

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT**

<b>UNITED STATES OF AMERICA,</b>	)	
	)	
<b>Appellee,</b>	)	
	)	<b>Docket No. 08-4215</b>
<b>v.</b>	)	<b>(1:07-cr-00209-TSE)</b>
	)	
<b>WILLIAM J. JEFFERSON,</b>	)	
	)	
<b>Appellant.</b>	)	

**GOVERNMENT OPPOSITION TO DEFENDANT JEFFERSON’S  
MOTION FOR STAY OF MANDATE**

The United States opposes defendant’s motion to stay the mandate. The defendant contends that a stay is necessary in order “to allow the Supreme Court to consider this matter before the case proceeds any further.” Mot. at 2.

“In exceptional cases, a party may obtain a stay of [the] mandate if it can demonstrate that its petition [for certiorari] presents a ‘substantial question and that there is good cause for a stay.’” *Nara v. Frank*, 494 F.3d1132, 1133 (3d Cir. 2007); *see also* Fourth Circuit Loc. R. 41 (Court will not stay its mandate absent “a substantial question” or “good cause or probable cause for a stay”). Specifically, “the party seeking the stay must demonstrate both a ‘reasonable probability of success on the merits’ and ‘irreparable injury absent a stay.’” *Al-Marbu v.*

*Mukasey*, 525 F.3d 497, 499 (7<sup>th</sup> Cir. 2008) (citations omitted). “In order to demonstrate a reasonable probability of succeeding on the merits of a proposed certiorari petition, the applicant must show a reasonable probability that four Justices will vote to grant certiorari and a ‘fair prospect’ that five Justices will vote to reverse the judgment of this court.” *Id.* (citing *California v. Am. Stores Co.*, 492 U.S. 1301, 1307 (1989) (O’Connor, J., in chambers)).

Even if the party seeking a stay has made the required showing, this Court’s decision to grant the stay “is a matter of discretion.” *Id.* (citing 20 *Moore’s Federal Practice* § 341.14 (3d ed. 1997)).

The defendant claims that stay of the mandate is appropriate in this case because the panel’s decision is “in direct conflict with the decisions of other courts of appeals that have addressed” the Speech or Debate Clause issue and requiring him “to go to trial on an indictment obtained in violation of the Clause would cause him irreparable constitutional injury.” Mot. at 2.

First, the defendant is wrong when he claims that a purported conflict among the federal courts of appeals “provides compelling grounds for a grant of certiorari.” Mot. at 3. This Court has already rejected this claim. As defendant concedes in his stay motion, this “conflict” argument was the centerpiece of his *en banc* rehearing petition. *See id.* at 3 (“[a]s set forth in more detail in Congressman

Jefferson’s petition for rehearing *en banc* . . . .”); *id.* at 4 (“[a]s described in more detail in the petition for rehearing *en banc* . . . .”). And, this Court apparently rejected this “conflict” claim when it denied the defendant *en banc* review of the panel’s decision. Indeed, no member of this Court even sought a poll on the matter. In such a context, it cannot be said that the defendant has met his substantial burden and demonstrated a reasonable probability of success on the merits, *i.e.*, a majority of the Supreme Court Justices voting to reverse this panel’s unanimous decision.<sup>1</sup>

Second, the defendant is additionally wrong when he claims that “irreparable injury” will necessarily flow from any trial that precedes adjudication of his certiorari petition. Mot. at 6. At any trial on this matter, the defendant will have every opportunity to “object[] to the introduction of Speech or Debate material at such point(s) in the trial as the Government may propose to put protected material

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<sup>1</sup> To be clear, we do not concede that the panel decision has raised any conflict among the courts of appeals. Indeed, we believe that the defendant inaccurately portrays the panel’s decision when he claims the panel solely held that a “facially-valid indictment was not subject to challenge on the grounds that evidence protected by the Speech or Debate privilege was presented to the grand jury.” Mot. at 3. In fact, the panel upheld the district court’s *in camera* review of the grand jury record as “within its discretion,” and added “that controlling authorities did not compel such a comprehensive review.” 546 F.3d at 314. The panel went on to hold that “we are satisfied that the district court, in conducting the pretrial proceedings, accorded Congressman Jefferson every substantive and procedural protection to which he was entitled.” *Id.*

into evidence.” *United States v. Rostenkowski*, 59 F.3d 1291, 1300 (D.C. Cir. 1995). Thus, “the district court can adequately protect the defendant against the admission of Speech or Debate material as the need arises in the course of trial.” *Id.*

Finally, the defendant completely discounts the government’s interest in prosecuting this indictment without further delay. The defendant now has had a full and fair opportunity to adjudicate on direct appeal his claim that his Speech or Debate Clause rights were somehow violated during the grand jury process. Now, the government should be afforded an opportunity to proceed with its prosecution and avoid any further prejudice attendant delay. *See Nara v. Frank*, 494 F.3d at 1133 (“In a close case, the movant should make a showing that, on balance, the interests of the parties and the public favor a stay.”).

In sum, this is not a close case: the defendant has not shown a “reasonable probability” of success on the merits of his certiorari petition and, at trial, the district court will scrupulously guard against any possible violations of the Speech or Debate Clause. Further, the government has a significant interest in moving forward with this prosecution. This Court should thus exercise its discretion and deny the defendant’s motion for the extraordinary relief of a stay of the mandate.

**CONCLUSION**

For the above stated reasons, this Court should deny Defendant Jefferson's Motion for Stay of Mandate.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on December 22, 2008, I electronically filed the foregoing with the Clerk of Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF user:

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