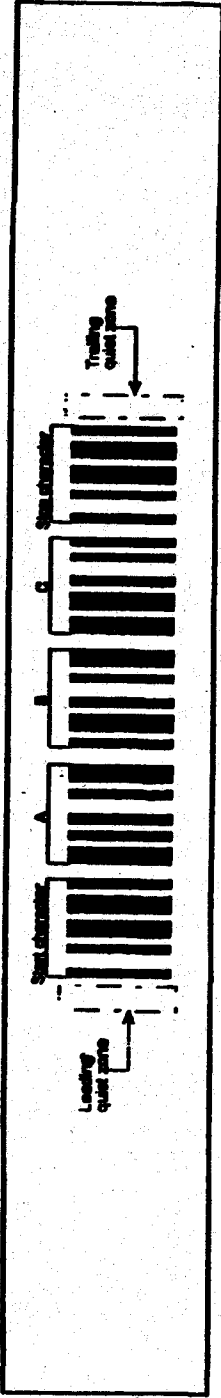
Code 39 supports the following characters:

- 26 uppercase letters.
- Ten digits.
- Seven special characters (-, \$, +, %, and a space).
- Start/stop character, which is depicted as an asterisk (*).

A Code 39 bar code symbol consists of the following elements:

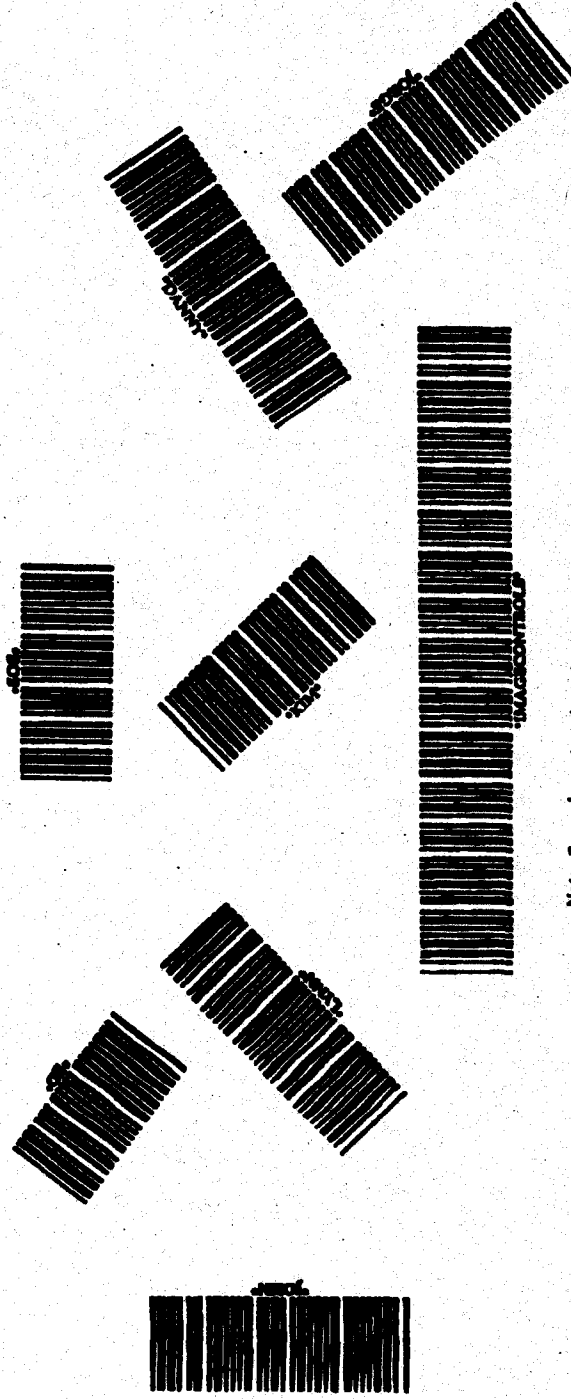
- Leading quiet zone.
- Start character.
- Data characters, with characters separated by an inter-character gap.
- Optional check character.
- Stop character.
- Trailing quiet zone.

Code 39 example:



Settings

- Enable Barcode recognition
- Type (in Use) = Code 39 (3 of 9)
- Bar size Height = 0.50
- Bar size Width = 0.075
- Enable 2 to 1 Ratio
- Skew = Heavy
- Density = Light
- Search Direction = All (0, 90, 180, 270)
- Quality = Normal
- Minimum Characters in Barcode = 0
- Maximum Barcodes Per Page = 8
- Maximum Barcodes Per Line = 8



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MAR 30 2001

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BY: *[Signature]*
CHIEF DEPUTY CLERK

O R D E R

This appeal is subject to the provisions of Nevada Rule of Appellate Procedure 3C. After reviewing the documents submitted with this appeal, we have determined that the transcript for the proceedings in district court on August 10, 1999 are necessary for this court's resolution of this appeal. Accordingly, counsel for appellant, Gregory L. Denué, shall have ten (10) days from the date of this order within which to file a rough draft transcript request form in the district court and serve a copy of the request form upon the court reporter or recorder and opposing counsel pursuant to NRAP 3C(d)(3). Counsel for appellant must also file with the clerk of this court two (2) file-stamped copies of the request form and proof of service of the form upon the court reporter or recorder and opposing counsel.¹

It is so ORDERED.

Maupin, C.J.

cc: Attorney General
Clark County District Attorney
Gregory L. Denué

¹NRAP 3C(d)(3).