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8 IN THE UNITED STATES DISTRICT COURT FOR THE  
9 EASTERN DISTRICT OF CALIFORNIA  
10

11 UNITED STATES OF AMERICA, ) NO. 1:08-cr-00220 OWW  
12 )  
13 ) GOVERNMENT'S MOTION FOR PRETRIAL  
14 ) ADMISSIBILITY HEARING OF TAPES  
15 ) AND TRANSCRIPTS OR, IN THE  
16 ) ALTERNATIVE, REQUEST FOR  
17 ) STIPULATIONS  
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26 )  
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28 )  
v. )  
RAUL DELEON, )  
DATE: March 16, 2009  
TIME: 9:00 a.m.  
PLACE: Courtroom Three  
Defendant. ) Honorable Oliver W. Wanger  
\_\_\_\_\_ )

20 The United States, by and through its undersigned counsel,  
21 moves this court for a pretrial order authorizing the  
22 admissibility of the tapes and transcripts in this case. In  
23 support of such motion, the government says as follows:

24 1. This case is currently set to be tried by a jury on  
25 April 7, 2009. The government intends to play numerous telephone  
26 calls derived from court-ordered wiretap orders issued in this  
27 district. These calls are in English, and the government has  
28 prepared (and produced as part of the pretrial discovery process)

1 transcriptions of the calls.

2       2. The authentication of the tapes and transcripts is a  
3 factual issue to be decided by the Court, not the jury, by a  
4 preponderance of the evidence. Fed.R.Evid. 104(a), 901(a); cf.  
5 Zenith Radio Corp. v. Matsushita Electric Industrial Co., Ltd.,  
6 505 F.Supp. 1190, 1219 (E.D. Penn. 1980) ("Required prima facie  
7 showing of authentication need not consist of preponderance of  
8 the evidence, but, rather, all that is required is substantial  
9 evidence from which trier of fact might conclude that document is  
10 authentic; thus, court must only conclude that prima facie  
11 showing has been made in order to admit document, and it is for  
12 trier of fact to consider rebuttal evidence and balance it  
13 against authenticating evidence in order to arrive at final  
14 determination on authentication.") Specifically, the foundation  
15 for wiretap evidence need not be made in the presence of the  
16 jury. To speed the trial in this case, the government is seeking  
17 a pretrial order concerning the authentication and admissibility  
18 of the tapes and the transcripts to be used at trial. See, e.g.,  
19 United States v. Webster, 84 F.3d 1056, 1064 n.4 (8th Cir. 1996);  
20 ([I]t is good practice for the district court to make a pretrial  
21 evaluation of a recording's admissibility.); United States v.  
22 Carbone, 798 F.2d 21, 25 (1st Cir. 1986) ("The preferred way of  
23 handling challenges to the accuracy and audibility of tape  
24 recordings is at a pretrial hearing."); see also United States v.  
25 Inadi, 748 F.2d 812, 816 (3d Cir. 1984). Likewise, the  
26 preferable means of authenticating transcripts of taped  
27 conversations is stipulation between the parties or a pretrial  
28 determination by the court. United States v. Wright, 932 F.2d

1 868, 880 (10th Cir. 1991).

2 3. The foundation for authentication of the wiretap tapes  
3 that will be used in this case follows the procedures set forth  
4 in United States v. Rengifo, 789 F.2d 975, 978 (1st Cir. 1986).  
5 It consists of the agents supervising the wiretaps, who will  
6 testify to the procedures followed to obtain the recordings and  
7 that the equipment used to intercept the telephone calls was in  
8 proper working order. The equipment is designed so that three  
9 identical tape recordings are simultaneously produced. One copy,  
10 the original, was sealed by the respective district courts  
11 pursuant to the requirements of the wiretap statute. The second,  
12 the duplicate original, was placed in secure evidence storage. A  
13 third tape, the working copy, was used for analysis during the  
14 course of the investigation. The government intends to move into  
15 evidence the working copy. In addition, an agent familiar with  
16 the voice of defendant Raul DeLeon will identify the voice of the  
17 defendant in one of the recordings.

18 4. In the alternative, the undersigned invites defense  
19 counsel to stipulate to the authentication and admissibility of  
20 the tapes and transcripts.

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22 DATED: February 23, 2009

Respectfully submitted,

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By: /S/  
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