

May 20, 2008, some three weeks later. The Magistrate Judge also determined that Ellis had not shown any basis upon which to equitably toll the limitations period, and recommended that Ellis be denied a certificate of appealability *sua sponte*.

In his objections, Ellis alleges that he is actually innocent of the offense, and actual innocence serves as a gateway through which a procedural default may be excused. He says that the alleged victim in the case refused to have a property hearing, through which ownership of the property could be established, and so there was no evidence that the alleged victim owned the property.

Ellis is confusing the concepts of procedural default and limitations. The Fifth Circuit has specifically stated that a claim of actual innocence will not justify tolling of the statute of limitations. Cousin v. Lensing, 310 F.3d 843, 849 (5th Cir. 2002). Thus, Ellis' claim of "actual innocence" does not toll or set aside the statute of limitations, and his objections are without merit.¹

The Court has conducted a careful *de novo* review of the pleadings in this cause, including the original petition, the Report of the Magistrate Judge, the Petitioner's objections thereto, and all other pleadings, documents, and records in the case. Upon such *de novo* review, the Court has concluded that the Report of the Magistrate Judge is correct and that the objections of the Petitioner are without merit. It is accordingly

ORDERED that the Petitioner's objections are overruled and that the Report of the Magistrate Judge is ADOPTED as the opinion of the District Court. It is further

ORDERED that the above-styled application for the writ of habeas corpus be and hereby is DISMISSED with prejudice. It is further

ORDERED that the Petitioner Donald Ellis is hereby DENIED a certificate of appealability *sua sponte*. Finally, it is

¹In addition, Ellis has failed to show that it is more likely than not that he is actually innocent of the offense. The fact that a separate hearing was not held to determine the ownership of the property is of no consequence, inasmuch as the testimony at trial was sufficient to show that the property belonged to the complaining witness. See Miller v. State, 909 S.W.2d 586, 596 (Tex.App-Austin 1995, no pet.).

ORDERED that any and all motions which may be pending in this action are hereby DENIED.

So ORDERED and SIGNED this 15th day of December, 2008.

A handwritten signature in black ink, appearing to read 'Leonard Davis', written over a horizontal line.

LEONARD DAVIS
UNITED STATES DISTRICT JUDGE