

LFC Requester: \_\_\_\_\_

AGENCY BILL ANALYSIS  
2019 REGULAR SESSION

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*{Include the bill no. in the email subject line, e.g., HB2, and only attach one bill analysis and related documentation per email message}*

**SECTION I: GENERAL INFORMATION**

*{Indicate if analysis is on an original bill, amendment, substitute or a correction of a previous bill}*

Check all that apply:

Original  Amendment \_\_\_\_\_  
Correction \_\_\_\_\_ Substitute \_\_\_\_\_

Date Feb. 9, 2019

Bill No: SB486

Sponsor: Gregory A. Baca  
Short Title: Firearms & Ammo of Incompetency Claims  
Agency Name and Code Number: Administrative Office of the District Attorneys 264  
Person Writing: Gail MacQuesten  
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**SECTION II: FISCAL IMPACT**

**APPROPRIATION (dollars in thousands)**

Appropriation		Recurring or Nonrecurring	Fund Affected
FY19	FY20		
0	0	n/a	n/a

(Parenthesis ( ) Indicate Expenditure Decreases)

**REVENUE (dollars in thousands)**

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY19	FY20	FY21		
0	0	0	n/a	n/a

(Parenthesis ( ) Indicate Expenditure Decreases)

**ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)**

	<b>FY19</b>	<b>FY20</b>	<b>FY21</b>	<b>3 Year Total Cost</b>	<b>Recurring or Nonrecurring</b>	<b>Fund Affected</b>
<b>Total</b>		Minimal	Minimal	Minimal	Recurring	General

(Parenthesis ( ) Indicate Expenditure Decreases)

Duplicates/Conflicts with/Companion to/Relates to: HB8; HB40; HB35; HB87; HB105; HB130; SB8; SB201

Duplicates/Relates to Appropriation in the General Appropriation Act: none found

**SECTION III: NARRATIVE**

**BILL SUMMARY**

Synopsis:

SB486 enacts a new section of the Criminal Procedure Code requiring a defendant in a criminal trial to relinquish all firearms and ammunition from the time the defendant makes a claim of incompetency to stand trial until the court makes a determination of the defendant's competency.

If the court makes a finding of probable cause that the defendant has custody or control of, owns or possesses a firearm or ammunition, the court shall issue a search warrant. A law enforcement officer shall take possession of all firearms and ammunition, give the defendant an inventory and file a copy of the inventory with the court.

If the court makes a finding of probable cause that the defendant still has firearms or ammunition, or has obtained firearms or ammunition, the court shall issue another search warrant.

The law enforcement agency may not charge the defendant any fee for storing the firearms or ammunition.

Upon a finding by the court that the defendant is competent to stand trial, the court shall return all firearms and ammunition.

**FISCAL IMPLICATIONS**

Note: major assumptions underlying fiscal impact should be documented.

Note: if additional operating budget impact is estimated, assumptions and calculations should be reported in this section.

The district attorneys will have some additional costs, because they will be involved in the probable cause hearings associated with the competency hearing.

**SIGNIFICANT ISSUES**

It is a violation of due process to prosecute a defendant who is incompetent to stand trial. To be considered competent, a defendant must (1) understand the nature and significance of the proceedings, (2) have a factual understanding of the charges, and (3) be able to assist in his own defense. *State v. Flores*, 2005-NMCA-135, ¶ 16, 138 N.M. 636, 124 P.3d 1175. *State v. Gutierrez* (N.M. App., 2015). Competency may be raised at any time, and may be raised by someone other than the defendant. If the court finds that the defendant is incompetent to stand trial, but not dangerous, the court may dismiss the criminal case. Further detention may be available under the civil commitment statutes. If the defendant is incompetent and dangerous, the court may impose commitment under the mental incompetency statutes.

Under SB486 if the defendant claims incompetency to stand trial, he or she is to relinquish firearms and ammunition. The court may, after a finding of probable cause, issue a search warrant for firearms and ammunition. The firearms and ammunition will be held until there is a finding that the defendant is competent to stand trial.

Many states have laws addressing possession of firearms by persons who are mentally incompetent. See: <http://www.ncsl.org/research/civil-and-criminal-justice/possession-of-a-firearm-by-the-mentally-ill.aspx> And under federal law it is illegal to sell guns to a person who has been found incompetent to stand trial. See **Title 27 U.S.C. section 478.11**. But New Mexico's only law addressing the issue is its prohibition against issuing a concealed carry license to a person who has been adjudicated mentally incompetent or committed to a mental institution. See Section 29-19-4 NMSA 1978.

SB486 raises a number of practical issues:

1. Does the definition of "incompetent to stand trial" reflect the sort of mental competency issues that make possession of a firearm a danger?
2. SB486 applies only if the defendant raises the issue of competency. (It is not clear if that includes situations in which the issue is raised by defense counsel, which is more likely.) If the concern is that persons found incompetent to stand trial should not have firearms, then firearms should be removed from any individual who is found incompetent to stand trial, whether the individual raised the issue, or if the court or prosecutor raised the issue. As written, if the court raised the issue and found the defendant incompetent, the defendant would keep his or her firearms.
3. SB486 contains no provision addressing what happens if the defendant is never found competent. Presumably, the defendant would never get his or her firearms and ammunition back. But does law enforcement hold the firearms and ammunition forever?
4. If a defendant has been found incompetent, and the court has dismissed the criminal case, what can the defendant do to be determined "competent" and have his or her ability to have firearms restored? If the case has not been dismissed with prejudice, will the defendant who seeks restoration of his or her right to firearms be required to go to trial on the original charges?
5. Will a defendant who is convicted of a crime be able to successfully argue that he or she was incompetent to stand trial, but was forced to choose between the constitutional right to bear arms and the constitutional due process right not to be tried while incompetent? Does SB486 put an unconstitutional burden on defendants who want to raise a competency issue?

## **PERFORMANCE IMPLICATIONS**

See Significant Issues, above.

## **ADMINISTRATIVE IMPLICATIONS**

See Significant Issues, above.

## **CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP**

There are a number of bills pertaining to firearms:

- HB40: Background checks for firearm sales at gun shows
- HB35: Requiring firearms licensees who buy a gun to request the state Department of Public Safety check to see if the gun is stolen
- HB87: Domestic violence and firearm possession
- HB105: Increasing penalties under the firearm enhancement statute
- HB130: Adding firearms crimes and penalties
- SB8: Background checks
- SB201: Gun sales
- HB8 and SB8: Background check for firearm sales

## **TECHNICAL ISSUES**

Paragraph A states:

“From the time that a defendant in a criminal trial makes a claim of incompetency to stand trial until the court makes a determination of the defendant’s competency, the defendant shall relinquish all firearms and ammunition.”

Competency may, and often is, raised before trial. It would be clearer to make SB486 applicable to a defendant “in a criminal case.”

The phrase “until the court makes a determination of the defendant’s competency” could be read as meaning until the court determines whether the defendant is competent. In other words, it could be argued that once a court makes a determination on competency, even if it determines that the defendant is not competent, the defendant can have firearms and ammunition. It would be clearer if the provision read, “until the court determines that the defendant is competent to stand trial.”

## **OTHER SUBSTANTIVE ISSUES**

None found.

## **ALTERNATIVES**

One alternative would be to prohibit anyone found incompetent to stand trial from possessing firearms and ammunition.

## **WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL**

Status quo.

### **AMENDMENTS”**

Amend Paragraph A as follows:

“From the time that a defendant in a criminal ~~trial~~ case makes a claim of incompetency to stand trial until the court ~~makes a determination of the defendant’s competency~~ determines that the defendant is competent to stand trial, the defendant shall relinquish all firearms and ammunition.”