

AgueAgueroAguero v. GoAguero v. Gonzales, No 05-50472 (5th Cir. Aug 4, 2006)(holding that aliens have c
rightsrights to be freerights to be free fromrights to be free from arrest without probable cause, may sue; denial of qu

Terms:: Abuse by border patrol : Abuse by border patrol a: Abuse by border patrol agent, *Bivens* actions un
wrongful arrest, excessive force under the Fourth and Fifth Amendments, tort action, assault.

*In the
United States Court of Appeals
for the Fifth Circuit*

● 05-50472

MARIA ANTONIETA MARTINEZ-AGUERO,

Plaintiff-Appellee,

VERSUS

HUMBERTO GONZALEZ,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas

Before SMITH, WIENER, and STEWART,
Circuit Judges.

JERRY E. SMITH, Circuit Judge:

We must decide whether aliens stoppedWe must decide v
theborder have a constithe border have a constitthe
freefree from false imprisonment andfree from false impi
excessiveexcessive force by law enfexcessive force by law enf

cannot walk long distances or adequately fulfill in the situation he confronted. *Id.*
clean her house anymore.

II.

Martinez-Aguero sued Gonzalez for assault, battery, and false arrest under the Federal Tort Claims Act and excessive use of force under the Fourth and Fifth Amendments. The district court denied the appeal.

III.

Our standard of review for appeals differs from the usual Federal Rule of Civil Procedure 56 standard. We lack jurisdiction to review the district court's finding of material fact exists; rather, we assess whether the district court's legal significance of the conduct that the district court deemed appropriate for purposes of summary judgment concerns summary judgment. We must view the facts in the light most favorable to the plaintiff. *id.* (citing *Wagner v. Bay City*, 227 F.3d 316, 320 (5th Cir. 2000)). Our review of the legal significance of the facts is *de novo*. See *id.* at 349.

IV.

We use a two-part test to determine whether an officer is entitled to qualified immunity. First, do the facts alleged show that he violated plaintiff's constitutional rights, see *Saucier v. Katz*, 533 U.S. 19, 533 U.S. 19, 533 U.S. 194, 201 (2001); second, were the rights clearly established at the time of the alleged violation? To determine whether a right is clearly established, we ask whether it would be clear to a reasonable officer that his conduct was unlaw-

The only claims relevant to Martinez-Aguero's lawsuit are her claims for assault, battery, and false arrest under the Federal Tort Claims Act and excessive use of force under the Fourth and Fifth Amendments. We must determine whether Gonzalez violated her rights, and (3) the rights were clearly established at the time of the incident.

Our standard of review for interlocutory appeals differs from the usual Federal Rule of Civil Procedure 56 standard. We lack jurisdiction to review the district court's finding of material fact exists; rather, we assess whether the district court's legal significance of the conduct that the district court deemed appropriate for purposes of summary judgment concerns summary judgment. We must view the facts in the light most favorable to the plaintiff. *id.* (citing *Wagner v. Bay City*, 227 F.3d 316, 320 (5th Cir. 2000)). Our review of the legal significance of the facts is *de novo*. See *id.* at 349.

Under *Bivens*, a person may sue a federal agent for money damages when that person has allegedly violated that person's constitutional rights. *Brown v. NationsBank*, 579 U.S. 579, 590 (5th Cir. 1999) (citing *Bivens v. Six United States Federal Officers*, 403 U.S. 388 (1971)). Martinez-Aguero's claim is not a *Bivens* claim. To determine whether a right is clearly established, we ask whether it would be clear to a reasonable officer that his conduct was unlaw-

C.

clearly established must be underclearly establish

Finally, we must determine whether Martinez-Aguero's rights were clearly established at the time of the incident. The Supreme Court in *Martinez-Aguero* held that Gonzalez has waived any right to Fourth Amendment or Fifth Amendment protection at all. Indeed, the Supreme Court in *Martinez-Aguero* held that Gonzalez presents on appeal, as discussed in his brief, deals exclusively with the question whether aliens enjoy Fourth or Fifth Amendment protection at all. Gonzalez states when Gonzalez states the defenseless alien without immunity. Because, however, Gonzalez's argument that the relevant constitutional protections do not support *any* constitutional protections for Martinez-Aguero as implicitly resting on the lesser argument that the clearly established, we therefore issue on the merits.

Gonzalez could argue that Martinez-Aguero's Fourth Amendment rights were clearly established because courts have splitly established precedential value because it is uncertain how the Court ruled; and because the Court seemed to reserve the question whether Gonzalez would have Fourth Amendment rights on U.S. soil.¹⁰ But, decisions pre-dating *Urquidez*, including cases from this state unequivocally state Fourth Amendment protection.¹¹

Also, the inquiry into whether rights are

¹⁰ *Verdugo-Urquidez*, 494 U.S. at 272, 494 U.S. at 272 (stating that *dicta* in a previous case are not dispositive of how the Court would rule on a Fourth Amendment claim by illegal aliens in the United States such a claim were squarely before us).

¹¹ See *supra* n.6 and accompanying text.