

APPENDIX D

NO. 23-11198

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

DAVID NICHOLSON,

Defendant - Appellant

**ON APPEAL FOR THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION**

Trial Court No. 4:22-CR-00361

**APPELLANT'S MOTION TO RECONSIDER COUNSEL WITHDRAWAL
AS RETAINED AND REQUEST FOR CJA APPOINTMENT**

**TO THE HONORABLE JUSTICES OF THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT:**

COMES NOW, the Defendant, David Nicholson, by and through undersigned counsel and files this Motion to Reconsider Withdrawal as Retained Counsel and Requests for Appointment via the Criminal Justice Act (“CJA”) in the above numbered and styled cause. In support of said motion, undersigned counsel would show unto the Court as follows:

Undersigned counsel was retained by Mr. Nicholson in the Northern District of Texas, matter No. 4:22-CR-00361. Mr. Nicholson initially entered into a retainer agreement with undersigned counsel for representation at the district court level, including trial and sentencing. Following sentencing, Mr. Nicholson executed a new retainer agreement with undersigned counsel for representation on direct appeal to the Fifth Circuit of the United States, under Case No. 23-11198. The agreement expressly excludes representation for any Petition for a Writ of Certiorari or post-conviction relief. Based on undersigned counsel’s representation to date, counsel believes there are at least three compelling issues that warrant the filing of a Petition for Writ of Certiorari. After conferring with undersigned counsel, Mr. Nicholson expressed his desire to obtain appointed counsel via the CJA to file a Petition for a Writ of Certiorari. In support of his request, Mr. Nicholson provided undersigned counsel with a financial affidavit to assist this Court in its determination.

Mr. Nicholson remains incarcerated and has exhausted all financial resources to continue funding representation by undersigned counsel. Given this, counsel

respectfully moves this Court to reconsider counsel's withdrawal as retained counsel and request appointment under the Criminal Justice Act ("CJA"). Counsel certifies that the case presents significant legal issues warranting the attention and review of the United States Supreme Court through a Petition for a Writ of Certiorari.

While counsel is fully prepared to continue providing effective assistance, proceeding without compensation would impose an undue financial burden on Whalen Law Office, particularly given the substantial time and effort required to research and draft a Petition for a Writ of Certiorari. Although counsel remains committed to ethical obligations and the client's interests, continued representation without funding is not sustainable.

Accordingly, counsel respectfully requests that the Court grant leave to withdraw from representation in a retained capacity. Recognizing the Defendant's right to counsel, counsel respectfully requests that the Court appoint James P. Whalen as court-appointed counsel for this matter. This appointment would preserve continuity of representation, ensure timely legal advocacy, and allow counsel to be compensated in accordance with CJA guidelines. This request is made in good faith and in order to balance the Defendant's need for effective representation with the firm's ability to manage its resources appropriately.

The undersigned counsel has contacted the Assistant United States Attorney in charge of the Appeal of this case, Jonathan Bradshaw, who advised that the

Government is unopposed to this motion.

WHEREFORE PREMISES CONSIDERED, the Appellant respectfully requests this Honorable Court grant this motion to reconsider withdrawal as retained counsel and grant the request for appointment via the CJA.

Respectfully submitted,

WHALEN LAW OFFICE

/s/ James P. Whalen

JAMES P. WHALEN

TEXAS BAR CARD NO. 00794837

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Frisco, Texas 75035

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ATTORNEY FOR APPELLANT

David Nicholson

CERTIFICATE OF CONFERENCE

This is to certify that on the 9th day of May 2025, the undersigned counsel's paralegal, Amy Morales, contacted the Assistant United States Attorney in charge of this case, Jonathan Bradshaw, who advised that the Government remains unopposed to this request, however defers to the Court on reconsideration.

/s/ James P. Whalen
JAMES P. WHALEN

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing motion was delivered via ECF delivery to Jonathan Bradshaw, the Assistant United States Attorney in charge of this case, on this the 9th day of May 2025.

/s/James P. Whalen
JAMES P. WHALEN

CERTIFICATE OF COMPLIANCE

Pursuant to 5TH CIR. R. 32.2, undersigned counsel certifies that this motion complies with the type-volume limitations of FED. R. APP. P. 27.

1. This motion complies with FED. R. APP. P. 27(d) and is printed in a proportionally spaced, serif typeface using Times New Roman 14-point font in text and Times New Roman 12-point font in footnotes produced by Microsoft Word software.
2. Exclusive of the portions exempted by FED. R. APP. P. 27(d), this motion contains 483 words printed in a proportionally spaced typeface.
3. Counsel has provided an electronic PDF version of this motion the Court.
4. Undersigned counsel understands that a material misrepresentation in completing this certificate, or circumvention of the type-volume limits in 5TH CIR. R. 32, may result in the Court's striking this motion and imposing sanctions against the person who signed it.

SIGNED this the 9th day of May 2025.

/s/James P. Whalen
JAMES P. WHALEN
Attorney for Appellant

EXHIBIT A

CJA-23 (Rev 3/21) **FINANCIAL AFFIDAVIT**
 IN SUPPORT OF REQUEST FOR ATTORNEY, EXPERT, OR OTHER SERVICES WITHOUT PAYMENT OF FEE

IN THE UNITED STATES DISTRICT COURT COURT OF APPEALS OTHER (Specify Below)

IN THE CASE OF

USA v. Nicholson

FOR
 AT

LOCATION
 NUMBER

PERSON REPRESENTED (Show your full name)
 David Nicholson

- 1 Defendant - Adult
- 2 Defendant - Juvenile
- 3 Appellant
- 4 Probation Violator
- 5 Supervised Release Violator
- 6 Habeas Petitioner
- 7 2255 Petitioner
- 8 Material Witness
- 9 Other (Specify)

DOCKET NUMBERS
 Magistrate Judge
 District Court
 Court of Appeals

CHARGE/OFFENSE (Describe if applicable & check box→) Felony Misdemeanor
 Possession with Intent to Distribute a Controlled Substance, 21 USC §841 (a)(1)
 § (b)(1)(A)

ANSWERS TO QUESTIONS REGARDING ABILITY TO PAY

INCOME & ASSETS	EMPLOYMENT	Do you have a job? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No IF YES, how much do you earn per month? _____ Will you still have a job after this arrest? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No <input type="checkbox"/> Unknown																		
	PROPERTY	Do you own any of the following, and if so, what is it worth? <table border="1" style="width: 100%; border-collapse: collapse;"> <thead> <tr> <th style="width: 30%;"></th> <th style="width: 30%; text-align: center;">APPROXIMATE VALUE</th> <th style="width: 40%; text-align: center;">DESCRIPTION & AMOUNT OWED</th> </tr> </thead> <tbody> <tr> <td>Home</td> <td>\$ _____</td> <td>_____</td> </tr> <tr> <td>Car/Truck/Vehicle</td> <td>\$ _____</td> <td>_____</td> </tr> <tr> <td>Boat</td> <td>\$ _____</td> <td>_____</td> </tr> <tr> <td>Stocks/bonds</td> <td>\$ _____</td> <td>_____</td> </tr> <tr> <td>Other property</td> <td>\$ _____</td> <td>_____</td> </tr> </tbody> </table>		APPROXIMATE VALUE	DESCRIPTION & AMOUNT OWED	Home	\$ _____	_____	Car/Truck/Vehicle	\$ _____	_____	Boat	\$ _____	_____	Stocks/bonds	\$ _____	_____	Other property	\$ _____	_____
		APPROXIMATE VALUE	DESCRIPTION & AMOUNT OWED																	
Home	\$ _____	_____																		
Car/Truck/Vehicle	\$ _____	_____																		
Boat	\$ _____	_____																		
Stocks/bonds	\$ _____	_____																		
Other property	\$ _____	_____																		
CASH & BANK ACCOUNTS	Do you have any cash, or money in savings or checking accounts? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No IF YES, give the total approximate amount after monthly expenses \$ _____																			

OBLIGATIONS, EXPENSES, & DEBTS	How many people do you financially support? <u>0</u>		
	BILLS & DEBTS	MONTHLY EXPENSE	TOTAL DEBT
	Housing	\$ _____	\$ _____
	Groceries	\$ _____	\$ _____
	Medical expenses	\$ _____	\$ _____
	Utilities	\$ _____	\$ _____
	Credit cards	\$ _____	\$ _____
	Car/Truck/Vehicle	\$ _____	\$ _____
	Childcare	\$ _____	\$ _____
	Child support	\$ _____	\$ _____
	Insurance	\$ _____	\$ _____
	Loans	\$ _____	\$ _____
	Fines	\$ _____	\$ _____
Other	\$ _____	\$ _____	

I certify under penalty of perjury that the foregoing is true and correct.

David Nicholson
 SIGNATURE OF DEFENDANT
 (OR PERSON SEEKING REPRESENTATION)

3-5-2025
 Date