United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
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Lyle W. Cayce
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No. 19-60432

KEVIN NOE SANTOS-ALVARADO,
ALSO KNOWN AS ALVARADO KEVIN SANTOS,

Petitioner,

versus

WILLIAM P. BARR, U.S. ATTORNEY GENERAL,

Respondent.

Petition for Review of an Order of
the Board of Immigration Appeals
No. A208 003 346

Before SMITH, HIGGINSON, and ENGELHARDT, *Circuit Judges.*

JERRY E. SMITH, *Circuit Judge*:

In 2014, Kevin Santos-Alvarado ("Santos") applied for asylum, withholding of removal, and protection under the Convention Against Torture

("CAT"). Santos's petition remained pending four years later when the Department of Homeland Security ("DHS") initiated removal proceedings against him following an arrest for drunk driving. The immigration judge ("IJ") denied Santos's application—finding that he had failed to establish a credible claim—and ordered him removed.

The Board of Immigration Appeals ("BIA") dismissed Santos's appeal, determining that the IJ's credibility findings were not clearly erroneous and that Santos had been afforded a full and fair hearing. Santos petitions for review of the BIA's denial, contending that (1) the BIA's decision went against the substantial weight of the evidence and (2) the IJ's hearing infringed his due process rights. Finding no error, we deny the petition.

I.

A.

Santos is a citizen of El Salvador who entered the United States unlawfully. More than two years after doing so, he applied for asylum, withholding of removal, and protection under the CAT with the Citizenship and Immigration Service. About three years after he initially applied, Santos submitted a new application and a supporting declaration, which he supplemented about eleven months later.

While his asylum application was pending, Santos was arrested for driving under the influence. As a result, DHS initiated removal proceedings by filing a Notice to Appear. Before an IJ, Santos admitted the factual allegations and conceded that he was removable as charged. Nevertheless, he informed the IJ of his pending asylum application and requested relief from removal on that basis.

In his written application, Santos sought relief in order to escape anti-gay discrimination and violence in El Salvador. According to Santos, in

El Salvador homosexuality is "taboo," and "[t]here is widespread discrimination and violence against the LGBT community." Santos described numerous instances of sexual-orientation-based abuse—both physical and emotional—at the hands of his family members and others in the community. Santos claimed that, because of his sexual orientation, no one would protect him, and the police would not care if he was "attacked or even murdered." Santos was afraid to return to El Salvador, because he would be "tortured or killed by [his] family members or strangers."

Santos indicated that his father was a heavy drinker who often abused him and his mother, because Santos's father suspected that Santos was gay and blamed Santos's mother for his sexual orientation. The police came to Santos's house four times on account of his father's abuse of his mother. Santos's father was arrested multiple times, but his mother would always bail him out within a few days. Eventually, the police stopped responding to calls.

On one occasion, Santos and his sister woke up to witness their father beating their mother and threatening her with a gun. Santos tried to intervene, but his father threated to kill him. Santos, his mother, and his sister escaped and "ran to the end of the street to seek refuge" at his paternal aunts' house. But because his aunts "despised" them, they turned them away. Santos and his mother would often flee his father's beatings, but his aunts refused to help and "would not let [them] in." According to Santos, his aunts blamed his mother for his sexual orientation, and they would often inform his father if they saw him with other boys, "even though they knew that it would result in" violence against him and his mother.

Santos also recounted that when he "was around nine" years old, his "father found [him] and another boy playing naked." In response, Santos's father "grabbed [him] by the neck and started to hit [Santos] with his belt," telling him that he did not want a gay son "and that [he] had to be a man."

Santos recalled a second incident when his "father caught [him] having sex with another male teenager." Santos's father reacted by "punch[ing] [him] in the face and hit[ting] [him] with a belt" in front of his mother, who did not attempt to stop it. Thereafter, the beatings from his "father became more aggressive," so Santos tried to hide his sexual orientation from his father.

Likewise, Santos detailed several instances of sexual abuse. Santos claimed that his brother "forced [Santos] to perform oral sex on him," and, after that, raped him multiple times per week for several months. For fear of his father, Santos never told his mother or the police about his brother's actions. In addition, Santos claimed that when he was fifteen years old, his school's caretaker raped him in the caretaker's office. After that initial assault, the caretaker raped Santos several more times "by following [him] into the bathroom after [he] finished band practice." In his application and declarations, Santos did not mention other instances of sexual assault.

B.

At the IJ's hearing on Santos's application, Santos testified about his father's abuse, including the incident where his father threatened his mother with a gun. Santos stated that his aunts told his father that he was "with other men" while he was at his grandmother's house and that his aunts "never wanted to help [him]" and "always discriminated against [him]." Santos reiterated that, in response to his father's threats with the gun, he, his mother, and his sister fled to his aunts' house and that they refused to help.

On cross-examination, the government confronted Santos with the written statement of his psychologist, Dr. Ariel Shidlo,[1] which quoted

[1] Shidlo concluded, based on a clinical evaluation and psychological testing, that Santos "suffers from Major Depression and Post Traumatic Stress Disorder (PTSD)." Shidlo observed that Santos was "cooperative and forthcoming" during their interview,

Santos's account of the incident with the gun as follows:

> I went outside in front of the house, where there was a little workshop. My mom had a gun [held by the father] to her head and was in her nightgown. I ran that night to my grandparents and aunts . . . who lived down the street. I went down there screaming and crying that my dad was going to kill mom. *One of my aunts got my father under control*. My mother grabbed the gun and hid it in a drawer."

(emphasis added). When confronted with the inconsistency, Santos first said that he has "a lot of aunts" and that perhaps Shidlo had misinterpreted him. Upon further questioning, Santos admitted "[t]hat is true that my aunt helped" him during the incident with the gun. Santos explained that "at first, when we arrived to their house, they rejected us . . . and when we r[a]n back to the house, that's when this aunt arrived and helped us." When asked why he had not indicated that in his declaration, Santos stated that he did not believe that his aunts helped him:

> Because they didn't help me. They sent help for them just to come and just to tell my dad to calm down. Is that help? Is that help that they didn't take him back to their house? Is that help that they didn't call the police? Is that what you call help?

Even so, Santos ultimately admitted that one of his aunts did come to the family's house to help calm down his father.

On direct examination, Santos also testified about his father's catching him with other boys. Specifically, Santos said that his father caught him with another boy "when [he] was 11, 12, 13." When asked by the IJ to clarify the number of times his father caught him, Santos responded "[o]ne time."

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but that he appeared "depressed and his upset level easily spiked when [they] discussed traumatic events." Shidlo also noted that Santos "fought back tears and cried several times."

Santos explained that the incident occurred when he "was going to [his] grandmother's" and that his father later beat him with a belt. When asked by the IJ whether the incident at his grandmother's was the only time that his father caught him with another male, Santos responded "[y]es."

On cross-examination, the government asked Santos why his declaration discussed two occasions when his father caught him with another boy: one time at age nine when his father found him "and a boy playing naked" and another when his father "caught [him] having sex with a male teenager." Santos initially responded "[d]o you think that I am lying with such a delicate thing?" When instructed by the IJ to answer, Santos stated that "[t]here were so many occasions that [his father] found [him]" and that he did not recall the second encounter. Santos later suggested that the two events were actually the same incident, though he clarified that he and the other boy were playing as if they were having sex but there was no penetration. When pressed further about whether his father caught him having sex with a male teenager, Santos indicated that he did not remember that event but that his neighbors might have told his father that it happened.

Finally, Santos recounted—though with some differing details—that he was raped by his brother and his school's caretaker. In response to the IJ's request for clarification, Santos indicated that, to him, "[r]ape is when a person touches you, when a person invites you to do things that you don't want to do[,] . . . [l]ike oral sex or grabbing your parts and things like that." In addition to discussing the abuse he suffered at the hands of his brother and the caretaker, Santos also testified his neighbor raped him at his grandmother's house. Santos indicated that the rape, which occurred when he was either thirteen or fourteen, was his first sexual encounter.

On cross-examination, the government asked Santos for further details about the assault by his neighbor. Santos indicated that his neighbor's

name was Milton, but he could not remember Milton's last name despite living in the same neighborhood for seventeen years. Santos indicated that he was unaware that the assault hadn't been included in his applications for asylum or his signed declarations. When asked why he had not mentioned the assault before taking the stand, Santos stated that he had brought it up to his lawyer.

Finally, after Santos concluded his testimony, the IJ asked whether he had any other witnesses. Santos attempted to call Shidlo via telephone, but the IJ informed Santos's counsel that their motion for Shidlo to testify telephonically had not been granted.[2] Santos's counsel indicated that he had "not receive[d] notification that it was not granted." The IJ responded, "Counsel, . . . if you don't receive notification, then you don't anticipate it's happening." The IJ explained that the motion was not granted owing to his longstanding preference to have witnesses "appear before an immigration court, or the [DHS] so they can identify themselves." Santos indicated that he had no more witnesses.

C.

Shortly after the hearing, the IJ orally denied Santos's application for asylum, withholding of removal, and protection under CAT. Central to the IJ's denial was his finding that Santos was not a credible witness. The IJ founded his adverse-credibility determination on inconsistencies and omissions among Santos's written submissions, live testimony, and the other submitted evidence.[3] The IJ considered Santos's PTSD and depression

[2] Santos filed that motion approximately one month before the hearing. Santos filed a separate motion seeking a continuance, because his country conditions expert, Dr. Thomas J. Boerman, was unavailable on Santos's hearing date. That continuance was denied the same day.

[3] The following documents, among others, were part of the record: (1) Santos's

when evaluating those inconsistencies and omissions but still found that Santos was not credible.[4]

That adverse-credibility determination served as the sole basis for denying Santos's withholding of removal claim and as the primary basis for rejecting Santos's petition for asylum.[5] The adverse-credibility determination also undermined Santos's eligibility for CAT protection, but it was not dispositive; the IJ found that Santos's other support—most relevantly, objective country conditions evidence and Boerman's statement—did not independently establish CAT eligibility. Finally, the IJ noted that Santos had "attempted to call a witness telephonically," which the court denied because it "requires that all witnesses be present at a[n] immigration court to present proper identification for them to testify."

Santos appealed. The BIA dismissed the appeal, finding that (1) the IJ's adverse credibility determination was "not clearly erroneous under the

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two applications for asylum; (2) Santos's two written declarations; (3) Santos's passport; (4) Shidlo's written declaration; (5) an affidavit, complete with supporting documents, submitted by Boerman, related to country conditions in El Salvador; (6) several letters of support from Santos's family, friends, and neighbors; (7) additional background documents on country conditions in El Salvador; (8) DHS's I-213 form detailing Santos's initial encounter with immigration authorities; (9) documents showing that Santos's DUI charge was later dismissed; and (10) Santos's brief in support of his application.

[4] The IJ "recognize[d] that sexual abuse against another person is a horrific and terrible crime" and that the "implications can be even more severe if it's based on sexual orientation." Nevertheless, the IJ found that "[a]lthough [Santos] claims that many of his inconsistent omissions are due to the abuse that he allegedly suffered in El Salvador," he was still "able to function" and hold a job without needing medication.

[5] Santos's application for asylum was time-barred, the IJ found, because (1) he hadn't applied for asylum within one year of his last arrival in the United States, and (2) the IJ's adverse credibility determination meant that Santos couldn't establish an exception to the one-year deadline. The IJ made clear, however, that even if the asylum application wasn't time barred, it would still fail. Santos's lack of credibility meant that he had not met his burden of proof to show either past persecution or a well-founded fear of future persecution.

totality of the circumstances," and (2) Santos "ha[d] not shown that he was denied a full and fair hearing."

To sustain the adverse-credibility finding, the BIA relied on three inconsistencies between Santos's testimony and other parts of his application: (1) Santos testified that his aunts refused to help his family, but his psychologist's report quoted him as saying that his aunts later helped get his father "under control"; (2) Santos testified that his father caught him with another boy only once, but his declaration specified two separate instances; and (3) Santos testified that his neighbor raped him, but he did not mention that event in any other documents supporting his application.

When considering Santos's credibility, the BIA recognized that Santos had been diagnosed with PTSD and that, accordingly, he might be hesitant to discuss past traumatic experiences. Notwithstanding, the BIA still found that Santos's diagnosis was not enough to render the IJ's adverse-credibility finding clearly erroneous, especially given that Santos had described other incidents of physical and sexual abuse both in his application and on the stand.

As for Santos's due process claim, the BIA found "no indication that either the [IJ] or the DHS behaved inappropriately toward [Santos] or prevented him from fully presenting his claim below." Moreover, the BIA noted that the IJ considered Shidlo's statement and diagnoses—even though the IJ did not let Shidlo testify telephonically—which precluded any showing of prejudice. Finally, the BIA declined to address Santos's contention that Boerman should have been permitted to testify, because Santos had not raised that position with the IJ.

Santos petitions for review, claiming that (1) the BIA's factual conclusions are not supported by substantial evidence, because the inconsistencies upon which the BIA relied are not inconsistencies at all; and (2) the IJ's ex-

clusion of Santos's psychologist and country-conditions expert robbed him of a full and fair hearing.

II.

A.

The Attorney General or the Secretary of DHS may grant asylum to an alien who is a "refugee." 8 U.S.C. § 1158(b)(1)(A). To be a refugee, an alien must establish that he is "unable or unwilling to return to" his home country, "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." *Id.* § 1101(a)(42)(A).

An asylum-seeker's testimony alone may be enough, "but only if the applicant satisfies the trier of fact that the applicant's testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee." *Id.* § 1158(b)(1)(B)(ii). IJs are entitled to

> base a credibility determination on the demeanor, candor, or responsiveness of the applicant or witness, the inherent plausibility of the applicant's or witness's account, the consistency between the applicant's or witness's written and oral statements . . . , the internal consistency of each such statement, the consistency of such statements with other evidence of record . . . , and any inaccuracies or falsehoods in such statements, without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim, or any other relevant factor.

Id. § 1158(b)(1)(B)(iii).

"To qualify for withholding of removal, an alien must demonstrate a 'clear probability' of persecution upon return." *Gonzalez-Soto v. Lynch*, 841 F.3d 682, 683 (5th Cir. 2016) (per curiam) (quotation marks omitted). "The 'clear probability' standard for withholding of removal is more difficult

than the 'well-founded fear' standard for asylum," *Revencu v. Sessions*, 895 F.3d 396, 402 (5th Cir. 2018), from which it follows that "one who fails to show entitlement to asylum fails to show entitlement to withholding of removal," *Munoz-Granados v. Barr*, 958 F.3d 402, 408 (5th Cir. 2020). When considering claims for withholding of removal, IJs assess credibility under the same standards used for asylum applications. *See* 8 U.S.C. § 1231(b)(3)(C).

A CAT claim is distinct from asylum and withholding-of-removal claims "and should receive separate analytical attention." *Efe v. Ashcroft*, 293 F.3d 899, 906–07 (5th Cir. 2002). "For a petitioner to be entitled to CAT relief, he . . . must show that it is more likely than not that he . . . would be tortured if removed to the proposed country of removal." *Garcia v. Holder*, 756 F.3d 885, 891 (5th Cir. 2014). "Torture is defined as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person . . . by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." 8 C.F.R. § 1208.18(a)(1). An applicant's credibility is also relevant to CAT eligibility. *See, e.g., Mwembie v. Gonzales*, 443 F.3d 405, 409 (5th Cir. 2006).

When the BIA issues its own decision, we "focus our review" on that order: "[W]e may only evaluate the IJ's underlying decision if it influenced the BIA's determination." *Mauricio-Benitez v. Sessions*, 908 F.3d 144, 147 (5th Cir. 2018), *cert. denied*, 139 S. Ct. 2767 (2019). We review factual findings—such as credibility determinations, eligibility for asylum, withholding of removal, and relief under CAT—for substantial evidence.[6] "Under th[at] standard, reversal is improper unless we decide not only that

[6] *See Avelar-Oliva v. Barr*, 954 F.3d 757, 763 (5th Cir. 2020) (credibility); *Chen v. Gonzales*, 470 F.3d 1131, 1134 (5th Cir. 2006) (eligibility).

the evidence supports a contrary conclusion, but also that the evidence *compels* it."[7]

B.

The IJ found Santos noncredible, and the BIA sustained that finding as not clearly erroneous. Recall that the BIA rested its conclusion on three inconsistencies that the IJ had identified. Santos contends that all three are illusory.

First, Santos contends that his testimony is consistent with Shidlo's written statement.[8] Specifically, Santos maintains "that he did not believe his aunt actually helped him." Moreover, Santos notes that Shidlo's statement devoted only one paragraph to the incident involving Santos's father and the gun and that Shidlo did not use the word "help."

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[7] *Revencu*, 895 F.3d at 401 (quotation marks omitted); *see also* 8 U.S.C. § 1252(b)(4)(B) ("[T]he administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary."); *INS v. Elias-Zacarias*, 502 U.S. 478, 481 n.1 (1992) ("To reverse the BIA finding we must find that the evidence not only *supports* that conclusion, but *compels* it.").

[8] As an initial matter, the government avers that Santos failed to exhaust this contention, because his administrative appeal brief did not contain "any discussion of why [Santos] may believe his testimony and declaration were consistent with Dr. Shidlo's statement." But to exhaust, Santos need only "have presented an issue in some concrete way in order to put the BIA on notice of his claim." *Vazquez v. Sessions*, 885 F.3d 862, 868 (5th Cir. 2018). "An issue is fairly presented when the petitioner made some concrete statement before the BIA to which they could reasonably tie their claims before this court." *Id.* (quotation marks omitted).

Santos met that burden in two ways: (1) He challenged Shidlo's exclusion, lamenting that "[h]ad Dr. Shidlo been allowed to testify, he could have testified to the alleged inconsistencies between his declaration and [Santos's] testimony"; and (2) he contended that the IJ had not given him an opportunity to explain a different alleged inconsistency between his testimony and Shidlo's statement, namely the date of his arrival. Though he did not advance the precise theory he does on appeal, those arguments, taken together, are sufficiently similar to put the BIA on notice of his claim. *See id.*

Though that might well be a reasonable explanation, it does not follow that the IJ's adverse credibility finding must be set aside. When confronted with the difference between his account and Shidlo's, Santos described his subjective belief that his aunts did not help him. But Santos never explained why his declaration omitted that his aunt later arrived to help control his father. Instead, Santos's declaration only suggests that his mother attempted to calm his father down, even though he admitted on cross-examination that his aunt helped to quell the situation. Just because Santos offered an explanation does not mean that the IJ was required to accept it, especially in the face of those conflicting details.[9]

Next, Santos contends that his testimony, which referenced his father's catching him with another boy only once, was consistent with his declaration, which detailed two separate incidents. Specifically, Santos suggests that (1) the first time he was caught was the occasion when he "and another boy were playing father and mother in the corner naked and were making like they were going to have sex," and (2) "there were other occasions where [Santos]'s father found him with other boys, but he could not specifically recall the other incident contained in his declaration." Santos averred that any confusion in his testimony was actually "a result of the questions posed by DHS counsel."

That characterization is easily belied by the administrative record.

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[9] *See, e.g., Avelar-Oliva*, 954 F.3d at 768 ("Avelar-Oliva's unsupported explanations do not compel a conclusion that no reasonable factfinder could have found her to be [no]ncredible."); *Wang v. Holder*, 569 F.3d 531, 540 (5th Cir. 2009) ("[T]he IJ was not required to accept Wang's testimony as true in the face of inconsistencies and verbal and nonverbal cues of deception."); *Qhao v. Lynch*, 608 F. App'x 282, 283 (5th Cir. 2015) (per curiam) ("Qhao's attempts to explain away the evidentiary inconsistencies, implausibilities, and lack of detail identified by the IJ do not constitute substantial evidence compelling the conclusion that she is credible.").

When asked by the IJ how many times his father caught him with other boys, Santos twice indicated that it had happened only once. But Santos's declaration plainly refers to two different incidents: (1) one when Santos was "around nine" and his "father found [him] and another boy playing naked" and (2) another when his "father caught [him] having sex with another male teenager." Santos even recounted separate responses that his father took for each. Santos's attempt to reconcile that obvious discrepancy, does not mean that either the IJ or the BIA "[wa]s required to accept [his] explanation for [the] plain inconsistencies in h[is] story." *Morales v. Sessions*, 860 F.3d 812, 817 (5th Cir. 2017) (quotation marks omitted).

Finally, Santos suggests that his "elaboration concerning the abuse he suffered from his neighbor is permissible given [his] PTSD and major depression and the sensitive nature of [his] testimony."[10] Santos maintains that the mental-health issues from which he suffers "prevented [him] from discussing the first time that he was raped as a young child." Santos avers that, notwithstanding Shidlo's diagnosis, the IJ ignored his mental-health history and "substituted a medical professional's expert opinion for his own lay opinion." And given those facts, he reasons, the BIA's totality-of-the-circumstances analysis was fatally flawed.

But that explanation does not change the fact that Santos did not mention the assault he suffered at his neighbor's hand *anywhere* in his written application materials—all of which were prepared with the help of *pro bono* counsel—even though he claimed to have informed both his lawyer and

[10] Santos did not assert before the IJ or the BIA that his PTSD or depression necessitated the additional procedural safeguards called for by *Matter of J-R-R-A-*, 26 I. & N. Dec. 609 (B.I.A. 2015). Accordingly, any contention related to *J-R-R-A-* is unexhausted, and we lack jurisdiction to consider it. *See Omari v. Holder*, 562 F.3d 314, 318–19 (5th Cir. 2009).

Shidlo of the incident. Though an alien can elaborate on the details of his claims during an in-person hearing, "an IJ may rely on *any* inconsistency or omission in making an adverse credibility determination as long as the 'totality of the circumstances' establishes that an asylum applicant is not credible." *Wang*, 569 F.3d at 538.

Santos's purported explanation does not compel a conclusion that he is credible. Omitting the rape by his neighbor, which Santos stated was his first sexual experience, goes beyond merely "fail[ing] to remember non-material, trivial details that [are] only incidentally related to [his] claim." *Morales*, 860 F.3d at 817. Despite his PTSD and depression, Santos was able to discuss the physical and sexual abuse that he suffered at the hands of his father, his brother, and his school's caretaker. And Santos indicated before the IJ that the information in his application, which he reviewed with his attorney, was complete and true, and he declined the IJ's invitation to make any last-minute changes or amendments. Santos's ability both to speak about other traumatic events and otherwise to participate in the administrative proceedings supports the IJ's finding.[11]

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[11] *See Singh v. Sessions*, 880 F.3d 220, 225–26 (5th Cir. 2018) (upholding adverse-credibility determination, despite petitioner's PTSD diagnosis, where "there was no indication that [petitioner's] PTSD affected his testimony or ability to speak in a coherent and linear manner" and "there [wa]s no indication that [petitioner] was reluctant to reveal relevant information or . . . unable to understand the questions asked"); *see also Zeru v. Gonzales*, 503 F.3d 59, 73 (1st Cir. 2007) (upholding adverse-credibility finding where petitioner's trauma and PTSD did not explain discrepancies between her testimony and other evidence regarding the number of times that she was sexually assaulted); *Fajardo-Paz v. Barr*, 776 F. App'x 539, 540 (9th Cir. 2019) (per curiam) ("While the BIA gave some weight to Petitioner's PTSD diagnosis in explaining this behavior, it found that the diagnosis failed to fully justify the discrepancies in Petitioner's testimony. Accordingly, a reasonable fact finder could credit the BIA's adverse credibility finding."); *Pagoada-Galeas v. Lynch*, 659 F. App'x 849, 857 (6th Cir. 2016) (upholding adverse-credibility determination where petitioner contended "that he could not remember details due to PTSD," even though "when questioned by his own attorney on direct examination, Pagoada–Galeas

In sum, though Santos has offered explanations—some of which may be plausible—for the inconsistencies between his testimony and other documents in the administrative record, "the evidence does not *compel* a finding that, from the totality of the circumstances, no reasonable fact-finder could have found [Santos] [no]ncredible." *Ghotra v. Whitaker*, 912 F.3d 284, 289 (5th Cir. 2019) (cleaned up) (emphasis added). Accordingly, "[t]he BIA's adverse credibility determination is supported by substantial evidence." *Id.* And because Santos does not challenge the BIA's ruling that he waived any contention "that he did not submit sufficient evidence to independently corroborate his testimony," substantial evidence also reinforces the BIA's conclusion that he is ineligible for asylum, withholding of removal, and protection under the CAT.

III.

We turn to Santos's due process challenge. When considering a petition for review, we review constitutional issues—such as due process claims—*de novo*. *See Fuentes-Pena v. Barr*, 917 F.3d 827, 829 (5th Cir. 2019).

"The Fifth Amendment's Due Process Clause protects individuals in removal proceedings." *Okpala v. Whitaker*, 908 F.3d 965, 971 (5th Cir. 2018). To satisfy due process, "removal proceedings must be conducted according to standards of fundamental fairness," which "include[ ] an alien's right to a full and fair hearing." *Vetcher v. Barr*, 953 F.3d 361, 370 (5th Cir. 2020), *pet. for cert. filed* (U.S. June 30, 2020) (No. 19-1437). "To prevail on a claim regarding an alleged denial of due process rights, an alien must make an initial showing of substantial prejudice. Proving substantial prejudice re-

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offered very clear answers and very clear dates" (brackets omitted)); *Mansare v. Holder*, 383 F. App'x 522, 526 (6th Cir. 2010) ("Mansare has not shown how PTSD could explain her inconsistency in describing the abductors or the omission of her cigarette burns from her testimony.").

quires an alien to make a prima facie showing that the alleged violation affected the outcome of the proceedings." *Okpala*, 908 F.3d at 971 (citation omitted).

Santos contends that the exclusion of his "psychologist and country conditions expert impinged upon the fundamental fairness of the hearing," thereby substantially prejudicing him. Outside of that statement, however, Santos's contentions focus exclusively on Shidlo. In fact, Santos referred to Boerman only in a single footnote, without any details as to why Santos believes he was entitled to a continuance.[12] Because "[i]t is not enough to merely mention or allude to a legal theory," Santos waived any due process theory related to Boerman.[13]

As for Shidlo, Santos maintains that the IJ's blanket in-person testimony policy violated due process, because (1) the IJ provided no notice (in any format) of the policy before Santos tried to call Shidlo, and (2) the IJ never ruled on Santos's motion to permit Shidlo to testify telephonically. Santos posits that Shidlo's exclusion substantially prejudiced him in three ways: (1) It deprived Santos "of the ability to demonstrate why he met an exception to the one-year bar to asylum"; (2) it curtailed Shidlo's ability to

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[12] The footnote states, in its entirety, that Santos "maintains that the IJ's failure to grant [his] motion for continuance due to the unavailability of his country conditions expert (especially considering that [Santos] is not detained) constitutes a due process violation because [Santos]'s motion provided good cause."

[13] *United States v. Scroggins*, 599 F.3d 433, 446 (5th Cir. 2010). Moreover, even assuming that Santos had properly briefed the issue on appeal, our considering it would still be improper. At his hearing before the IJ, Santos never contended that he should have been entitled to present Boerman's testimony, telephonically or otherwise. The BIA has "long held that [it] generally will not consider an argument or claim that could have been, but was not, advanced before the [IJ]." *Matter of W-Y-C- & H-O-B-*, 27 I. & N. Dec. 189, 190 (B.I.A. 2018). And we have upheld the BIA's authority not to consider such contentions. *See Eduard v. Ashcroft*, 379 F.3d 182, 195 n.14 (5th Cir. 2004).

explain the inconsistencies between his written statement and Santos's live testimony; and (3) it prevented Santos from "present[ing] evidence on the effects of his trauma."

But even assuming Santos's due process rights were violated, none of the suggestions Santos offers establishes the requisite prejudice. It is irrelevant whether Shidlo could shed light on why Santos didn't file his asylum application within one year, because the BIA did not rest its decision on the timeliness of Santos's application. As for the inconsistencies between Shidlo's written statement quoting Santos and Santos's testimony, the BIA rested its conclusion on *Santos's* unresponsiveness to the government's questioning and *his* inability to explain the discrepancies between his statements. Santos does not convincingly explain how Shidlo—who Santos claimed might have misinterpreted him—*would have* rehabilitated Santos's already inconsistent statements. And finally, Shidlo's written statement was part of the record the IJ considered, and the BIA expressly took account of Santos's mental-health issues before blessing the IJ's adverse credibility finding.

In short, Santos identifies nothing to which Shidlo would have testified that was not already included in Shidlo's written statement,[14] and none of Santos's proffered reasons suggests that the outcome would have been different had Shidlo appeared telephonically. Santos's due process claim fails.

The petition for review is DENIED.

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[14] Santos suggests that Shidlo "could have opined on the effects of [Santos's] mental trauma, how that trauma manifests itself in [his] ability to recall facts and previous traumatic events, and how it affects [his] ability to discuss and relive about his previous abuse." But Shidlo's statement already spoke extensively to Santos's psychological symptoms and the effects his trauma has on him. Santos does not identify what, if anything, live testimony would have added beyond Shidlo's already detailed statement.