

FOR PUBLICATION

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

LOUIS DONALD MENDONSA,
AKA Louis Mendonsa,

Defendant - Appellant.

No. 25-1517

D.C. No.
2:22-cr-00243-
TLN-1

OPINION

Appeal from the United States District Court
for the Eastern District of California
Troy L. Nunley, District Judge, Presiding

Argued and Submitted February 12, 2026
San Francisco, California

Filed September 16, 2026

Before: Sidney R. Thomas and Eric D. Miller, Circuit
Judges, and Stanley Blumenfeld, Jr., District Judge.*

Opinion by Judge Blumenfeld

* The Honorable Stanley Blumenfeld, Jr., United States District Judge
for the Central District of California, sitting by designation.

SUMMARY**

Criminal Law

The panel affirmed Louis Mendonsa’s sentence for possessing and distributing child pornography in a case in which the district court applied the five-level sentencing enhancement in U.S.S.G. § 2G2.2(b)(5) for defendants who “engaged in a pattern of activity involving the sexual abuse or exploitation of a minor.”

Consistent with the Guidelines commentary, the district court interpreted the pattern enhancement to encompass Mendonsa’s prior sex abuse convictions that were over 30 years old. Mendonsa contended that the pattern enhancement unambiguously applies only to conduct related to the offense of conviction, and that under *Kisor v. Wilkie*, 588 U.S. 558 (2019), the district court’s deference to the Guidelines commentary was inappropriate. The panel held that § 2G2.2(b)(5) is ambiguous as to whether the pattern enhancement reaches conduct outside the offense of conviction, that the commentary interpretation permitting consideration of such conduct is reasonable, and that deference to the commentary is therefore appropriate.

Mendonsa argued, alternatively, that even if his prior convictions may be considered for the pattern enhancement, they do not satisfy § 2G2.2(b)(5) because (1) his convictions for lewd and lascivious acts under Cal. Pen. Code § 288(a) do not qualify under the categorical approach as “sexual

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

abuse or exploitation” and (2) his convictions for oral copulation do not constitute a “pattern” because they may have arisen from the same incident.

- The panel held that the categorical approach does not apply to Mendonsa’s § 288(a) convictions because the enhancement focuses on a defendant’s conduct rather than prior convictions.
- Because the categorical approach does not apply, the district court was entitled to examine the facts underling the convictions. The panel held that, in relying on documents from state-court proceedings, the district court neither clearly erred in finding at least two separate instances of qualifying sexual abuse nor abused its discretion in considering hearsay evidence concerning the state convictions. The district court therefore properly applied the enhancement.

COUNSEL

Roger Yang (argued), Assistant United States Attorney; Nirav K. Desai, Appellate Chief; Eric Grant, United States Attorney; Office of the United States Attorney, United States Department of Justice, Sacramento, California; for Plaintiff-Appellee.

Douglas J. Beevers (argued), Assistant Federal Defender; Heather E. Williams, Federal Defender; Office of the Federal Public Defender, Sacramento, California; for Defendant-Appellant.

OPINION

BLUMENFELD, District Judge:

Defendant Louis Mendonsa appeals his 292-month sentence for possessing and distributing child pornography. The district court applied the five-level sentencing enhancement in Section 2G2.2(b)(5) of the United States Sentencing Guidelines for defendants who “engaged in a pattern of activity involving the sexual abuse or exploitation of a minor.” Consistent with the Guidelines commentary, the district court interpreted the pattern enhancement to encompass Mendonsa’s prior sex abuse convictions that were over 30 years old.

Mendonsa contends that the pattern enhancement unambiguously applies only to conduct related to the offense of conviction, and that under *Kisor v. Wilkie*, 588 U.S. 558 (2019), the district court’s deference to the Guidelines commentary was inappropriate. Alternatively, he argues that even if his prior convictions may be considered for the pattern enhancement, the district court erred under the categorical approach by considering the underlying factual record from his state convictions to determine that the enhancement applied.

We hold that the pattern enhancement is ambiguous and deference to the Guidelines commentary is appropriate. Moreover, the categorical approach does not apply because the enhancement focuses on a defendant’s conduct rather than prior convictions, and the district court neither clearly erred in finding the enhancement satisfied nor abused its discretion in considering hearsay evidence concerning Mendonsa’s state convictions.

I

In April 2024, Mendonsa pleaded guilty to seven counts of distribution of child pornography in violation of 18 U.S.C. § 2252(a)(2) and one count of possession of child pornography in violation of 18 U.S.C. § 2252(a)(4). Mendonsa posted hundreds of images on four “dark web” websites—of which he was an administrator or moderator—between July and November 2022.

Decades before the child pornography offenses, a state jury found Mendonsa guilty of child sex abuse offenses for molesting newspaper delivery boys whom he supervised. In 1993, he was convicted of nine counts of lewd and lascivious acts upon a child under age 14 in violation of California Penal Code § 288(a); two counts of oral copulation with a child in violation of Penal Code § 288a(c); and one count of a lewd act upon a child in violation of Penal Code § 288(c). All but the last of these involved the same victim. Mendonsa was sentenced to 14 years in prison for the offenses.

Section 2G2.2 of the Sentencing Guidelines governs the offense-level calculation for Mendonsa’s federal child pornography crimes. This appeal concerns the pattern enhancement in § 2G2.2(b)(5), which requires a five-level increase “[i]f the defendant engaged in a pattern of activity involving the sexual abuse or exploitation of a minor.” U.S.S.G. § 2G2.2. The commentary to § 2G2.2 defines a “pattern of activity involving the sexual abuse or exploitation of a minor” as:

any combination of two or more separate instances of the sexual abuse or sexual exploitation of a minor by the defendant, whether or not the abuse or exploitation

(A) occurred during the course of the offense;
(B) involved the same minor; or (C) resulted
in a conviction for such conduct.

Id. cmt. n.1. The commentary further defines “sexual abuse or exploitation” as conduct described in specified federal statutes, including 18 U.S.C. §§ 2241–2243 (criminalizing sexual acts involving force or threats, minors, or persons incapable of giving consent), or equivalent state-law conduct. *Id.*

The original presentence report (PSR) prepared by the U.S. Probation Office did not recommend applying the pattern enhancement to Mendonsa. The government informally objected and argued for the enhancement, citing discovery materials related to his 1993 convictions. Over Mendonsa’s objection, the final PSR recommended applying the pattern enhancement based on his prior lewd and lascivious acts on minor victims on several occasions.

Mendonsa objected to the pattern enhancement on two grounds, arguing: (1) that it was “based on conduct that allegedly occurred thirty years prior to the offense”; and (2) that the evidence concerning his 1993 convictions was “insufficient to establish that he committed two separate incidents of specifically defined sexual crimes.”

At the sentencing hearing, the district court summarized the documents from the 1993 convictions and understood them to reflect multiple acts involving one victim at different times. The court found that there were “six separate incidents,” including four where Mendonsa touched the victim under his clothing. The court also described an incident with another victim, in which, according to the investigation report, Mendonsa “touched [the victim’s] leg

and moved towards his penis . . . then continued rubbing [his] neck and worked his way down to his groin area.” The district court concluded that the underlying records detailed “different occurrences” and that the § 2G2.2 commentary “eliminates any need for any temporal or factual nexus between . . . the offense of conviction and any prior act of sexual abuse.” Consequently, the court applied the pattern enhancement.

Mendonsa was sentenced to 292 months in prison followed by 10 years of supervised release. He timely appealed his sentence.

II

“We review the district court’s interpretation of the Sentencing Guidelines de novo, its application of the Guidelines to the facts of the case for abuse of discretion, and its factual findings for clear error.” *United States v. Kirilyuk*, 29 F.4th 1128, 1133 (9th Cir. 2022).

III

Mendonsa principally argues that the district court erred in applying the § 2G2.2(b)(5) pattern enhancement because that Guidelines provision unambiguously applies only to conduct relevant to the offense of conviction, not to sexual abuse occurring decades earlier. In the alternative, he argues that the record does not support application of the enhancement and that the district court erred in relying on hearsay to support its contrary conclusion.

A

We first address Mendonsa’s contention that the pattern enhancement in § 2G2.2(b)(5) applies only to conduct that is temporally or otherwise related to the offense of conviction.

The Guidelines commentary rejects such limitations, stating that the enhancement applies “whether or not the abuse or exploitation . . . occurred during the course of the offense.” U.S.S.G. § 2G2.2 cmt. n.1. Relying on the commentary, this court previously held that the pattern enhancement (then found at § 2G2.2(b)(4)) “allows for consideration of expanded relevant conduct” unrelated to the offense of conviction. *United States v. Williamson*, 439 F.3d 1125, 1140 (9th Cir. 2006). At the time we decided *Williamson*, we gave the Guidelines commentary “controlling weight unless it is plainly erroneous or inconsistent with the regulation.” *Stinson v. United States*, 508 U.S. 36, 45 (1993) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)). The Supreme Court’s subsequent decision in *Kisor*, however, requires us to reexamine the conclusion in *Williamson*, which rested solely on the Guidelines commentary and cases finding the commentary unambiguous.

Kisor established a two-step framework for determining whether to defer to an agency’s interpretation of its own regulations. First, the court asks whether the regulation is “genuinely ambiguous” after applying the traditional tools of interpretation. 588 U.S. at 573. If not, the regulation controls. *Id.* at 575. Second, if the regulation is found to be ambiguous, the court defers only if the agency’s interpretation is reasonable and its character and context warrant controlling weight—meaning that it reflects the agency’s official position, implicates its substantive expertise, and represents its fair and considered judgment. *Id.* at 575–79. Although the circuits disagree over the deference owed to the Guidelines commentary after *Kisor*,

this court applies the *Kisor* framework. *United States v. Castillo*, 69 F.4th 648, 655 (9th Cir. 2023).¹

1

Mendonsa argues that deference to the Guidelines commentary is inappropriate because the § 2G2.2(b)(5) enhancement for “a pattern of activity involving the sexual abuse or exploitation of a minor” unambiguously limits the qualifying pattern of abuse or exploitation to conduct related to the offense of conviction. Neither the plain text nor the standard tools of construction compel that reading.

a

There is no express temporal or offense-related limitation in the text of § 2G2.2(b)(5). The guideline merely provides that the offense level should be increased “[i]f the defendant engaged in a *pattern of activity* involving the *sexual abuse or exploitation* of a minor.” U.S.S.G. § 2G2.2(b)(5) (emphasis added).

A “pattern of activity” is a recurring course of conduct. As relevant here, “pattern” means “a reliable sample of traits, acts, tendencies, or other observable characteristics of a person.” *Webster’s Third New International Dictionary* 1657 (1993). Applied to § 2G2.2(b)(5), that definition looks to repeated acts of sexual abuse as evidence of a

¹ Other circuits continue to apply the more deferential standard articulated in *Stinson*. E.g., *United States v. Vargas*, 74 F.4th 673, 678, 680 (5th Cir. 2023) (en banc); *United States v. Maloid*, 71 F.4th 795, 809–13 (10th Cir. 2023). The Supreme Court recently granted certiorari to decide whether *Stinson* remains the governing standard. *Beaird v. United States*, No. 25-5343, 2026 WL 1052007, at *1 (U.S. Apr. 20, 2026). The issue does not affect the result here because Mendonsa cannot prevail even under *Kisor*’s less deferential standard.

characteristic course of behavior. The focus is therefore on the recurrence of the conduct, not its connection to any particular offense.

The nature of the pattern of activity—“sexual abuse or exploitation of a minor”—reinforces this focus. Section 2G2.2 governs nonproduction child-pornography offenses; the pattern enhancement, by contrast, targets a defendant’s personal involvement in the sexual abuse or exploitation of minors. *See United States v. Ketcham*, 80 F.3d 789, 794–95 (3d Cir. 1996) (explaining that § 2G2.2(b)(4)—now § 2G2.2(b)(5)—targets “more dangerous” defendants who have been “involved first hand in the exploitation of children”). The enhancement’s focus on sexual abuse or exploitation—conduct distinct from the child-pornography offense—suggests that the aggravating factor is the defendant’s history of such conduct, not its connection to the offense of conviction.

Thus, the text does not contain the limitations Mendonsa seeks to impose—much less unambiguously so.

b

The inquiry does not end with the text of § 2G2.2(b)(5), because in determining whether a guideline is ambiguous, courts must exhaust the tools of construction, including by looking to its “structure, history, and purpose.” *Kisor*, 588 U.S. at 575; *United States v. Cisneros*, No. 24-6774, 2026 WL 2451424, at *3 (9th Cir. Aug. 21, 2026) (explaining that “[w]e may not defer to the Sentencing Commission’s commentary interpreting the Sentencing Guidelines unless the guideline itself is genuinely ambiguous” after exhausting the traditional tools of construction). Mendonsa argues that the Guidelines’ structure—including § 2G2.2(b)(5)’s location, its interaction with other Guidelines provisions,

and the limitations in the neighboring subsections of § 2G2.2—requires finding that the pattern enhancement is limited to conduct related to the offense of conviction.

The strongest support for Mendonsa’s argument comes from U.S.S.G. § 1B1.3(a). Section 1B1.3(a) provides that, “[u]nless otherwise specified,” Chapter Two adjustments—where the pattern enhancement is found—“shall be determined” based on several categories of relevant information. One such category, set out in subsection (a)(1)(A), includes “all acts and omissions committed . . . by the defendant . . . that occurred during the commission of the offense of conviction.” U.S.S.G. § 1B1.3(a)(1)(A). Mendonsa reads this language as imposing a default limitation: unless the applicable guideline specifies otherwise, a court may not consider conduct that occurred outside the offense of conviction.

That argument, however, gives subsection (a)(1) more limiting force than the structure of § 1B1.3(a) supports. Section 1B1.3(a)(1) is only one of four categories of information the provision directs courts to consider. Subsection (a)(4) separately permits consideration of “any other information specified in the applicable guideline.” Thus, subsection (a)(1) does not itself categorically limit Chapter Two adjustments to conduct occurring during the offense of conviction.² See *United States v. Arias-Granados*, 941 F.2d 996, 998 (9th Cir. 1991) (considering prior

² Although *Williamson* stated that § 1B1.3(a)(1) generally limits relevant conduct to conduct occurring during the offense “[u]nless otherwise specified,” 439 F.3d at 1139, it did not address § 1B1.3(a)(4). Nor did it need to because it concluded that the commentary expressly permitted consideration of conduct unrelated to the offense of conviction. *Id.* at 1140.

unrelated offenses in calculating guidelines range); *United States v. Davis*, 360 F.3d 901, 903 (8th Cir. 2004) (relying on § 1B1.3(a)(4) to impose enhancement for firearm used in offense unrelated to conviction and rejecting argument that § 1B1.3(a)(1) limited its application).

That does not mean, however, that subsection (a)(4) resolves the issue in the government’s favor. Subsection (a)(4) permits consideration only of information “specified in the applicable guideline.” It therefore shifts the inquiry back to § 2G2.2(b)(5): whether that provision’s direction to consider whether “the defendant engaged in a pattern of activity” itself specifies consideration of conduct outside the offense of conviction. Neither party addresses subsection (a)(4) or its effect on that inquiry.

Setting aside § 1B1.3(a)(4), Mendonsa’s reliance on § 1B1.3(a)(1) still does not establish that the pattern enhancement is limited to conduct occurring during the offense of conviction because that limitation is qualified by the phrase “[u]nless otherwise specified.” A guideline “otherwise specifie[s]” if its text directs consideration of conduct different from § 1B1.3’s default scope, whether or not it expressly references § 1B1.3 or disclaims its default rule.

The First Circuit has adopted this reading. *United States v. Salvador-Gutierrez*, 128 F.4th 299, 311–13 (1st Cir. 2025). It held that a guideline “otherwise specifie[s]” when its language is “best read as an explicit instruction to adjust the defendant’s offense level based on a different (or narrower) range of conduct than the conduct specified in § 1B1.3.” *Id.* at 311. The guideline need not, however, “mention § 1B1.3 by name or quote from its text.” *Id.* This court has similarly recognized in another context that a

provision may “specify” a condition that triggers an exception to a default rule without expressly referencing the statute containing the default rule. *Spencer Enters., Inc. v. United States*, 345 F.3d 683, 688–90 (9th Cir. 2003) (holding that an immigration statute providing that the Attorney General “may” grant asylum would, absent a specific carveout in the statute, trigger a jurisdiction-stripping provision applicable when a decision or action “is specified . . . to be in the discretion of the Attorney General”).

Section 2G2.2(b)(5) may fairly be read to “otherwise specif[y]” a broader range of conduct than the offense-related conduct described in § 1B1.3(a)(1). As discussed, the enhancement’s focus on a defendant’s “pattern of activity” points to a recurring course of conduct, and the nature of that conduct—firsthand sexual abuse or exploitation—distinguishes it from the nonproduction child-pornography conduct governed by § 2G2.2. Taken together, these textual cues provide a basis for looking beyond the offense of conviction. At a minimum, they undermine Mendonsa’s argument that § 1B1.3(a)(1) unambiguously limits the pattern enhancement to abuse related to the child-pornography offense.

This conclusion is bolstered by the pattern enhancement’s immediate context. Section 2G2.2(b)(5)’s reference to whether “the defendant engaged in” a pattern of abuse or exploitation stands in stark contrast to the neighboring subsections, each of which ties the enhancement to the conduct or circumstances of the child-pornography offense itself. *See* U.S.S.G. § 2G2.2(b)(2) (enhancing where “the material involved a prepubescent minor or a minor who had not attained the age of 12 years”); *id.* § 2G2.2(b)(3)(A) (enhancing where “the offense involved distribution for pecuniary gain”); *id.* § 2G2.2(b)(3)(B) (enhancing where

“the defendant distributed in exchange for any valuable consideration”); *id.* § 2G2.2(b)(3)(C)–(E) (enhancing where “the offense involved distribution to a minor” under specified circumstances); *id.* § 2G2.2(b)(3)(F) (enhancing where “the defendant knowingly engaged in distribution”); *id.* § 2G2.2(b)(4) (enhancing where “the offense involved material that portrays” sadistic or masochistic conduct, violence, or abuse of an infant or toddler); *id.* § 2G2.2(b)(6) (enhancing where “the offense involved the use of a computer or an interactive computer service”); *id.* § 2G2.2(b)(7) (enhancing where “the offense involved” a specified number of images). Section 2G2.2(b)(1) is the lone neighboring provision that reduces, rather than increases, the offense level. But it too focuses on the offense conduct, applying when “the defendant’s conduct was limited to the receipt or solicitation” of qualifying material and the defendant lacked intent to traffic or distribute it. *Id.* § 2G2.2(b)(1).

Mendonso invokes these neighboring provisions to argue that § 2G2.2(b)(5) should be read to contain a similar offense-related limitation. But “[t]he Supreme Court has emphasized that ‘Congress generally acts intentionally when it uses particular language in one section of a statute but omits it in another,’ and that this canon ‘applies with particular force’ when the use and omission occur ‘in close proximity’ to one another.” *Castillo*, 69 F.4th at 658 (quoting *Dep’t of Homeland Sec. v. MacLean*, 574 U.S. 383, 391–92 (2015)). In *Castillo*, the definition of “controlled substance offense” listed completed drug offenses but did not include related attempt and conspiracy offenses, even though neighboring Guidelines provisions expressly included such inchoate crimes. The court reasoned that the contrast showed that the drafters “knew how to include”

inchoate offenses when intended but chose not to include them in the definition at issue. *Id.* The same reasoning cuts against Mendonsa here. The neighboring subsections demonstrate that the Commission knew how to tie an adjustment to offense-related conduct and did so in every neighboring provision. Section 2G2.2(b)(5), by comparison, asks only whether “the defendant engaged in” a pattern of abuse or exploitation, without referring to “the defendant’s conduct,” “the offense,” or the “material” at issue. That contrast suggests that the omission of an offense-related limitation was deliberate.

Mendonsa’s remaining structural arguments are similarly unavailing. He first relies on the title of § 2G2.2(b)—“Specific Offense Characteristics”—to argue that the pattern enhancement is limited to a pattern of activity related to the offense of conviction. Like many guidelines in Chapter Two, § 2G2.2 is organized into subdivisions that set the base offense level, provide adjustments to that level, and supply a cross-reference. In that structure, “Specific Offense Characteristics” identifies a category of adjustments to the base offense level; it does not itself define the conduct relevant to those adjustments. *See* U.S.S.G. § 1B1.3(a) (providing that “specific offense characteristics” are determined under its relevant-conduct rules “[u]nless otherwise specified”); *cf. United States v. Ellison*, 113 F.3d 77, 82 (7th Cir. 1997) (“The listing of an enhancement under the heading ‘specific offense characteristics’ does not require us to truncate the definition of ‘offense’ by ignoring the full range of relevant conduct under § 1B1.3.”). The title therefore does not establish that the pattern enhancement unambiguously applies only to conduct related to the offense of conviction.

Finally, Mendonsa argues that § 2G2.2(b)(5)’s placement in Chapter Two, rather than Chapter Four, indicates that the enhancement is limited to conduct related to the offense of conviction. But that argument conflates a defendant’s criminal history with a defendant’s history of conduct. Part A of Chapter Four calculates a defendant’s criminal history category principally from “prior sentence[s].” U.S.S.G. § 4A1.1. A “prior sentence” is one “previously imposed upon adjudication of guilt . . . for conduct not part of the instant offense.” U.S.S.G. § 4A1.2(a)(1). Some enhancements in Chapter Two require a prior conviction, *see, e.g.*, U.S.S.G. § 2L1.2(b), which may or may not also be included in calculating a defendant’s criminal history category, *see* U.S.S.G. § 4A1.2(c). But the pattern enhancement here, like other pattern enhancements in Chapter Two, turns on whether the defendant engaged in qualifying conduct, regardless of whether that conduct resulted in a conviction or sentence. *Cf.* U.S.S.G. § 2A6.2(b)(1)(E) & cmt. n.1 (“pattern of activity involving stalking, threatening, harassing, or assaulting the same victim”); U.S.S.G. § 2B1.5(b)(5) & cmt. n.6 (“pattern of misconduct involving cultural heritage resources or paleontological resources”). Its placement outside Chapter Four therefore does not establish that the qualifying conduct must be related to the offense of conviction.

In sum, neither the immediate context of § 2G2.2(b)(5) nor the broader structure of the Guidelines unambiguously limits the pattern enhancement to conduct related to the offense of conviction.

c

Nor do the history and purpose of § 2G2.2(b)(5) support Mendonsa’s interpretation. *See Kisor*, 588 U.S. at 575

(noting that courts should look to a regulation's history and purpose before finding ambiguity and extending deference). The Sentencing Commission first considered a pattern enhancement in 1990 because its "own research revealed that prior incidents of sexually abusing children seemed to establish a 'heartland' characteristic in child pornography cases." U.S. Sent'g Comm'n, *The History of the Child Pornography Guidelines* 16 (2009). The Commission responded by amending § 2G2.2's commentary to "recommend consideration of an upward departure where the defendant had sexually abused a minor at any time in the past." *Id.* (citing U.S.S.G. app. C, amend. 325). In 1991, as part of an effort to increase sentences for child-pornography offenses, Congress directed the Commission to "provide at least a 5 level increase for offenders who have engaged in a pattern of activity involving the sexual abuse or exploitation of a minor." *Id.* at 23 (quoting Treasury, Postal Service and General Government Appropriations Act, 1992, Pub. L. No. 102-141, § 632, 105 Stat. 834, 876 (1991)).

The Commission implemented that directive by amending § 2G2.2 itself to add the pattern enhancement, effective November 1991. *Id.* at 24-25. At the same time, the Commission defined the operative phrase in the commentary:

'Pattern of activity involving the sexual abuse or exploitation of a minor,' for the purposes of subsection (b)(4) [now (b)(5)], means any combination of two or more separate instances of the sexual abuse or the

sexual exploitation of a minor, whether involving the same or different victims.

United States v. Debus, 688 F. Supp. 3d 201, 208 (M.D. Pa. 2023) (citing U.S.S.G. app. C, amend. 435).

Thus, the pattern enhancement grew out of the recognized connection between child-pornography offenses and a defendant's history of sexually abusing or exploiting minors—a concern the Commission first addressed by recommending an upward departure, and Congress later addressed by directing the Commission to create the enhancement. Neither the pattern enhancement nor its contemporaneous definition required that the abuse be related to the child-pornography offense. After the First and Sixth Circuits held that conduct under the enhancement must relate to the offense of conviction, the Commission made explicit that the enhancement encompasses a broader scope of conduct, amending the commentary to state that the enhancement applies “whether or not the abuse or exploitation . . . occurred during the course of the offense.” *See Williamson*, 439 F.3d at 1139–40 & n.17 (discussing history of the pattern enhancement's commentary).

This history supports the government's reading. The enhancement was designed to account for a child-pornography offender's history of prior sexual abuse, and nothing in its development suggests that Congress or the Commission intended to confine it to abuse connected to the offense of conviction. The enhancement's history and purpose therefore undermine Mendonsa's contention that § 2G2.2(b)(5) unambiguously requires an offense nexus.

2

The plain text, structure, and history of § 2G2.2(b)(5) do not unambiguously limit the enhancement to offense-related conduct, but neither do they unambiguously establish that it reaches conduct unrelated to the offense of conviction. The enhancement does not expressly extend to such unrelated conduct, and its placement under the “Specific Offense Characteristics” heading, coupled with § 1B1.3(a)(1)’s general focus on offense-related conduct, leaves sufficient uncertainty about the enhancement’s scope to render the guideline ambiguous. Although Mendonsa ends his *Kisor* analysis at the first step and does not dispute that the government can satisfy the remaining steps for deference, the government addresses those steps on the merits and does not invoke forfeiture. *Cf. Cisneros*, 2026 WL 2451424, at *4 n.2 (finding that defendant forfeited any challenge to *Kisor*’s third step by making no argument). Accordingly, we briefly consider the remaining *Kisor* steps.

a

The next step is to determine whether the Commission’s interpretation of the enhancement in the commentary is reasonable. *United States v. Trumbull*, 114 F.4th 1114, 1118 (9th Cir. 2024). To be reasonable, the interpretation “must come within the zone of ambiguity the court has identified after employing all its interpretive tools.” *Kisor*, 588 U.S. at 575–76.

The commentary defines a “pattern of activity involving the sexual abuse or exploitation of a minor” as a “combination of two or more separate instances of the sexual abuse or sexual exploitation of a minor by the defendant, whether or not the abuse or exploitation (A) occurred during the course of the offense; (B) involved the same minor; or

(C) resulted in a conviction for such conduct.” U.S.S.G. § 2G2.2 cmt. n.1. This court has explained that the application note “obviously intends to cast a wide net to draw in any conceivable history of sexual abuse or exploitation of children.” *United States v. Garner*, 490 F.3d 739, 743 (9th Cir. 2007).

The Commission’s interpretation is reasonable. As discussed, the text of § 2G2.2(b)(5) can be read to reach a defendant’s history of abusive conduct unrelated to the offense of conviction, and the enhancement’s structure, history, and purpose support that reading. The commentary adopts that permissible reading by specifying that the pattern of abuse need not have “occurred during the course of the offense.” That interpretation falls within the zone of ambiguity identified above.

b

The final step of the *Kisor* analysis examines the “character and context of the agency interpretation,” asking whether the commentary: (1) represents the agency’s “official position” rather than an “ad hoc statement not reflecting the agency’s views”; (2) “implicates the agency’s substantive expertise”; and (3) “reflects the agency’s fair and considered judgment.” *Trumbull*, 114 F.4th at 1118 (cleaned up) (quoting *Kisor*, 588 U.S. at 574–79).

Mendonza does not dispute that these requirements are satisfied. As in *Trumbull*, the application note represents the Commission’s official position on the meaning of the guideline, implicates its substantive expertise in federal sentencing, and reflects its “fair and considered judgment” through the Commission’s process for reviewing and promulgating Guidelines commentary. *Id.* at 1120–21; accord *United States v. Yafa*, 136 F.4th 1194, 1199 (9th Cir.

2025); *see also Stinson*, 508 U.S. at 45 (discussing the Commission’s statutory duty to periodically review and revise the Guidelines). Deference to the commentary to § 2G2.2(b)(5) is therefore appropriate under *Kisor*.

In sum, because the Commission’s interpretation is reasonable and satisfies *Kisor*’s remaining requirements, we defer to its conclusion that § 2G2.2(b)(5) reaches a defendant’s pattern of sexual abuse or exploitation unrelated to the offense of conviction.

B

We next consider Mendonsa’s alternative argument that his 1993 convictions do not satisfy § 2G2.2(b)(5) because (1) his convictions for lewd and lascivious acts under Cal. Pen. Code § 288(a) do not qualify as “sexual abuse or exploitation” and (2) his two convictions for oral copulation do not constitute a “pattern” because they may have arisen from the same incident.

1

The commentary to U.S.S.G. § 2G2.2(b)(5) defines “sexual abuse or exploitation” as any of the following:

(A) conduct described in 18 U.S.C. § 2241, § 2242, § 2243, § 2251(a)–(c), § 2251(d)(1)(B), § 2251A, § 2260(b), § 2421, § 2422, or § 2423; (B) an offense under state law, that would have been an offense under any such section if the offense had occurred within the special maritime or territorial jurisdiction of the United States; or

(C) an attempt or conspiracy to commit any of the offenses under subdivisions (A) or (B).

U.S.S.G. § 2G2.2(b)(5) cmt. n.1.

Mendonsa argues that his convictions under Cal. Penal Code § 288(a) do not satisfy the definition because § 288(a) encompasses over-the-clothes touching that would not violate the federal statutes identified in the commentary.³ This argument rests on the assumption that a prior state conviction may qualify for the enhancement only if it satisfies the categorical approach, under which a court may examine only “the fact of conviction and the statutory definition of the prior offense.” *Taylor v. United States*, 495 U.S. 575, 602 (1990).

The categorical approach does not apply where an enhancement is based on prior conduct rather than prior convictions. *See United States v. Dailey*, 941 F.3d 1183, 1191 (9th Cir. 2019) (applying noncategorical approach where the statute “cover[ed] ‘any *conduct* that by its nature is a sex offense against a minor’” (quoting 34 U.S.C. § 20911)); *accord United States v. Byun*, 539 F.3d 982, 992 (9th Cir. 2008) (rejecting categorical approach where statute addressed “conduct”); *cf. Taylor*, 495 U.S. at 600 (reasoning that a statute’s reference to “convictions” for specified crimes supported application of the categorical approach); *United States v. Thompson*, 127 F.4th 1204, 1210–13 (9th Cir. 2025) (applying categorical approach to sentencing enhancement that required a qualifying “prior conviction”). Courts use “ordinary tools of statutory construction, relying

³ For purposes of this argument, Mendonsa accepts the Guidelines commentary as controlling, and we therefore proceed on that premise.

primarily on the language of the statute,” to determine whether a provision “calls for a categorical approach or an examination of the facts underlying prior convictions.” *Byun*, 539 F.3d at 991 (internal quotation marks omitted).

Here, although the commentary’s definition of sexual abuse or exploitation references specific federal provisions, it applies to the “conduct described in” those statutes. U.S.S.G. § 2G2.2 cmt. n.1. The definition of a “pattern of activity” also expressly extends to “instances” of sexual abuse regardless of whether they “resulted in a conviction.” *Id.* The enhancement thus turns on whether the defendant engaged in qualifying conduct, not whether a prior conviction categorically qualifies. Accordingly, the categorical approach does not apply to Mendonsa’s § 288(a) convictions.⁴

2

Because the categorical approach does not apply, the district court was entitled to examine the facts underlying Mendonsa’s 1993 convictions. To apply the pattern enhancement, the district court had to find by a preponderance of the evidence that Mendonsa’s 1993 convictions involved “two or more separate instances of . . . sexual abuse or sexual exploitation of a minor.” *Id.*; see *United States v. Lucas*, 101 F.4th 1158, 1162 (9th Cir. 2024)

⁴ Our decision accords with decisions by two other circuits permitting district courts to examine the underlying facts of the defendant’s past conduct when applying § 2G2.2(b)(5)’s pattern enhancement. See *United States v. Davis*, 751 F.3d 769, 778 (6th Cir. 2014); *United States v. Morin*, 417 F. App’x 885, 887 (11th Cir. 2011).

(en banc) (adopting preponderance-of-the-evidence standard at sentencing).

The government submitted police reports and charging documents from the state sentencing proceedings. In reviewing this evidence at the sentencing hearing, the district court described multiple instances of sexual contact with one victim, including direct genital touching and oral sexual conduct. Mendonsa was convicted of two counts of oral copulation and nine counts of lewd and lascivious acts, including multiple instances of skin-to-skin sexual contact with this victim. Based on this evidence, the district court reasonably concluded by a preponderance of the evidence that Mendonsa committed at least two separate instances of qualifying sexual abuse.

Focusing on this one victim,⁵ Mendonsa argues that the police reports show only “one very brief incident” involving five sexual acts on September 20, 1992. The reports, however, do not support that characterization. The victim reported that “Mendonsa fondled and orally copulated him” on September 20 and further described six additional incidents—five in Mendonsa’s vehicle and one behind his truck. Nothing in the report states that those additional incidents occurred during the same encounter or even on the same day. And the conduct reported on September 20 itself was not confined to a single brief episode: the report describes sexual acts separated by intervening events over a work shift lasting from approximately 12:30 a.m. to 5:00 a.m. The charging documents further allege qualifying conduct over different date ranges. The district court

⁵ The district court also identified qualifying conduct involving at least one other victim, further supporting its conclusion.

therefore did not clearly err in finding at least two separate instances of qualifying sexual abuse involving this victim.⁶

C

Finally, Mendonsa argues that the district court erred by relying on unreliable hearsay—namely, documents describing the conduct involved in his 1993 convictions. Hearsay evidence is admissible at sentencing provided that it is accompanied by “some minimal indicia of reliability.” *United States v. Berry*, 258 F.3d 971, 976 (9th Cir. 2001) (quoting *United States v. Petty*, 982 F.2d 1365, 1369 (9th Cir.), *amended*, 992 F.2d 1015 (9th Cir. 1993)). A district court’s determination whether hearsay statements are sufficiently reliable at sentencing is reviewed for abuse of discretion.⁷ *United States v. Shetty*, 130 F.3d 1324, 1331 (9th Cir. 1997).

The documents reviewed by the district court consisted of (1) charging documents, (2) court records, and (3) police reports. Mendonsa does not genuinely challenge the accuracy of the charging documents or court records. As for the police reports, hearsay may be sufficiently reliable when

⁶ Indeed, Mendonsa conceded below that if the categorical approach did not apply, his prior lewd-and-lascivious conduct would satisfy the requirements of the enhancement. In light of that concession, the district court’s finding arguably should be reviewed for plain error. *See Greer v. United States*, 593 U.S. 503, 507 (2021) (forfeited claims are reviewed for plain error). But the government does not seek plain-error review, and Mendonsa’s challenge in any event fails under the more favorable clear-error standard.

⁷ The record does not indicate that Mendonsa challenged the documents’ reliability below, arguably subjecting his evidentiary challenge to plain-error review. *Greer*, 593 U.S. at 507. Regardless, the challenge fails under the more favorable abuse-of-discretion standard.

corroborated by other evidence. *United States v. Littlesun*, 444 F.3d 1196, 1200–01 (9th Cir. 2006). Here, the victims’ accounts in the police reports largely correspond to the charges on which Mendonsa was convicted, providing sufficient indicia of reliability for sentencing purposes.

Mendonsa’s contrary arguments are unpersuasive. His contention that we cannot evaluate the reliability of the documents because they are not in the record is moot because we granted the government’s unopposed motion to supplement the record on appeal. Nor is it disputed that the government provided the documents to the U.S. Probation Office, which incorporated information from them into the presentence report reviewed by the parties and the district court. That they were not separately filed on the docket below does not call their reliability into question.

Second, Mendonsa argues that the police reports are not reliable because at the time they were prepared, the author of the reports was “tasked with investigating whether there were separate counts and not whether there were separate instances of federally defined offenses.” But Mendonsa confuses the purpose of the investigation with the reliability of the facts it produced. The investigator’s purpose may bear on what the documented facts establish, but it does not undermine the reliability of the facts themselves.

Third, he contends that the passage of time since the police reports were authored makes it impossible for the defense to test their accuracy. But the inability to cross-examine the source of hearsay does not, by itself, render the evidence unreliable at sentencing. *See Petty*, 982 F.2d at 1367 (upholding reliance on a hearsay statement despite the defendant’s inability to cross-examine the declarant).

In sum, Mendonsa has not shown that the district court abused its discretion by relying on the documents from the state-court proceedings.

IV

We hold that § 2G2.2(b)(5) is ambiguous as to whether the pattern enhancement reaches conduct outside the offense of conviction and that the Commission's interpretation permitting consideration of such conduct is reasonable and entitled to deference. Because the district court properly applied the enhancement, we affirm Mendonsa's sentence.

AFFIRMED.