

No. 22- **A216** **ORIGINAL**

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IN THE  
SUPREME COURT OF THE UNITED STATES

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**FILED**  
**SEP 02 2022**  
OFFICE OF THE CLERK  
SUPREME COURT, U.S.

ANDRES CANO,  
Applicant.

vs.

MARK GARCIA; CITY OF KIRBY, TEXAS; KEVIN BOIS,  
KIRBY POLICE DEPARTMENT; JAMES LAYMON;  
JASON RENDON, KIRBY POLICE DEPARTMENT;  
JOHN DOE  
Respondents.

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On Petition for a Writ of Certiorari to the  
United States Court of Appeals for the Fifth Circuit

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**APPLICATION FOR AN EXTENSION OF TIME TO FILE A  
PETITION FOR A WRIT OF CERTIORARI  
TO THE HONORABLE JUSTICE SAMUEL ALITO:**

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Andres Cano  
Pro Se Litigant  
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**RECEIVED**  
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SUPREME COURT, U.S.

**TO THE HONORABLE JUSTICE SAMUEL ALITO:**

**APPLICATION FOR AN EXTENSION OF TIME TO FILE A  
PETITION FOR A WRIT OF CERTIORARI**

Pursuant to Rule 13.5 of the United States Supreme Court Rules, Andres Cano requests a 40 day extension in which to file his Certiorari Petition. Cano's Petition is due on September 14, 2022. In support of this request, Cano would present the following:

**(I.)** Cano's planned Petition includes several seminal topics, which this Court should address.

(1) To what extent does the doctrine of *Vertical Stare Decisis* require all lower Courts to adhere to U.S. Supreme Court rulings?

(2) Whether criminal acts committed by law enforcement performing *ministerial duties* deprive them of the affirmative defense of Qualified Immunity?

(3) Whether federal courts are free to disregard matters of public record in Rule 12(b)(6) Motions?

(4) Whether willful exposure by law enforcement to a known and recurring danger satisfies the parameters of a *State Created Danger* Theory?

**(II.)** On May 16, 2022, a three-member panel of the Fifth Circuit ignominiously dismissed Cano's Appellant Brief and Reply Brief. Combined, Cano cited well

over 150 cases from the U.S. Supreme Court, Federal Circuits, and Texas Courts. This ‘panel’ didn’t even address Cano’s well-structured arguments. Rather, it misstated the gist of Cano’s appellate theories and did not rule on the briefs.

**(III.)** On May 30, 2022, Cano filed a Petition for Rehearing En Banc. This was denied on June 16, 2022—without a poll. Thus, the 90 day period started on June 16, 2022 and concludes on September 14, 2022. These documents are affixed.

**(IV.)** This Honorable Court has jurisdiction under 28 U.S.C. 1254(1).

**(V.)** Cano has until September 14, 2022 to file his Petition for a Writ of Certiorari.

**(VI.)** Under Rule 13.5, a Supreme Court Justice may extend the time to file a Petition for a Writ of Certiorari up to 60 additional days.

**(VII.)** The Pro Se Petitioner requests an additional period of 40 days in which to file his Writ of Certiorari. This would make the brief due on October 24, 2022.

**(VIII.)** For most of this Summer 2022, Cano has experienced the debilitating symptoms of COVID-19 BA.5. This variant wielded weakness, equilibrium imbalances, digestive ailments, fever, congestion, and the loss of taste. Upon recovery, Cano had to care for other members of his family who were stricken by this strain.

After the COVID-19 BA.5 variant was finally weathered and conquered, Cano had to devote much time to major repairs which were required in his household. This took another month of time. These repairs were necessary in light of the sustained Heat Wave in San Antonio, Texas during June-August 2022.

During this Summer of 2022, Cano's computer system also crashed. The data was not recoverable. This included many word-processing programs and applications. This also resulted in the loss of much legal research, legal documents, rough drafts, and appellate cases.

In light of these conditions, it was not possible for Cano to produce any kind of a substantive Petition for a Writ of Certiorari.

**(IX.)** It is because of these extant conditions, that Andres Cano respectfully requests a 40 day extension in which to file his Petition for a Writ of Certiorari. This would reset the due date from September 14, 2022 to October 24, 2022.

Respectfully Submitted,



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**CERTIFICATE OF SERVICE**

I affirm a true and correct copy of this document was sent via the United States Postal Service on September 2, 2022 to:

**Andres Cano**

City of Kirby Defendants  
Charles Frigerio  
Attorney at Law  
Riverview Towers  
111 Soledad, Suite 840  
San Antonio, TX 78205

Defendant Mark Garcia's Counsel  
Jon Disrud  
Attorney at Law  
13750 San Pedro, Suite 410  
San Antonio, TX 78232

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1. This document complies with the type-volume limit of Fed. R. App. P. 27(E)(2)(a), 32(a)(5), 32(a)(6) and the word limit of Fed. R. App. P. 27(2)(a). The 6 pages of the application, enumerated (1-6) contain:

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/s/ Andres Cano

Pro Se Appellant

Dated: 9/2/2022

United States Court of Appeals  
for the Fifth Circuit

United States Court of Appeals  
Fifth Circuit

**FILED**

May 16, 2022

Lyle W. Cayce  
Clerk

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No. 21-50742

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ANDRES CANO,

*Plaintiff—Appellant,*

*versus*

MARK GARCIA; CITY OF KIRBY, TEXAS; KEVIN BOIS, KIRBY  
POLICE DEPARTMENT; JAMES LAYMON; JASON RENDON, KIRBY  
POLICE DEPARTMENT; JOHN DOE,

*Defendants—Appellees.*

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Appeal from the United States District Court  
for the Western District of Texas  
USDC No. 5:20-cv-1331

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Before JONES, SOUTHWICK, and OLDHAM, *Circuit Judges.*

PER CURIAM:\*

Two men beat Andres Cano. Cano sued the assailants, his city, and several police officers. The district court dismissed all Cano's federal claims

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\* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

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with prejudice. The court was correct to dismiss, but it should have done so without prejudice. We therefore affirm the judgment as modified.

I.

Cano's complaint alleges that, on November 16, 2018, Mark Garcia and an unidentified individual ("John Doe") brutally beat Cano without provocation. Cano reported the incident to the Kirby Police Department (the "Department"), but the police did nothing. For about the next two years, Cano continued to ask the Kirby police to investigate the attack. They never did. Garcia, however, did not attack Cano again.

In 2020, Garcia sued (proceeding *pro se*) in federal district court. He brought claims under the federal Constitution against Kirby and three current or former police officers, pursuant to 42 U.S.C. § 1983. And he brought Texas-law claims against Garcia and Doe.

The district court dismissed Cano's federal claims for failure to state a claim. *See* FED. R. CIV. P. 12(b)(6). The district court didn't specify whether that dismissal was with or without prejudice. When a district court dismisses for failure to state a claim without "specify[ing] whether [the dismissal] was with or without prejudice," the dismissal is with prejudice. *Memon v. Allied Domecq QSR*, 385 F.3d 871, 874 n.6 (5th Cir. 2004) (per curiam) (citing *Hall v. Tower Land & Inv. Co.*, 512 F.2d 481, 483 (5th Cir. 1975)); FED. R. CIV. P. 41(b) ("Unless the dismissal order states otherwise, a dismissal under this subdivision (b) *and any dismissal not under this rule*—except one for lack of jurisdiction, improper venue, or failure to join a party under Rule 19—operates as an adjudication on the merits." (emphasis added)); *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 505 (2001) (explaining that "the effect of the 'adjudication upon the merits' default provision of Rule 41(b)" is to render the dismissal in question prejudicial, thereby barring "refiling of the same claim" in the same court).

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In light of that dismissal, the court held “it would be inappropriate to exercise supplemental subject-matter jurisdiction over [Cano’s] state law tort claims.” So it dismissed those claims. It explicitly noted this latter dismissal was without prejudice to refile in state court. *See* 28 U.S.C. § 1367(c). That eliminated all Cano’s claims.

Cano timely appealed. We have jurisdiction under 28 U.S.C. § 1291.

## II.

We examine our own subject-matter jurisdiction “whenever [it] appears fairly in doubt.” *Nat’l Football League Players Ass’n v. Nat’l Football League*, 874 F.3d 222, 225 (5th Cir. 2017) (quotation omitted). We conduct that review *de novo*. *Tenth St. Residential Ass’n v. City of Dallas*, 968 F.3d 492, 498 (5th Cir. 2020).

“[V]ictims do not have standing based on whether *other* people—including their perpetrators—are investigated or prosecuted.” *Lefebure v. D’Aquila*, 15 F.4th 650, 652 (5th Cir. 2021) (citing *Linda R.S. v. Richard D.*, 410 U.S. 614, 617–19 (1973)); *see also id.* at 655 (“[I]t is not the province of the judiciary to dictate prosecutorial or investigative decisions to [an] executive branch.”). That is because, though a crime victim has certainly been *injured* by the criminal, that injury is usually neither *traceable* to executive-branch inaction nor *redressable* by a judgment against an executive branch official. *Id.* at 654; *see also Linda R.S.*, 410 U.S. at 618.

*Lefebure* squarely governs here. Every one of Cano’s federal claims centers on the same theme: Kirby’s policies, and the police defendants, caused Cano’s beating to go uninvestigated. Cano does not plausibly allege that the lack of investigation resulted in *further* harm. His only complaint is that his assailants got away with their crime. Thus, though Cano may be a sympathetic plaintiff, his failure-to-investigate claims are simply not cognizable in federal court. *See Lefebure*, 15 F.4th at 652.

United States Court of Appeals  
for the Fifth Circuit

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No. 21-50742

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ANDRES CANO,

*Plaintiff—Appellant,*

*versus*

MARK GARCIA; CITY OF KIRBY, TEXAS; KEVIN BOIS, *Kirby Police  
Department*; JAMES LAYMON; JASON RENDON, *Kirby Police  
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*Defendants—Appellees.*

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Appeal from the United States District Court  
for the Western District of Texas  
USDC No. 5:20-CV-1331

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ON PETITION FOR REHEARING EN BANC

Before JONES, SOUTHWICK, and OLDHAM, *Circuit Judges.*

PER CURIAM:

Treating the petition for rehearing en banc as a petition for panel rehearing (5TH CIR. R. 35 I.O.P.), the petition for panel rehearing is DENIED. Because no member of the panel or judge in regular active service requested that the court be polled on rehearing en banc (FED. R. APP. P. 35 and 5TH CIR. R. 35), the petition for rehearing en banc is DENIED.