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TITLE: SUBJECT: FISCAL GENERAL SAYS RE-SURRENDER POSSIBLE

- UNDER DECREES

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SUBJECT: FISCAL GENERAL SAYS RE-SURRENDER POSSIBLE

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1. (U) SUMMARY: THE PROSECUTOR GENERAL RECENTLY SUGGESTED THERE IS NOTHING IN THE SURRENDER DECREES PROHIBITING SENTENCE REDUCTIONS FOR ESCAPED SURRENDEREES IF THEY RESURRENDER. IN OTHER WORDS, PABLO ESCOBAR COULD RESURRENDER AND DERIVE SENTENCE REDUCTIONS FOR ANY CRIME CONFESSED TO EXCEPT THE MINOR ONE ALREADY CONFESSED TO A YEAR AGO. IN THE END, HE MAY RECEIVE AS LITTLE AS 12 TO 15 YEARS, SOMETHING THE GOC DOESN'T WANT. END SUMMARY.

2. (U) IN A RECENTLY PUBLISHED OPINION, FISCAL GENERAL GUSTAVO DE GREIFF ASSERTED THAT THE 1990/91 SURRENDER DECREES, WHICH WERE CONVERTED INTO LAW IN 1991, DO NOT PROHIBIT AN ESCAPED SURRENDEREE FROM AGAIN TAKING ADVANTAGE OF LEGAL SENTENCE REDUCTION BENEFITS SHOULD HE SURRENDER A SECOND TIME. DE GREIFF BELIEVES, HOWEVER, THAT AN ESCAPEE WOULD LOSE ANY BENEFITS PREVIOUSLY GRANTED FROM THE INITIAL CONFESSION. DE GREIFF'S OPINION DERIVES FROM THE CONCEPT THAT IF SOMETHING IS NOT SPECIFICALLY ALLOWED OR DISALLOWED IN THE LAW, IT CANNOT BE IMPOSED, I.E., THE SURRENDER DECREES CONTAIN NO PROHIBITION AGAINST A SECOND SURRENDER FOLLOWING AN ESCAPE; THEREFORE A SECOND SURRENDER WITH BENEFITS IS POSSIBLE.

3. (C) THE GOC HAS BEEN FIRM IN ITS ASSERTION THAT ANY SURRENDER BY ESCOBAR MUST BE UNCONDITIONAL.

REVIEW AUTHORITY: James Cooper, Senior Reviewer

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NEVERTHELESS, ASSUMING DE GREIFF'S INTERPRETATION OF THE LAW IS CORRECT (AND WE THINK IT IS), ESCOBAR CAN SURRENDER, CONFESS TO MULTIPLE CRIMES, AND RECEIVE A REDUCTION IN SENTENCE FOR DOING SO. PROOCURADOR GENERAL CARLOS GUSTAVO ARRIETA, IN A CONVERSATION WITH AMBASSADOR, DCM AND POLCOUNS, NOTED THAT ESCOBAR COULD CONFESS TO ALL CRIMES FOR WHICH HE IS LIKELY TO BE CONVICTED, I.E., ESCAPE FROM PRISON, KIDNAPPING (FORMER VICE MINISTER EDUARDO MENDOZA WILL TESTIFY THAT HE WAS HELD HOSTAGE) AND PERHAPS EVEN HOMICIDE.

4. (C) COMMENT: IN OTHER WORDS, ESCOBAR AND COHORTS COULD RESURRENDER AND AVAIL THEMSELVES OF SENTENCE REDUCTION BENEFITS BY CONFESSING ADDITIONAL CRIMES. SINCE WE UNDERSTAND THAT ESCOBAR'S ONLY PREVIOUSLY CONFESSED CRIME WAS SMUGGLING COCAINE INTO MARTINIQUE, A CRIME FOR WHICH HE WAS ALREADY CONVICTED IN A FRENCH COURT, THE RIGHT TO SURRENDER AGAIN AND CONFESS ADDITIONAL CRIMES WOULD SEEM TO HOLD OUT CERTAIN ADVANTAGES. HE AND HIS LAWYERS KNOW THAT THE POLICE ARE NOT GOING TO DESIST IN THEIR EFFORTS TO LOCATE HIM AND BRING HIM IN. HE CANNOT LEAVE THE COUNTRY FOR FEAR OF APPREHENSION AND EXTRADITION TO THE UNITED STATES. RESURRENDER APPEARS TO BE ESCOBAR'S BEST OPTION.

5. (C) IN COLOMBIA, THE CUMULATIVE SENTENCE FOR ALL CONFESSED CRIMES, NO MATTER HOW MANY THERE ARE, IS 30 YEARS - THE CONCEPT OF CONSECUTIVE SENTENCES DOES NOT EXIST. UNLESS ESCOBAR IS CONVICTED OF A CRIME TO WHICH HE HAS NOT CONFESSED, THE SENTENCE REDUCTION PROCEDURE WOULD BEGIN AT THE CUMULATIVE 30 YEARS. ESCOBAR WOULD RECEIVE A ONE-THIRD REDUCTION FOR CONFESSING, PERHAPS ANOTHER ONE-SIXTH FOR IMPLICATING CO-CONSPIRATORS, MOST OF WHOM HAVE BEEN MURDERED, OR FOR TURNING OVER TO THE STATE SOME OF HIS ILL-GOTTN GAINS (ILLICIT ENRICHMENT). IF HE WORKS OR STDIES WHILE INCARCERATED, HE RECEIVES ADDITIONAL REDUCTION (THE CONCEPT OF INELIGIBILITY FOR THA REDUCTION DOES

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NOT EXIST).

6. (C) IN A WORSE CASE SCENARIO, ESCOBAR COULD BE A FREE MAN 12 TO 15 YEARS AFTER SURRENDERING, SOMETHING THE GOC WOULD PREFER DID NOT OCCUR. NEVERTHELESS, IF ESCOBAR DOES FIND A WAY TO SURRENDER SUCCESSFULLY, WITH GOOD LEGAL ADVICE, WHICH HE CERTAINLY HAS, HE MIGHT WELL OBTAIN A REDUCED SENTENCE IN NOT TOO ARDUOUS CONDITIONS (MAXIMUM SECURITY FACILITIES COMPARABLE TO THAT AT MARION, ILLINOIS DO NOT EXIST). WHILE ESCOBAR WILL NOT GET ANOTHER ENVIGADO NO MATTER WHERE HE IS IMPRISONED, ODDS ARE HE WOULD SOON HAVE MANY OF THE AMENITIES -- TV, BETAMAX, TELEPHONES, VISITORS, ETC. -- DEEMED STANDARD FOR AFFLUENT CONVICTS IN LATIN AMERICAN PRISONS. END COMMENT.

7. (U) DE GREIFF'S LETTER, TRANSLATED BELOW, RESPONDS TO A QUERY FROM MINISTER OF JUSTICE ANDRES GONZALEZ REQUESTING THE FISCAL'S FORMAL INTERPRETATION OF THE STATUS OF THE SURRENDER DECREES. GONZALEZ REQUESTED CLARIFICATION OF HOW THE LAW WOULD BE APPLIED IN THE CASE OF THE ESCAPE OF A PERSON WHO HAD PREVIOUSLY SURRENDERED. DE GREIFF'S RESPONSE WAS PHRASED IN GENERAL TERMS, DISAVOWING ANY SPECIFIC CONNECTION TO THE ESCOBAR SITUATION. THE TEXTS OF BOTH THE QUERY AND THE RESPONSE WERE PUBLISHED IN THE AUGUST 15 EDITION OF EL TIEMPO. BELOW IS EMBASSY'S UNOFFICIAL TRANSLATION OF DE GREIFF'S LETTER.

8. (U) BEGIN TEXT OF UNOFFICIAL TRANSLATION:

TWO LEGAL RULES DETERMINE WHEN AN ACCUSED FORFEITS THE BENEFITS AVAILABLE UNDER THE REGIME OF SUBMISSION TO JUSTICE (THE SURRENDER DECREES).

ARTICLE 4 OF DECREE 2372/1990, INCORPORATED AS PERMANENT LEGISLATION BY ARTICLE 2 OF DECREE 2265/1992 PROVIDES: "IN ACCORDANCE WITH THE PROCEDURES IN DECREE 2047/1990 AND IN THIS DECREE (2372), AN ACCUSED FORFEITS THOSE RIGHTS WHICH HE MAY HAVE OBTAINED BY CONFESSING, SHOULD HE ESCAPE OR ATTEMPT ESCAPE."

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ON THE OTHER HAND, ARTICLE 2 OF DECREE 303/1991, INCORPORATED AS PERMANENT LEGISLATION BY ARTICLE 4 OF DECREE 2265/1991 PROVIDES: "ANY CRIMINAL ACT OR CONDUCT ATTRIBUTABLE TO THE ACCUSED WHICH, CONTRARY TO THE SUBMISSION DECREES, PROVIDED FOR UNDER DECREES 2047 AND 3030 OF 1990, CAUSE THE FORFEITURE OF ANY BENEFITS THEREIN SET FORTH, SHALL BE PROVEN DURING THE PROCEEDINGS, SHALL OPERATE FROM THE DATE THE SENTENCED IS EXECUTED."

THE FOLLOWING CONCLUSIONS CAN BE DRAWN FROM THE ABOVE PRINCIPLES:

1. ESCAPE OR ATTEMPTED ESCAPE CAUSE THE FORFEITURE OF THE BENEFIT OF SENTENCE REDUCTION BY CONFESSION; THAT IS, ONE-THIRD, PURSUANT TO ARTICLE 10 OF DECREE 3030/1990.
2. THE ONE-SIXTH REDUCTION FOR COOPERATION WITH JUDICIAL AUTHORITIES IS NOT FORFEITED BY THE ACCUSED BY ESCAPE OR ATTEMPTED ESCAPE. OF COURSE, IT IS NECESSARY TO PROVE IN THE SUBMISSION PROCEEDINGS THAT COOPERATION LEADING TO THE IDENTIFICATION OF OTHER PARTICIPANTS AND/OR ILLEGALLY OBTAINED PROPERTY OCCURRED. THIS CONCLUSION RESULTS FROM THE SPECIAL CHARACTER OF DECREE 2372/1990 AND, BECAUSE THE SOLE ACCUSATION (IDENTIFICATION OF OTHER PARTICIPANTS OR ILLEGALLY OBTAINED PROPERTY) COULD RESULT IN THE ABOVE-INDICATED REDUCTION, WITHOUT PREJUDICE FOR THE ESCAPE OR ATTEMPT THEREOF.
3. IN ORDER FOR FORFEITURE OF THE BENEFIT OF PENALTY REDUCTION FOR CONFESSING, THE ESCAPE OR ATTEMPTED ESCAPE MUST BE PROVEN IN A FINDING OF CRIMINAL

CULPABILITY OF THE ACCUSED.

ON THE OTHER HAND, IF AN INDIVIDUAL HAS ESCAPED, IT IS PRESUMED (REBUTTABLE PRESUMPTION) THAT HE ACTUALLY ESCAPED AND THEREFORE WOULD FORFEIT THE PENALTY REDUCTION BENEFITS FOR CRIMES CONFESSED DURING THE SURRENDER PROCEEDINGS. IT DOES NOT PROSCRIBE, HOWEVER, A NEW SUBMISSION TO JUSTICE, CONSIDERING THAT ARTICLE 1 OF DECREE 303/1991, INCORPORATED AS PERMANENT LEGISLATION BY ARTICLE 4 OF DECREE

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2265/1991, DID NOT PROHIBIT SUCH A POSSIBILITY, AS IT DID IN THE PAST ARTICLE 1 OF DECREE 3030/1990.

ARTICLE 1 OF DECREE 303/1991 PROVIDES:

"PERSONS WHO SUBMIT BEFORE JUSTICE UNDER THE CONDITIONS AND BY REASON OF THE CRIMES HEREIN CONTEMPLATED, SHALL BE ENTITLED TO THE INDICATED REDUCTION OF PENALTY FOR CONFESSED CRIMES, COMMITTED PRIOR TO THE DATE OF SURRENDER, AS LONG AS THEY EFFECTIVELY COMPLY WITH THE PUNISHMENT OF IMPRISONMENT CONTAINED IN THE RESPECTIVE SENTENCE AND IT IS CONTEMPLATED IN THIS DECREE."

FROM THIS CONCEPT, IT IS CLEARLY DEDUCED THAT TO AGAIN GRANT THE BENEFIT OF REDUCTION OF PENALTY FOR CONFESSING, IT IS IMPERATIVE THAT THE INDIVIDUAL CONFESS CRIMES COMMITTED PRIOR TO THE DATE OF THE SURRENDER AND THAT CONFESSION SERVE TO PRESCRIBE A SENTENCE.

IN CONCLUSION:

1. ESCAPE OR ATTEMPTED ESCAPE CAUSES THE ACCUSED TO FORFEIT THE PENALTY REDUCTION FOR CONFESSING.
2. OTHER BENEFITS SUCH AS PENALTY REDUCTION FOR COOPERATION WITH JUDICIAL AUTHORITIES ARE NOT FORFEITED BY ESCAPE OR ATTEMPTED ESCAPE.
3. A NEW SURRENDER IS POSSIBLE BY AN INDIVIDUAL WHO HAS ESCAPED, BUT HE FORFEITS THE BENEFITS OBTAINED FROM HIS INITIAL SURRENDER, AS LONG AS HE IS CONVICTED OF THE CRIME OF 'ESCAPE'.
4. WITH THE NEW SURRENDER, THE INDIVIDUAL ACQUIRES THE POSSIBILITY OF OBTAINING PENALTY REDUCTION BY CONFESSING CRIMES DIFFERENT FROM THOSE CONFESSED IN THE FIRST SURRENDER.
5. THE INDIVIDUAL ALSO ACQUIRES THE POSSIBILITY OF OBTAINING PENALTY REDUCTION FOR THE IDENTIFICATION OF OTHER ACTORS OR PARTICIPANTS IN CRIMINAL ACTIONS COMMITTED PRIOR TO HIS FIRST OR NEW SURRENDER, OR BY THE IDENTIFICATION OF PROPERTY ILLEGALLY OBTAINED.
6. ADDITIONALLY, ACCORDING TO ARTICLES 7 AND 9 OF DECREE 3030/1990, THE INDIVIDUAL HAS THE POSSIBILITY OF A "JUDICIAL CONCURRENCE" (CASES TO BE TRIED TOGETHER AND RESULTING SENTENCES TO RUN CONCURRENTLY)

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OF PROCEEDINGS AND PENALTIES.
ALL OF THE ABOVE DOES NOT IMPEDE, ON THE OTHER HAND,
WITH THE PRESENCE OF THE ACCUSED, THE APPLICATION OF
PROCEDURES TO OBTAIN AN EXPEDITIOUS TERMINATION OF THE
PROCEEDINGS, ACCORDING TO THE PROVISIONS OF ARTICLE 37
OF THE CRIMINAL PROCEDURES CODE (PLEA BARGAIN
PROVISIONS).

AS YOU (MINJUS) WELL-NOTED IN YOUR LETTER, THE
CONTENTS OF THIS LETTER DO NOT COMPROMISE THE POSITION
OF THE OFFICE OF THE FISCAL GENERAL IN CONCRETE CASES
IN WHICH THIS OFFICE MAY HAVE AN INTEREST. THIS
LETTER ONLY EXPRESSES GENERAL AND ABSTRACT LEGAL
REGULATIONS. END TEXT. BUSBY

END OF MESSAGE CONFIDENTIAL



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