

# Appendix A

United States Court of Appeals  
For the Eighth Circuit

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No. 17-1271

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United States of America

*Plaintiff - Appellee*

v.

Jacob Scott Watters

*Defendant - Appellant*

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Appeal from United States District Court  
for the Southern District of Iowa - Davenport

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Submitted: December 15, 2017

Filed: May 2, 2018

[Unpublished]

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Before WOLLMAN, LOKEN, and MURPHY, Circuit Judges.

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PER CURIAM.

In 2016 Jacob Watters pled guilty to receipt of child pornography under 18 U.S.C. § 2252(a)(2). At sentencing, the district court<sup>1</sup> determined that Watters' prior

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<sup>1</sup>The Honorable John A. Jarvey, United States District Judge for the Southern District of Iowa.

Iowa conviction for Lascivious Acts with a Child qualified as a predicate offense for enhanced sentencing under 18 U.S.C. § 2252(b)(1) and sentenced him to 240 months imprisonment. Watters appeals his sentence. We affirm.

## I.

In 2013 Watters pled guilty to one count of Lascivious Acts with a Child, IOWA CODE § 709.8. Watters, nineteen at the time, had carried on a sexual relationship with A.L., a twelve year old girl. In 2014 Iowa police learned that Watters had exchanged sexually explicit photos with a fifteen-year-old California girl. Officers searched his home and discovered multiple electronic devices containing a total of about 400 sexually explicit photos of six minor girls, including A.L. and T.W., who were seventeen when the photos were taken. The photos of A.L. predated Watters' 2013 conviction, and he procured photos of the four other girls after extensive online communications in 2014 and early 2015.

In February 2015 Watters pled guilty to receipt of child pornography, 18 U.S.C. § 2252(a)(2). Section 2252(b)(1) mandates a 5-20 year sentence for anyone who violates § 2252(a)(2), but increases the mandatory sentence to 15-40 years when the defendant has a prior conviction for certain sexual offenses. At sentencing, the district court found that Watters' 2013 Iowa conviction (lascivious acts with a child) qualified as a predicate offense under § 2252(b)(1). He thus had a mandatory minimum of 15 years and a maximum sentence of 40 years.

The district court determined that Watters' guideline offense level was 36 (including a five level "relevant conduct" enhancement of his base offense level under U.S.S.G. § 2G2.1(d)(1)). The district court calculated a guideline range of 210-262 months and sentenced Watters to 240 months imprisonment.

II.

Watters first argues the district court improperly applied the relevant conduct enhancement and thus his total offense level should have been 35 rather than 36, resulting in a guideline range of 188–235 months. "We review the district court's interpretation of the guidelines *de novo* and the court's relevant conduct determination for clear error." United States v. Allebach, 526 F.3d 385, 388 (8th Cir. 2008) (citation omitted).

Section 2G2:1(d)(1) states: "If the offense involved the exploitation of more than one minor, Chapter Three, part D (Multiple Counts) shall be applied." Application Note 7 under § 2G2:1 clarifies that "if the relevant conduct of an offense of conviction includes more than one minor being exploited, whether specifically cited in the count of conviction or not, each such minor shall be treated as if contained in a separate count of conviction." Under §3D1.4, a defendant's offense level may be enhanced by 5 units if he has more than 5 incidents of relevant conduct and 4 units for between 3.5 to 5 incidents of relevant conduct.

"Relevant conduct" consists of all acts and omissions committed by the defendant "that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense." § 1B1.3(a)(1)(A). Relevant conduct is a "broad concept" that "includes activities that occurred before the date identified by the indictment as the starting date of the offense." United States v. Burman, 666 F.3d 1113, 1119 (8th Cir. 2012) (citation omitted). "Conduct underlying a prior conviction is not relevant to the instant offense if the former conviction was a 'severable, distinct offense' from the latter." United States v. Weiland, 284 F.3d 878, 881 (8th Cir. 2002) (citation omitted).

The district court determined that Watters had six incidents of relevant conduct and thus enhanced his offense level five units. Watters argues the district court should have only enhanced his offense level four units because his conduct toward victims T.W. and A.L. is irrelevant. Watters procured sexually explicit images of T.W. in person when the two were seventeen and in a romantic relationship. He argues that his conduct toward her was distinct from his 2014 behavior. Additionally, Watters argues that his conduct toward A.L. is irrelevant because it occurred prior to his 2014 offense and the photos were taken in person rather than online. Watters continued to possess the images of T.W. and A.L. until 2014, however, so his conduct "occurred during the commission of the offense of conviction." § 1B1.3(a)(1)(A). Thus, the district court did not clearly err when it made its relevant conduct findings under § 1B1.3(a)(1)(A) and applied that enhancement.

### III.

Watters also argues the district court erred in determining his prior conviction for Lascivious Acts with a Child, Iowa CODE § 709.8, qualifies as a predicate offense under 18 U.S.C. § 2252(b)(1). Whether a defendant's prior conviction qualifies as a predicate offense under § 2252(b)(1) is reviewed *de novo*. United States v. Weis, 487 F.3d 1148, 1151 (8th Cir. 2007).

We need not decide whether the district court erred in determining Watters' prior conviction qualified as a predicate offense because even if the court erred, the error would have been harmless. "When the district court would have imposed the same sentence absent an error, such error is harmless." United States v. Jauron, 832 F.3d 859, 864 (8th Cir. 2016). After sentencing Watters to 240 months, the district court stated: "It is the same decision the Court would have reached even if [defendant's prior conviction] does not qualify to enhance the mandatory minimum or maximum sentence. This sentence was largely driven by, of course, the behavior and the Court's belief in the reasonableness of the Guideline range." Watters'

sentence also was within the mandatory sentence of 5 to 20 years so that any error in the application of the enhancement would be harmless.

#### IV.

Accordingly, the judgment of the district court is affirmed.



Appendix B

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF IOWA

UNITED STATES OF AMERICA

v.

Jacob Scott Watters

JUDGMENT IN A CRIMINAL CASE

Case Number: 3:15-CR-00012-001

USM Number: 15228-030

Terence L. McAtee

Defendant's Attorney

THE DEFENDANT:

pleaded guilty to count(s) Two of the indictment filed on February 19, 2015.

pleaded nolo contendere to count(s) \_\_\_\_\_ which was accepted by the court.

was found guilty on count(s) \_\_\_\_\_ after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. § 2252(a)(2)	Receipt of Child Pornography	08/2014	Two
2252(b)(1)			

See additional count(s) on page 2.

The defendant is sentenced as provided in pages 2 through 9 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

The defendant has been found not guilty on count(s) \_\_\_\_\_.

Count(s) One is  dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

January 23, 2017

Date of Imposition of Judgment

Signature of Judge

John A. Jarvey, Chief U.S. District Judge

Name of Judge

Title of Judge

January 24, 2017

Date

DEFENDANT: Jacob Scott Watters  
CASE NUMBER: 3:15-CR-00012-001

### IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

240 months as to Count Two of the Indictment filed on February 19, 2016.

The court makes the following recommendations to the Bureau of Prisons:

The Court recommends the defendant be placed at the Bureau of Prisons' facility located at either Oxford, Wisconsin, or Sandstone, Minnesota, to provide the defendant with vocational training and to be as close to his family in Iowa as possible.

The defendant is remanded to the custody of the United States Marshal.

The defendant shall surrender to the United States Marshal for this district:

at \_\_\_\_\_  a.m.  p.m. on \_\_\_\_\_

as notified by the United States Marshal.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

before \_\_\_\_\_ on \_\_\_\_\_

as notified by the United States Marshal.

as notified by the Probation or Pretrial Services Office.

### RETURN

I have executed this judgment as follows:

Defendant delivered on \_\_\_\_\_ to \_\_\_\_\_

a \_\_\_\_\_, with a certified copy of this judgment.

UNITED STATES MARSHAL

By \_\_\_\_\_  
DEPUTY UNITED STATES MARSHAL

DEFENDANT: Jacob Scott Watters  
CASE NUMBER: 3:15-CR-00012-001

**SUPERVISED RELEASE**

Upon release from imprisonment, the defendant shall be on supervised release for a term of:  
Ten years as to Count Two of the Indictment filed on February 19, 2015.

**MANDATORY CONDITIONS**

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.  
 The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. (check if applicable)
4.  You must cooperate in the collection of DNA as directed by the probation officer. (check if applicable)
5.  You must comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which you reside, work, are a student, or were convicted of a qualifying offense. (check if applicable)
6.  You must participate in an approved program for domestic violence. (check if applicable)

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

DEFENDANT: Jacob Scott Watters  
CASE NUMBER: 3:15-CR-00012-001

### STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full-time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

### U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. I understand additional information regarding these conditions is available at the [www.uscourts.gov](http://www.uscourts.gov).

Defendant's Signature: \_\_\_\_\_

Date: \_\_\_\_\_

DEFENDANT: Jacob Scott Watters  
CASE NUMBER: 3:15-CR-00012-001

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### ADDITIONAL SPECIAL CONDITIONS OF SUPERVISION

The defendant shall submit to a search of his person, property, residence, adjacent structures, office, vehicle, papers, computers (as defined in 18 U.S.C. § 1030(e)(1)), and other electronic communications or data storage devices or media, conducted by a U.S. Probation Officer. Failure to submit to a search may be grounds for revocation. The defendant shall warn any other residents or occupants that the premises and/or vehicle may be subject to searches pursuant to this condition. An officer may conduct a search pursuant to this condition only when reasonable suspicion exists that the defendant has violated a condition of his release and/or that the area(s) or item(s) to be searched contain evidence of this violation or contain contraband. Any search must be conducted at a reasonable time and in a reasonable manner. This condition may be invoked with or without the assistance of law enforcement, including the U.S. Marshals Service.

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DEFENDANT: Jacob Scott Watters  
CASE NUMBER: 3:15-CR-00012-001

### CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	<u>Assessment</u>	<u>JVTA Assessment*</u>	<u>Fine</u>	<u>Restitution</u>
<b>TOTALS</b>	\$ 100.00	\$ 0.00	\$ 0.00	\$ 0.00

The determination of restitution is deferred until \_\_\_\_\_. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

<u>Name of Payee</u>	<u>Total Loss**</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
<b>TOTALS</b>	\$0.00	\$0.00	

Restitution amount ordered pursuant to plea agreement \$ \_\_\_\_\_

The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

The court determined that the defendant does not have the ability to pay interest and it is ordered that:

the interest requirement is waived for the  fine  restitution.

the interest requirement for the  fine  restitution is modified as follows:

\* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.  
\*\* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

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## SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A  Lump sum payment of \$ 100.00 due immediately, balance due

not later than \_\_\_\_\_, or  
 in accordance  C,  D,  E, or  F below; or

B  Payment to begin immediately (may be combined with  C,  D, or  F below); or

C  Payment in equal \_\_\_\_\_ (e.g., weekly, monthly, quarterly) installments of \$ \_\_\_\_\_ over a period of \_\_\_\_\_ (e.g., months or years), to commence \_\_\_\_\_ (e.g., 30 or 60 days) after the date of this judgment; or

D  Payment in equal \_\_\_\_\_ (e.g., weekly, monthly, quarterly) installments of \$ \_\_\_\_\_ over a period of \_\_\_\_\_ (e.g., months or years), to commence \_\_\_\_\_ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E  Payment during the term of supervised release will commence within \_\_\_\_\_ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F  Special instructions regarding the payment of criminal monetary penalties:

All criminal monetary payments are to be made to the Clerk's Office, U.S. District Court, P.O. Box 9344, Des Moines, IA. 50306-9344.

While on supervised release, you shall cooperate with the Probation Officer in developing a monthly payment plan consistent with a schedule of allowable expenses provided by the Probation Office.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

The defendant shall pay the cost of prosecution.

The defendant shall pay the following court cost(s):

The defendant shall forfeit the defendant's interest in the following property to the United States:

an Alcatel cellular phone (SN: 013122000953072); an Alcatel cellular phone (SN: 013584001195153); an iPhone touch with black case (SN: CCQGD05FDGP9); an iPhone touch with red case (SN: Unknown); a Samsung phone with memory card (SN: 5360LGSMH); an Acer laptop computer (SN: LUS780Y0029180C70F2500);

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVTA assessment, and (8) costs, including cost of prosecution and court costs.

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### **ADDITIONAL FORFEITED PROPERTY**

two SanDisk micro cards; a Samsung Sidekick phone (SN: R31C10GWDRE); and an Alcatel OneTouch cellular phone (SN: 860498010198146), as outlined in the Preliminary Order of Forfeiture entered on September 21, 2016.

Appendix C

UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT

No: 17-1271

United States of America

Appellee

v.

Jacob Scott Watters

Appellant

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Appeal from U.S. District Court for the Southern District of Iowa - Davenport  
(3:15-cr-00012-JAJ-1)

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**ORDER**

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Kelly did not participate in the consideration or decision of this matter.

July 18, 2018

Order Entered at the Direction of the Court:  
Clerk, U.S. Court of Appeals, Eighth Circuit.

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/s/ Michael E. Gans