

NONCITIZENS ENTITLED TO FOURTH AMENDMENT PROTECTION AT BORDER

by BRENDA SAPINO JEFFREYS

The 5th U.S. Circuit Court of Appeals has held that noncitizens stopped at the U.S. border have the same constitutional rights as citizens to be free from false imprisonment and the use of excessive force by law enforcement officers.

In the Aug. 4 opinion, a three-judge panel found a Mexican woman who alleges she was manhandled at the border by a U.S. Immigration and Naturalization Service agent in El Paso in 2001 is entitled to Fourth Amendment protection to “be free of entirely meritless arrests and the excessive use of force.”

“No reasonable officer would believe it proper to beat a defenseless alien without provocation, as [plaintiff Maria Antonieta] Martinez-Aguero alleges,” 5th Circuit Judge Jerry Smith wrote in *Martinez-Aguero v. Gonzalez*. Judges Jacques Wiener Jr. and Carl Stewart joined Smith in the opinion.

The appeal arose from a false arrest/“constitutional tort” suit Martinez-Aguero filed in 2003 against Humberto Gonzalez, an INS border patrol agent. Martinez-Aguero alleges in her complaint, filed in the U.S. District Court for the Western District of Texas, that Gonzalez violated her First, Fourth and Fifth Amendment rights when falsely arresting her as she tried to enter the United States at the Pasa del Norte International Bridge.

Gonzalez sought summary judgment on the ground of qualified immunity. He alleges that Martinez-Aguero, as a nonresident alien who had not gained entry to the United States, is not entitled to the constitutional protections of the First, Fourth and

Fifth Amendments. In his summary judgment motion he cites *United States v. Verdugo-Urquidez*, a 1990 decision in which the U.S. Supreme Court said that an alien who has no voluntary attachment to the United States is not entitled to extraterritorial Fourth Amendment protection — protection of the Constitution outside the boundaries of the United States.

In 2005, U.S. District Judge Kathleen Cardone of El Paso denied Gonzalez’s motion for summary judgment. Gonzalez filed an interlocutory appeal with the 5th Circuit.

In the eight-page ruling, the 5th Circuit affirmed Cardone’s denial of Gonzalez’s motion for summary judgment and remanded the suit to the district court for further proceedings.

Lawyers on both sides agree the 5th Circuit addressed an issue of first impression.

An attorney for Martinez-Aguero, Javier Maldonado, says the 5th Circuit’s opinion sends a clear message to law enforcement officers.

“Millions cross the border each day. It’s a great victory for everyone when a court says a public official is not above the law,” says Maldonado, an El Paso solo who is a former executive director of the Lawyers’ Committee for Civil Rights Under Law of Texas.

Jeanne “Cezy” Collins, a lawyer for Gonzalez, says in deciding *Martinez-Aguero*, the 5th Circuit considered *Verdugo-Urquidez* and followed its own precedent in *Lynch v. Cannatella* (1987). In *Lynch*, the 5th Circuit held that “excludable aliens” — people who can be prevented from entering the United States — are entitled under the due process clauses of the Fifth and 14th Amendments to be “free of



Jonathan Bridges says legally the opinion suggests that everyone, not just individuals who are U.S. residents or have strong ties to the country, has constitutional rights.

gross physical abuse at the hands of state or federal officials.”

“They decided to interpret *Verdugo* in a way that the *Lynch* decision is still valid. I don’t think it’s a stretch that the 5th Circuit follows its own precedent,” says Collins, a partner in Kemp Smith in El Paso.

Collins says Gonzalez has not decided if he will ask the U.S. Supreme Court to review the 5th Circuit opinion.

Disputed Allegations

In her complaint, Martinez-Aguero says that on Oct. 4, 2001, she attempted to enter the United States from Mexico so she could accompany her aunt to the Social Security office in El Paso. Martinez-Aguero, a Mexican citizen who lives in Ciudad Juarez, and her aunt had border-crossing cards, but the cards were not biometric machine-

readable cards that the INS at that time had recently begun to require. (The functions of INS are now in two divisions of the U.S. Department of Homeland Security: U.S. Customs and Border Protection and U.S. Citizenship and Immigration Services.)

According to the 5th Circuit opinion, Martinez-Aguero and her aunt had applied for new cards in July 2001, but they had not received them by the time they attempted to cross the U.S.-Mexico border on Oct. 4, 2001. Martinez-Aguero was told by officials at the U.S. consular office that her old card would work in the interim.

Martinez-Aguero and her aunt were traveling by bus when U.S. immigration officials stopped the vehicle outside the port of entry but within the territorial United States. According to the 5th Circuit opinion, Gonzalez ordered Martinez-Aguero and her aunt off the bus and after looking at their documents told them they could not enter the United States.

Martinez-Aguero alleges she asked to speak to a supervisor, but Gonzalez told her he was in charge, Smith wrote. Ultimately, according to the 5th Circuit opinion, Gonzalez yelled profanities at the women in Spanish and threw their visas on the ground. Martinez-Aguero picked up her visa and made a sarcastic remark to her aunt about Gonzalez's bad language, but he overheard it and ordered them to stop walking.

Martinez-Aguero alleges in an affidavit that Gonzalez grabbed her arms, twisted them behind her back, pushed her into a concrete barrier, which hit her in the stomach, and then kicked her in the lower back with his knees, Smith wrote. Another agent took Martinez-Aguero into an office and handcuffed her to a chair, where she soon had an epileptic seizure. After receiving medical assistance, she was allowed to leave.

Martinez-Aguero alleges in her complaint that after she returned home that day she suffered another seizure and now suffers from recurrent seizures, memory problems, back injuries and pain. She also alleges she cannot walk long distances or adequately clean her house any more.

She further alleges she was subjected to false arrest, deprived of her

constitutional rights under the First, Fourth and Fifth Amendments, and is entitled to unspecified actual and punitive damages.

Gonzalez denies the allegations. His defense attorney, Collins, points out that *Martinez-Aguero* has not been tried on its merits.

"The 5th Circuit has no choice but to take the plaintiff's version of the facts as true, which my client vehemently disagrees with. [The allegation] that she was gratuitously beaten at the border? She certainly was not, and my client will prove that later on. We haven't even done discovery," Collins says.

In his motion for summary judgment, Gonzalez alleged that Martinez-Aguero became verbally abusive after he told her she and her aunt could not enter the country without the new border crossing cards. He alleged Martinez-Aguero continued to be disruptive and use "profane language" even after he warned her that he would arrest her if she didn't stop.

Gonzalez alleged he told Martinez-Aguero she was under arrest, but she walked away from him, so he grabbed her wrist. She fought him and he placed her in an "arm/wrist lock." He alleged in his motion that it was standard procedure for someone in custody to be handcuffed to a chair.

Collins argued Gonzalez's appeal before the 5th Circuit. Jonathan Bridges, a partner in Susman Godfrey in Dallas, handled the argument for Martinez-Aguero.

Bridges says the decision has a practical effect and a potentially significant legal effect. On the practical side, he says, it's a clear announcement for government agents working on the border that even when people aren't U.S. citizens they are entitled to constitutional protections when they step on U.S. soil.

Legally, he notes, the opinion suggests that everyone, not just individuals who are U.S. residents or have strong ties to the country, has constitutional rights.


"The court didn't quite hold that but hinted at it very strongly," says Bridges, who worked on the appeal with Suyash Agrawal, an associate with Susman Godfrey in Houston. The firm took the case pro bono.



Jeanne "Cezy" Collins (above) says her client, Humberto Gonzalez, denies the allegations, and she points out that *Martinez-Aguero* has not been tried on its merits.

Professor Michael A. Olivas, who teaches immigration law at the University of Houston Law Center, says the opinion affirms existing law and is the correct decision for the set of allegations.

"She certainly had reason to be treated better than she was, if the 5th Circuit recitation of the facts was even halfway true," he says.

He adds that this is a "case brought in front of a very conservative tribunal and it certainly is important both for intending immigrants and government workers. . . . [It] shows clearly what's on the wrong side of the law." 

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The 5th U.S. Circuit Court of Appeals' opinion in *Martinez-Aguero v. Gonzalez* is online at www.texaslawyer.com. Look for the link within the online version of this article.