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9 Attorneys for Plaintiff
 10 UNITED STATES OF AMERICA

11 UNITED STATES DISTRICT COURT

12 FOR THE CENTRAL DISTRICT OF CALIFORNIA

| | | |
|------------------------------|---|-----------------------------------|
| 13 UNITED STATES OF AMERICA, |) | No. CR 07-689-GW |
| |) | |
| 14 Plaintiff, |) | <u>GOVERNMENT'S EX PARTE</u> |
| |) | <u>APPLICATION FOR SENTENCING</u> |
| 15 v. |) | <u>RULING PURSUANT TO FED. R.</u> |
| |) | <u>CRIM. P. 32(b)(1)</u> |
| 16 CHARLES C. LYNCH, et al., |) | |
| |) | |
| 17 Defendants. |) | |
| |) | |

18
 19 The United States, by and through its counsel of record, the
 20 United States Attorney's Office for the Central District of
 21 California, hereby respectfully requests that the Court issue its
 22 sentencing decision and judgment and commitment order with
 23 respect to defendant Charles C. Lynch ("defendant"), in the
 24 above-captioned case.

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 26 //
 27 //
 28 //

1 This application is based on the attached memorandum of
2 points and authorities, and the files and records in this case.
3 An advanced copy of this application was provided to defense
4 counsel by facsimile on October 8, 2009. Defense counsel
5 indicated their opposition to the application and that they will
6 "request a briefing schedule in a seperate pleading."

7 Dated: October 9, 2009

Respectfully submitted,

8 GEORGE S. CARDONA
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9 CHRISTINE C. EWELL
10 Assistant United States Attorney
11 Chief, Criminal Division

12 _____ /s/

13 DAVID P. KOWAL
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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I. INTRODUCTION

3 It has been over fourteen months since defendant was
4 convicted by jury of five felony offenses, eleven months since
5 the presentence report was first disclosed to the parties, and
6 four months since the last sentencing hearing during which the
7 Court estimated that a final sentencing opinion and judgment
8 would issue "within a week." No judgment has yet been entered.
9 The continuing delay is inconsistent with Fed. R. Crim. P. 32,
10 has frustrated the parties' attempts to seek prompt appellate
11 review, and hinders the government's efforts to achieve finality
12 in this prosecution. The government therefore requests the
13 issuance of a sentencing opinion and a judgment and commitment
14 order, or at minimum, asks that the Court set a deadline for the
15 issuance of its decision in accord with the procedures set forth
16 in Local Civil Rule 83-9.

17 II. PROCEDURAL HISTORY

18 On July 13, 2007, defendant and a co-defendant were indicted
19 by a federal grand jury. (CR 1). On August 5, 2008, defendant
20 was convicted by a jury of all five drug trafficking counts
21 against him. (CR 169). On that day, the Court granted
22 defendant's request to extend to 30 days the usual 10-day period
23 for the filing of a new trial motion, which motion defendant
24 filed on September 4, 2008. (CR 169, 179). On September 18,
25 2008, over government objection (CR 178), the Court granted, in
26 part, defendant's request for additional time to file a second
27 new trial motion. (CR 187). On November 3, 2008, the Probation
28 Office disclosed to the parties defendant's Presentence

1 Investigation Report. (See CR 259). On November 11, 2008, the
2 Court found defendant's second new trial motion inadequate, in
3 that it lacked organization or citation to the record or case
4 law. (CR 206 at 2). Rather than deny the motion as the
5 government requested, the Court set a supplemental briefing
6 schedule to allow defendant to file a third new trial motion,
7 which was filed on December 15, 2008. (CR 206, 210).

8 The Court denied defendant's new trial motions on January 5,
9 2009. (CR 217). At that hearing, over the government's request
10 for a "tighter" schedule, the Court also continued from January
11 12, 2009 to February 23, 2009 the date for sentencing, and set a
12 schedule for sentencing briefing to address, among other things,
13 the applicability of mandatory minimum sentences. (Id.; RT
14 1/05/09: 13-32). In rejecting defendant's request for an even
15 lengthier delay, the Court stated that it did not "want this to
16 be a snail court" and noted that "[i]f a person gets convicted in
17 August and we haven't gotten to the sentencing in January, that's
18 pretty slow." (RT 1/05/09: 21). On February 9, 2009, upon
19 stipulation due to the length of defendant's initial sentencing
20 papers, and to permit briefing on the issue of bail pending
21 appeal, sentencing was continued to March 23, 2009. (CR 226,
22 227). Extensive sentencing briefs were filed by the parties in
23 the weeks prior to that hearing.

24 At the March 23, 2009 hearing, all parties acknowledged
25 having received and reviewed both the November 3, 2008
26 presentence report and its March 16, 2009 addendum. (RT 3/23/09:
27 3-4). Although the government was seeking a mandatory minimum
28 sentence for defendant, over government objection, as part of the

1 Court's consideration of discretionary sentencing factors under
2 18 U.S.C. § 3553(a), the Court delayed sentencing to April 30,
3 2009 upon ordering the government to provide additional
4 information from Washington D.C. regarding the government's
5 policy towards marijuana dispensaries. (CR 268; RT 3/23/09: 5-
6 18). The Court also refused to rule on pending legal issues that
7 had already been briefed such as the applicability of the
8 mandatory minimum sentences until first receiving the
9 government's response to its new inquiry, stating that the
10 Court's sentencing decisions were "a gestalt-type of thing."
11 (Id. at 30). On March 27, 2009, the Court conducted a telephonic
12 status conference during which it clarified its request to the
13 government, and overruled the government's arguments that the
14 request was unnecessary. (CR 272; RT 3/27/09: 1-25).

15 At the April 23, 2009 sentencing hearing, the Court reviewed
16 the charges of conviction and made preliminary statements about
17 applicable case law. (RT 4/23/09: 23-30). It read the
18 government's response to the Court's March 27, 2009 inquiry into
19 the record and stated it "takes care of that particular issue,"
20 but made no ruling regarding how the government's response
21 impacted sentencing under section 3553(a) or otherwise. (Id. at
22 31). The Court then made comments about various issues
23 concerning mandatory minimum sentences, and indicated that it did
24 not wish to apply the mandatory sentences, stating that "if I
25 could find a way out, I would." (Id. at 33). It thereafter
26 continued sentencing again to June 11, 2009 and requested further
27 briefing on new questions, not previously referenced by the Court
28 or the parties, regarding interpretation of the safety valve

1 provision and the Court's options for incarceration. (CR 282;
2 Id. at 34-37, 98-99, 102-109). The Court set a further briefing
3 schedule and indicated that prior to the next hearing it would
4 draft a tentative decision "so that you can at least know where
5 my thoughts are." (RT 4/23/09: 103).

6 After further briefing by the parties, but without any
7 tentative decision by the Court, a third sentencing hearing was
8 held on June 11, 2009. (RT 6/11/09: 1-86).¹ The Court said that
9 it had read all the submissions and pleadings of the parties.
10 (29-30, 50). It reviewed the charges of conviction, and the
11 guideline calculations of the probation office and parties. (Id.
12 at 32-37). It discussed other marijuana prosecutions and, after
13 hearing argument, denied defendant's attempts to seek relief from
14 the mandatory minimum sentences other than as provided by the
15 safety valve provision. (38-49, 63). The Court ruled, however,
16 that it would find "the safety valve applicable in this
17 situation." It stated its intent to "put it in writing so there
18 is no confusion as to why I['m] doing that. I will put that in
19 writing hopefully that will be out within a week." (Id. at 65).
20 The Court then sentenced defendant to one year and one day in
21 prison, and to supervised release. (Id. at 65, 884). Over
22 government objection, and with the oral waiver of defendant to
23 not be present for the Court's ultimate decision, the Court
24 declined to explain its balancing of the section 3553(a)
25 sentencing factors, or to otherwise explain the sentence it had
26

27 ¹ The clerk has not entered into the docket the minutes
28 from this hearing, nor any similar record reflecting that the
hearing took place.

1 imposed until its subsequent written sentencing decision. (68-
2 70, 78-80).

3 On June 15, 2009, defendant filed a notice of appeal. (CR
4 298). On July 13, 2009, the government filed a notice of cross-
5 appeal. (CR 301). On August 18, 2009, at the request of the
6 Ninth Circuit, the parties voluntarily dismissed their notices of
7 appeal without prejudice because the Ninth Circuit lacked
8 appellate jurisdiction in the absence of a final ruling and
9 judgment and commitment order from this Court. (CR 310; see 28
10 U.S.C. § 1291). As of the filing of this application, the Court
11 has yet to provide its written rulings regarding sentencing, nor
12 has it yet issued a judgment and commitment order.

13 III. THE COURT SHOULD PROMPTLY ISSUE ITS SENTENCING DECISION

14 Rule 32(b)(1) of the Federal Rules of Criminal Procedure
15 requires that the Court "must impose sentence without unnecessary
16 delay." Fed. R. Crim. P. 32(b)(1). While the timing of
17 sentencing is generally left to the discretion of the district
18 court, that discretion is not unlimited. The Supreme Court has
19 noted that "[t]he time for sentence is of course not at the will
20 of the judge." Pollard v. United States, 352 U.S. 354, 361
21 (1957) (citing Rule 32). Especially where the sentencing
22 procedures under Rule 32 have been observed, further delay
23 frustrates the proper administration of justice. Cf. United
24 States v. MacDonald, 435 U.S. 850, 853-54 (1978) ("The rule of
25 finality has particular force in criminal prosecutions because
26 'encouragement of delay is fatal to the vindication of the
27 criminal law.'" (quoting Cobbledick v. United States, 309 U.S.
28 323, 325 (1940)); Cobbledick, 309 U.S. at 325 ("To be effective,

1 judicial administration must not be leaden-footed."))).

2 In this case, there are none of the usual or accepted
3 reasons for a significant delay in the imposition of sentence.
4 The other co-defendant has been sentenced, and defendant is not
5 cooperating with the government or needed to testify in another
6 proceeding. See Rule 32, Advisory Committee Notes to 1989
7 Amendment (discussing reasons for sentencing delay). Nor is
8 there any factor or issue that has not been briefed by the
9 parties, or ruled on by the Court. (Id.). The Court noted at the
10 last sentencing hearing, over four months ago, that it had
11 reviewed all the relevant pleadings. At that time, all trial and
12 hearing transcripts had been completed, and the Court was
13 sufficiently familiar with the record, case law, and arguments to
14 set forth its ultimate sentencing decisions on the record. The
15 Court also said that it was hopeful that it could issue its
16 written opinion explaining its decisions "within a week." While
17 the Court need not to be held to that precise estimate, the
18 estimate, in combination with the overall state of the record at
19 the time the matter was taken under submission, militates
20 strongly against any further delay.

21 As a result of the absence of a final ruling, the parties
22 have been unable to seek appellate review, notwithstanding their
23 clear interest, as expressed through their protective notices of
24 appeal. Further delay will also harm the proper administration
25 of justice by, among other things, depriving all parties of
26 finality, delaying the deterrent effect of the sentence, and
27 frustrating the government's interest in vindicating violations
28 of federal criminal laws. This is especially true here, where

1 there have been an unusual number of delays between the date of
2 conviction and the final sentencing hearing. Indeed, by the
3 Court's own analysis, were sentencing completed nine months ago,
4 in January 2009, it would have been correct to deem the
5 sentencing process "pretty slow."

6 Analogy to the timing limits established by Local Civil Rule
7 83-9 is apt, and that rule's procedures should be applied by the
8 Court. Rule 83-9 is made applicable to criminal matters by Local
9 Criminal Rule 57-1. See Local Crim. R. 57-1 (civil rules govern
10 criminal proceedings before district court when applicable
11 directly or by analogy). Rule 83-9 provides that when a court
12 has had a matter under submission for more than 120 days, upon
13 notification of the parties, the Court shall within ten days
14 advise the parties in writing of the date of its intended
15 decision. That decision date will then be monitored by the Chief
16 Judge. See Local Civ. R. 83-9.2 through 83-9.5. October 9, 2009
17 will be 120 days since the June 11, 2009 hearing during which the
18 Court issued its oral sentencing conclusions and took under
19 submission its intended issuance of a written explanation and
20 final judgment.

21 While Rule 83-9 applies by its own terms only to non-jury
22 trials and to motions, the present sentencing issues under
23 submission are akin to a motion. In any event, the purpose and
24 structure of Rule 83-9 should inform the Court's discretion under
25 Fed. R. Crim. P. 32(b)(1) in order to avoid unnecessary
26 sentencing delay. Rule 83-9 sets a 120 day period for matters as
27 complex as rulings on a non-jury trial, where the court must make
28 detailed findings of fact and conclusions of law regarding an

1 entire trial. See Fed. R. Crim. P. 23(c); Fed. R. Civil P.
2 52(a)(1). By contrast, here, the issues before this Court are
3 more circumscribed, have been known for many months and fully
4 briefed by the parties, were the subject of multiple hearings,
5 and were sufficiently understood and analyzed by the Court to
6 have stated its ultimate conclusions (though not its reasoning)
7 on the record.

8 IV. CONCLUSION

9 Based on the foregoing, the government respectfully requests
10 that the Court issue its final written sentencing decision and
11 judgment and commitment order or, alternatively, set a deadline
12 for the issuance of its decision and judgment, in accord with the
13 procedures set forth in Local Civil Rule 83-9.

14 Dated: October 9, 2009

Respectfully submitted,

15 GEORGE S. CARDONA
16 Acting United States Attorney

17 CHRISTINE C. EWELL
18 Assistant United States Attorney
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20 _____/s/
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