

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
vs.)	No. 04-20242 BV
)	
CURTIS BYRD, JR.,)	
)	
Defendants.)	

ORDER DENYING DEFENDANT'S MOTION TO PRODUCE ORIGINAL DOCUMENT
AND
REPORT AND RECOMMENDATION ON MOTION TO DISMISS THE INDICTMENT

Before the court is the December 21, 2004 motion of the defendant, Curtis Byrd, Jr., requesting the court to order the United States to provide the original uniform residential loan application that is the subject of this indictment. The motion was referred to the United States Magistrate Judge for determination. For the following reasons the motion is denied, and it is therefore recommended that the motion to dismiss be denied.

In an indictment returned by the grand jury on May 26, 2004, Byrd was charged with having prepared a fraudulent loan application and instructing the parties to the application to provide false statements to verify the information contained in the loan application. Byrd contends that the original loan application could not have been altered or added to after the signatures were

affixed by the alleged victims in this case and it is thus critical that the original loan application be produced in order to completely exculpate him.

If the original application is in the possession of the United States, Byrd requests that the United States deliver it to him, or, in the alternative, that the case be dismissed for failure to produce the original. In an effort to locate the original loan application, Byrd consulted with Postal Inspector, Steve Orr, with the permission of Assistant United States Attorney, Tracy Berry. Orr was unable to locate the original.

According to Byrd, the original application has been lost, misplaced, mishandled, or otherwise become unavailable through no fault of his own. Furthermore, Byrd claims that the United States has had access to the document since the beginning of the case and that the United States has failed to preserve this document or has failed to take necessary steps to preserve it.

The United States contends that the copy that it provided to Byrd was the only document that was ever within the government's possession, custody, and control. The government claims that the document Byrd seeks was neither requested nor produced during the grand jury investigation. It is the belief of the United States that the loan originator possesses the document sought by Byrd.

If the United States does not possess the original application

requested, then it would be futile for the court to compel the United States to produce what it does not have. Byrd has provided no evidence to prove the government failed to preserve the original application or that the original was ever in the possession of the United States. Moreover, the United States has indicated who it believe is in possession of this document. Byrd can retrieve the document from the party who possesses it by way of subpoena or otherwise. Accordingly, Byrd's motion is denied, and it is recommended that Byrd's motion to dismiss be denied.

IT IS SO ORDERED this 5th day of January 2005.

DIANE K. VESCOVO
UNITED STATES MAGISTRATE JUDGE