THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA

V. CASE NO. 8:03-CR-277-T-30TBM

IVAN DOLGUSHUV
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MOTION TO SUPPRESS STATEMENTS AND REQUEST FOR EVIDENTIARY HEARING

COMES NOW, the Defendant, IVAN DOLGUSHUV, by and through his undersigned counsel, and respectfully moves this Honorable Court pursuant to Rule 12(b)(3) of the Federal Rules of Criminal Procedure, for an Order granting the suppression of any and all statements made by the Defendant. As grounds for this motion the Defendant would state:

1. The Miranda rights form given to each of the Defendants was a poor photocopy from an antiquated fax marred with large blackened spots, smudges, wrinkles, margin failure, horizontal blackened lines, vertical whitened lines, slurred lettering, deliberately deceptive small font and indecipherable letters. (See attached Exhibit One, note the fax number on the upper right hand portion of the document). Significant portions of the document can neither be understood nor read. For example, the first three paragraphs are simply not clear enough to be readable because of dark dotting, horizontal blackened lines and invisibility or ghosting where almost apparent letters should exit. Further, between paragraphs six and eight there is an unreadable portion marred by two horizontal blackened lines which

effectively delete the words. Under the area where two signatures exist there is lettering, then mere oblivion.

2. The Defendants were without the cultural background of American citizens who have some preexisting knowledge of the Miranda warning. With no cultural knowledge of the Miranda warning the Defendants could not supply the necessary context to make sense of the document.

3. Because the Miranda warning was unreadable in numerous places, the scattered letters make words that are only decipherable upon reading if one is already familiar with the Miranda warning. For example, in the third paragraph of the Miranda warning there appears to be the word in Russian for *scooter* or possibly the word is for *airplane*. Yet another interpretation of the word is the one apparently intended, *advocate*. Yet the intended word is only arrived at by cultural reference not by the small smudged letters of an old fax. Another example occurs with the word which our cultural references tell us should be the word *rights*. A similar looking word with similar letters as easily discernable is a Russian word for *custom*. (See paragraph 18 for a discussion of misconceptions resulting from cultural confusion even where words were decipherable.)

4. The third paragraph of the Miranda warning is an example of the textual problems found throughout the document. The third paragraph translated into English should approximate the following: *Everything that you say may be used against you*. The first word of the third paragraph, which thankfully is in English lettering and therefore readily rendered for the Court, could be *Bec* or possibly *Bce.* (see Exhibit One) If the word is *Bec* the

Russian meaning is *weight*; whereas the intended meaning of the word is *everything* if the word is *Bce* though to a Russian reader *Bce* could also mean *all the time* or *quite*. The other words of the third paragraph are similarly suspect and require a reader unfamiliar with the Miranda warning to reconstruct letter by letter what the words were intended to convey. Yet there is a far more significant problem which distorts and undermines the intended meaning. Instead of reading *Everything that you say may be used against you* a Russian reader unfamiliar with Miranda would read it literally as a command to speak. The word, as apparently misspelled in Russian on the Miranda form, strikes an imperative mood (*you must say*) rather than the conditional mood (*if you say*). The Miranda warning should be straightforward and easily understood not ambiguous hieroglyphics.

5. Even where words are somewhat readable no attempt was made by the interrogators to ascertain if the Defendants understood the context in which the words were used in the Miranda warning.

6. The interrogators displayed limited knowledge of the Russian language. The interrogators asked the Defendants to speak very slowly so that they could understand him. Further, when the interrogators spoke to the Defendants it was with difficulty resulting in incoherent questions. The language barrier was so significant that the questioners refused to listen (or could not translate) explanatory answers but demanded that the Defendants simply agree or disagree with statements which the interrogators had already written. As evidence of this a comparison of the purported Miranda statements by the Defendants shows common use of *boat-case words* which

none of the Defendants had ever used, for example, use of the word fastboat, which is the language of the interrogators not the Defendants. Further, the questions and statements of the interrogators were often nonsensical or open to various interpretations. It was immediately clear to the Defendants that the interrogators confused words, misused words, and misunderstood the language.

7. The interrogators failed to record the interrogations of the Defendants in audio or video.

8. Further, the interrogators became so befuddled and confused while attempting to communicate with the Defendants that the interrogators were unable to make adequate actual contemporaneous notes of the exchange, only later making frantic belated scribbles *in English* as other Co-Defendants were interrogated with resulting confusion and misapplication as to what each and every Defendant actually said.

9. No Russian language translation of the statement of the Defendants were ever made by the interrogators nor were the Defendants ever given an opportunity to review their alleged statements in the Russian language (note that the Defendant, IVAN DOLGUHUV, is of Russian descent though most of the Co-Defendants are of Lithuanian descent and Russian is their second language; despite this only the Russian language was used by the interrogators without proper determination as to each Defendant's level of understanding of Russian).

10. Before and during the interrogations various weapons and firearms of police, marshals and interrogators were visible and purposely displayed in a manner designed to intimidate the Defendants.

11. The interrogators harshly threatened the Defendants and gave false promises of freedom to the Defendants if the Defendants would agree to what the interrogators said.

12. The interrogators told various Defendants that if they signed the Miranda form it would "speed up the process and get you home" and that "if you do not cooperate with us we will make it worse for you" and that "the prosecutor will help you during the trial" and that failure to sign the Miranda warning would signify guilt. Further, the interrogators told various Defendants that failure to sign the Miranda warning would result in spending twenty-five years or more in prison.

13. The Defendants were not allowed to sleep for three days before giving their statements. Upon the seizure of the vessel seventeen men were grouped in unsanitary and intolerably close proximity in a sauna like small cabin with no fresh air while the temperatures soared. The men suffered from diarrhea, night sweats, aches, cramps and sleep deprivation. The sleeplessness was also caused by the actions of members of the Coast Guard who kept firearms upon the Defendants in an effort to intimidate them.

14. The sanitary conditions endured by the Defendants for the three days from the time the vessel was seized by the United States until the freighter reached the port of Tampa were purposefully humiliating. The men

were often unable to use a toilet and therefore water was purposely kept in short supply. The men were filthy and unable to keep themselves clean.

15. Once the freighter arrived in Tampa the Defendants were fed a small breakfast at approximately eight in the morning, then they were confined to their small shared cabin in shackles and chains. Sometime before 12pm they boarded a bus and were driven to Pinellas County, Florida. The bus was deliberately kept very cold which after the extreme heat, cramped quarters, unsanitary conditions and discomfort of the ship weakened the men physically and psychologically. The bus had no toilet facilities. The men were in leg irons and hand irons shackled together in chains and given light paper garments with no coats. The men were left on the bus for approximately nine hours before finally being questioned between nine and midnight. The Defendants had not been given food since the morning and were not given food again until after the questioning.

16. The Defendants were forced to wait on the bus for approximately twelve hours as the Government deliberately avoided taking the men to a United States Magistrate. Apparently, the Government gave the Magistrate's office the impression that the men were still in transit though the men were in fact only a few blocks from the United States District Court building in Tampa, Florida until the Government moved the men to Pinellas County, Florida. This deliberate delay was useful to the Government in that it foreclosed by another day a United States Magistrate's ability to relay to the Defendants their rights under American law and directly delayed the United States Magistrate's appointment of attorneys to represent the Defendants.

17. Article 36 of the Vienna Convention on Consular Relations explicitly obligates treaty signatories to allow foreign nationals access to the consul of their home country. As a party to this treaty the United States has an obligation to notify foreign nationals charged in criminal proceedings that this assistance is available should they choose to take advantage of it. Lithuania is a party to this treaty as is the United States. The Defendants are Lithuanian nationals. The Defendants were deliberately never informed of their right to access the consul of Lithuania nor was the government of Lithuania informed about the arrest of its citizens. Had either the nationals or the government of Lithuania been properly informed, as required by treaty, the Defendants would likely have had representation by attorneys at the time of their statements.

18. Lithuania has a long history of being occupied alternatively by the Germans and Russians. Although in 1991, Lithuania gained its independence from the Soviet Union, Soviet troops did not leave the country until 1994. Yet it was not until 1999 that Lithuania established a Lithuanian court system complete with a Code of Criminal Conduct and Code of Criminal Procedure. Until 1999 the Soviet system was still in place and with it the inherent corruption that finally undermined it. The Defendants naturally have a distrust of any state sponsored police apparatus and the Defendants shared a legitimate subjective fear of police brutality in interrogations. The Defendants, having lived in a totalitarian society for most of their lives, have much different notions of the meanings of many of the words in the Miranda warnings which Americans merely take for granted as their inalienable rights. For example, the *right to remain silent* culturally to a Lithuanian signifies the notion that though one could be silent, *the silence itself will be*

evidence at one at one's trial. Further, the Soviet system had attorneys or advocates, but the advocates assigned by the Government were part and parcel of the Soviet system often working with the prosecutors to insure the certain sanctity of prearranged verdicts. No attempt was made by the interrogators to dispel these and many other misconceptions the Defendants had about the Miranda rights, the interrogators themselves and the nature of an American trial. Instead the interrogators used these incorrect notions, and added a few more of their own, to gain unfair leverage over the Defendants in persuading them to make statements. It is especially troubling that the interrogators told various Defendants that "the prosecutor will help you during the trial." (see paragraph 12, above)

19. The Defendant, IVAN DOLGUSHUV, is 55 years of age. He was the cook aboard the vessel.

MEMORANDUM OF LAW

The Government may make no use of a waiver, or any other statement involuntarily obtained from a defendant in violation of the Fifth Amendment. Mincey v. Arizona, 437 U.S. 385 (1977) Further, the Government has the burden to prove, in addition to formal compliance with Miranda, that any incriminating statement obtained from the Defendant was given voluntarily. Lego v. Twomey, 404 U.S. 477 (1972)

The subjective background of the Defendant is relevant to a determination of whether the Government elicited a knowing and intelligent waiver of Miranda rights. The determination of voluntariness of a statement requires consideration of the totality of the circumstances, including

personal history, level of educational attainment, and physical condition of the accused, as well as the circumstances by which the Government elicited the statement. See U.S. v. Montoya-Arruba, 749 F.2d 700 (11th Cir.1985), Schneckloth v. Bustamonte, 412 U.S. 218 (1973); see also U.S. v. Garibay, 143 F.3d 534 at 537-538 (9th Cir. 1998) in which a Defendant with limited English skills and low mental capacity did not validly waive his Miranda rights.

A statement is involuntary if it is given under physical intimidation or psychological pressure, but even subtle psychological coercion either by promises of leniency or indirect threats, may also render a statement involuntary. Arizona v. Fulminante, 111 S. Ct. 1246 (1991), Townsend v. Sain, 307 U.S. 293 (1963); see also for subtle coercion, United States v. Tingle, 658 F2d 1332(9th Cir. 1981).

Physical abuse resulting in suppression of a statement may consist of tactics which include the denial of food. See Payne v. Arkansas, 356 U.S. 560 (1958), in which food was denied a Defendant for twenty-five hours. Also, a Defendant's lack of sleep or lack of food before a statement should be considered by the Court. See Clewis v. Texas, 386 U.S. 707 (1967).

Foreign culture and inexperience with the American judicial system is an element in the totality of the circumstances test. See Blanco v. Singletary, 943 F2d 1477 (11th Cir. 1991), see also United States v. Guerrero-Herrera, 590 F.2d 238 (7th Cir. 1978). A lack of facility with the language spoken by the interrogators will also bear upon the issue of voluntariness and the language used must be sufficient to appraise the accused of the rights set forth in Miranda. Further, a translation must include each of the core Miranda rights in language which the suspect can understand. See Gallegos v. State, 153 Neb 831 (1950), aff'd, 342 U.S. 55 (1951); Duckworth v.

Eagan, 492 U.S. 195, 202-203 (1989); United States v. Hernandez, 913 F.2d 1506, 1510 (10th Cir. 1990). For a systematic discussion of cultural issues that impact a federal criminal case, see generally Cultural Issues In Criminal Defense, (James Connell, Rene Valladares, eds. 2003).

In the case at bar the Defendants were subjected to physical and psychological abuse. Though the Department of Justice may not be directly responsible for the treatment of the Defendants while they were at sea, the United States should not benefit from the conduct of the Coast Guard when mistreatment is proven.

For at least three days once in United States custody before arrival at the port of Tampa seventeen men were grouped in unsanitary and intolerably close proximity in a sauna like small cabin of a very hot freighter with no fresh air while the temperatures soared. The men suffered from exhaustion, diarrhea, night sweats, aches, cramps and sleep deprivation. The men were then placed on a bus that was unreasonably cold and left there cold and without food for nine to twelve hours before they were questioned late at night. The Government deliberately used their fatigue, frustration and fear as an aid in obtaining statements.

When looking at the totality of the circumstances in the case at bar it is clear the Defendants never made a knowing or intelligent waiver. In order to be knowing and intelligent, a waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. See Moran v. Burbine, 475 U.S. 412 (1986).

Besides the physical and psychological pressure the Defendants were confronted with an unreadable Russian Miranda form, defective translation of the Miranda form (with imperative demands *you must say*, rather than

conditional *if you say*), interrogators with limited Russian language skills, misleading statements by the interrogators, and the inexperience of the Defendants with the American judicial system combined with their lack of familiarity with American culture. The Defendants in the case before the Court shared a willingness to obey officers because of their Soviet experience. The Defendants shared a legitimate subjective fear of police in interrogations which made them much more likely to acquiesce to questioning.

All of this when considered together should render their statements involuntary. The interrogators exploited these shortcomings to overcome the will of the Defendants. (See, Code of Responsibility of the Official Interpreters of the United States Courts, Canon 12 (1979) for the problem of interpretation by biased interpreters.)

Federal law provides that a Defendant be promptly brought before a United States Magistrate after his arrest on a federal charge. See 18 U.S.C. Section 3501(c). An unexplained unreasonable delay between arrest and arraignment can itself form the basis for involuntariness. See U.S. v. Alvarez-Sanchez, 511 U.S. 350, (1994), McNabb v. U.S., 318 U.S. 332 (1943)

In the case at hand the Defendants were taken at sea by the United States Coast Guard and apparently brought to Tampa sometime before or during May 31, 2003. The Defendants were kept in the vessel overnight and finally brought from the vessel sometime before 12pm on June 1, 2003.

The Government had advance notice of the date and time of the Defendants' arrival, after all, the vessel took at least three days to reach port in Tampa after the Coast Guard seized it. The Government deliberately avoided bringing the men to Tampa sooner. Once in Tampa the Government

deliberately failed to bring the men before a United States Magistrate instead making them wait on a bus for approximately nine hours and moving the men to Pinellas County, Florida where between 9pm and midnight on June 1, 2003 statements were taken from the Defendants. Another day passed before the Defendants were finally taken to the federal magistrate on June 2, 2003. In this case the delay was clearly an abuse: caused, arranged and exploited by the Government in order to make certain the men were not properly appraised of their rights by a disinterested, impartial United States Magistrate.

Not only did the Government violate United States law in failing to bring the Defendants to a federal magistrate without unnecessary delay, the Government in this case also violated Section 36 of the Vienna Convention on Consular Relations which the United States ratified in 1969 and which under the Supremacy Clause is binding authority. See 21 U.S.T. 100, T.I.A. # 6820; see also U.S. Const. art. VI, cl.2. The Defendants in this case were interrogated without being informed of their rights to consult with consular officials who could and would have supplied attorneys for the Defendants before statements were given.

Article 36 of the Vienna Convention on Consular Relations establishes protections for foreigners arrested abroad. Subparagraph 1(b) provides as follows:

> If he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be

forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph.

The Defendants in this case were interrogated without the benefit of having been informed of their rights to consult with consular officials, without being brought to a United States Magistrate in a timely manner, without a readable or understandable Miranda form, without food, without medical aid, without sleep and without hope.

In Watts v. Indiana, the Supreme Court observed: “There is torture of the mind as well as body; the will is as much affected by fear as by force. And there comes a point where this Court should not be ignorant as judges of what we know as men.” See Watts v. Indiana, 338 U.S. 49, at 52 (1949)

Before the Government can use any of the Defendant’s statements as evidence, it must establish that they were taken in accord with the above legal principles.

WHEREFORE, the Defendant, by and though his undersigned attorney, respectfully requests this Honorable Court to either enter an appropriate order granting this Motion to Suppress Statements or to issue an order denying it with specificity. Further, the Defendant requests an evidentiary hearing.

Respectfully Submitted,

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By:______________________
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by US Mail delivery to the named parties below and to the United State's Attorney's Office, 400 North Tampa Street, Suite 3200, Tampa, Florida 33602, this 19th day of January, 2004.

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