

Case and Statute References for Mental Retardation

Mental retardation is directed to be determined by the court in the following states:

- Alabama. See *Morrow v. State*, 928 So. 2d 315, 316 (Ala. Crim. App. 2004) (noting that Alabama Legislature has not yet enacted legislation defining mental retardation for purposes of implementing Atkins).
- Arizona. Ariz. Rev. Stat. § 13-703.02(G) (2007).
- Delaware. Del. Code Ann. tit. 11, § 4209(d)(3)(b)-(c) (2007).
- Florida. Fla. Stat. Ann. § 921.137(4) (2008).
- Idaho. Idaho Code Ann. § 19-2515A (2008).
- Indiana. Ind. Code Ann. § 35-36-9-5 (2008).
- Kansas. Kan. Stat. Ann. § 21-4623(b) (2007).
- Kentucky. KRS § 532.135 (2008).
- Mississippi. See *Chase v. State*, 873 So.2d 1013, 1029 (Miss. 2004).
- Nebraska. Neb. Rev. Stat. § 28-105.01(4),(5) (2008).
- Nevada. Nev. Rev. Stat. Ann. § 174.098 (2008).
- New Mexico. N.M. Stat. Ann. § 31-20A-2.1(C) (2008).
- New York. N.Y. Crim. Proc. Law § 400.27(12)(a) (2008).
- Ohio. See *State v. Were*, 118 Ohio St. 3d 448, 477 (Ohio 2008) (holding that “whether or not a defendant is mentally retarded ‘should be decided by the court and do[es] not represent a jury question.’”) (quoting *State v. Lott*, 97 Ohio St. 3d 303, 2002 Ohio 6625, 779 N.E.2d 1011, 1015 (Ohio 2002)).
- Pennsylvania. See *Commonwealth v. VanDivner*, 2009 Pa. LEXIS 174, at *4 (Pa. Jan. 23, 2009) (noting that the trial judge held a four day hearing prior to trial in response to defendant's pre-trial petition to bar death penalty).
- South Carolina. See *Franklin v. Maynard*, 588 S.E.2d 604, 606 (S.C. 2003).
- South Dakota. S.D. Codified Laws § 23A-27A-26.3 (2009).
- Tennessee. Tenn. Code Ann. § 39-13-203(c) (2008).
- Utah. Utah Code Ann. § 77-15a-104 (2008).
- Washington state. Wash. Rev. Code § 10.95.030(2) (2008).

Mental retardation is directed to be determined at least in part by the jury in the following states:

- California. Cal. Pen. Code. § 1376(b)(1),(2) (2008) (determination by either jury or court).
- Connecticut. Conn. Gen. Stat. § 53a-46a(h)(2) (2008) (jury, or if there is no jury, then the court).
- Georgia. O.C.G.A. § 17-7-131(b)(1) (2008) (jury, or if there is no jury, then the court).
- Louisiana. La. C. Cr. P. Art. 905.5.1(C)(1) (2008) (jury, or if the state and defendant agree, the court).
- Maryland. See *Oken v. State*, 835 A.2d 1105 (Md. 2003).
- Missouri. Mo. Rev. St. § 565.030.4 (2008) (determination by either jury or court).
- New Jersey. See *State v. Jimenez*, 908 A.2d 181 (N.J. 2006).
- North Carolina. N.C. Gen. Stat. § 15A-2005(c),(d),(e) (2008) (determination by either jury or court).
- Oklahoma. See *Lambert v. State*, 2003 OK CR 11 (Okla. Crim. App. 2003) (granting offender's petition for post-conviction relief and remanding to the trial court for a jury determination on the issue of mental retardation).
- Texas. See *Williams v. State*, 270 S.W.3d 112, 132 (Tex. Crim. App. 2008) (holding that a jury may decide mental retardation); but see *Ex Parte Briseno*, 135 S.W.3d 1, 11 (Tex. Crim. App.

2004) (holding that when an inmate sentenced to death files a habeas corpus application raising a cognizable Atkins claim, the factual merit of that claim should be determined by the judge of the convicting court).

- Virginia. Va. Code Ann. § 19.2-264.3:1.1 (2007).

Mental retardation is directed to be determined by the court, with the right to *de novo* determination by the jury in the following state:

- Arkansas. A.C.A. § 5-4-618(d)(2) (2008) (court with right to *de novo* determination by jury).

The defendant bears the burden of proof by a preponderance of the evidence in the following states:

- Alabama. See *Smith v. State*, 2007 Ala. LEXIS 91, 32-33 (Ala. May 25, 2007) (citing *Morrow v. State*, 928 So. 2d 315, 323 (Ala. Crim. App. 2004); see also *Holladay v. Campbell*, 463 F. Supp. 2d 1324, 1341 n.21 (N.D. Ala. 2006)).
- Arkansas. A.C.A. § 5-4-618(a)(2),(c) (2008).
- California. Cal. Pen. Code. § 1376(b)(3) (2008).
- Colorado. Colo. Rev. Stat. § 18-1.3-1102(2) (2008); see also *People v. Vasquez*, 84 P.3d 1019 (Colo. 2004).
- Delaware. Del. Code Ann. tit. 11, § 4209(d)(3).
- Idaho. Idaho Code Ann. § 19-2515A(3) (2008).
- Illinois. 725 ILCS 5/114-15(b) (2009).
- Kentucky. See *Bowling v. Commonwealth*, 163 S.W.3d 361, 382 (Ky. 2005).
- Louisiana. La. C. Cr. P. Art. 905.5.1(C)(1) (2008).
- Maryland. Md. Code Ann., Crim. Law § 2-202(b)(2)(ii).
- Mississippi. See *Chase v. State*, 873 So.2d 1013, 1029 (Miss. 2004).
- Missouri. Mo. Rev. St. § 565.030.4(1) (2008).
- Nebraska. Neb. Rev. Stat. § 28-105.01(4) (2008).
- Nevada. Nev. Rev. Stat. Ann. § 174.098.5(b) (2008).
- North Carolina. N.C. Gen. Stat. § 15A-2005(c), (f) (2008) (standard of proof is preponderance of the evidence if determined by a jury, clear and convincing evidence if determined by a court).
- Ohio. See *State v. Lott*, 97 Ohio St. 3d 303, 2002 Ohio 6625, 779 N.E.2d 1011, 1015 (Ohio 2002).
- Oklahoma. See *Murphy v. State*, 2002 OK CR 32, 54 P.3d 556, 568 (Okla. Crim. App. 2002); *Blonner v. State*, 2006 OK CR 1, 6-8 (Okla. Crim. App. 2006).
- South Carolina. See *Franklin v. Maynard*, 588 S.E.2d 604, 606 (S.C. 2003).
- South Dakota. S.D. Codified Laws § 23A-27A-26.3 (2009).
- Tennessee. Tenn. Code Ann. § 39-13-203(c) (2008).
- Texas. See *Ex Parte Briseno*, 135 S.W.3d 1, 12 (Tex. Crim. App. 2004).
- Utah. Utah Code Ann. § 77-15a-104(11)(a).
- Virginia. Va. Code Ann. § 19.2-264.3:1.1(C).
- Washington State. Wash. Rev. Code § 10.95.030(2) (2008).

The defendant bears the burden of proof by clear and convincing evidence in the following states:

- Arizona. Ariz. Rev. Stat. § 13-703.02(G) (2007).
- Florida. Fla. Stat. Ann. § 921.137(4) (2008).
- Indiana. Ind. Code Ann. § 35-36-9-4(b) (2008).

- North Carolina. N.C. Gen. Stat. § 15A-2005(c), (f) (2008) (standard of proof is preponderance of the evidence if determined by a jury, clear and convincing evidence if determined by a court).

The defendant bears the burden of proof beyond a reasonable doubt in the following state:

- Georgia. O.C.G.A. § 17-7-131(c)(3) (2008).

The defendant bears the burden of proof, but the statute does not address the standard of proof in the following states:

- Connecticut. Conn. Gen. Stat. § 53a-46a(c),(d),(h) (2008).
- Kansas. Kan. Stat. Ann. § 21-4623(d) (2007).

The determination may be made pre-trial in the following states:

- Arizona. Ariz. Rev. Stat. § 13-703.02(B) (2007) (pre-trial, unless defendant waives right to pre-trial determination of mental status).
- Arkansas. A.C.A. § 5-4-618(d)(2) (2008) (determination made pre-trial by the court with right to de novo determination by jury during sentencing).
- California. Cal. Pen. Code. § 1376(b)(1) (2008) (determination made pre-trial by the court, or at the conclusion of the phase of the trial in which the jury has found the defendant guilty if by the jury).
- Colorado. Colo. Rev. Stat. § 18-1.3-1102(2) (2008).
- Delaware. Del. Code Ann. tit. 11, § 4209(d)(3)(c) (2007) (defendant files motion 90 days before trial, at which time the court orders an evaluation of the defendant. Court determines sentence to be imposed post-trial).
- Idaho. Idaho Code Ann. § 19-2515A(2) (2008).
- Illinois. 725 ILCS 5/114-15(b) (2009).
- Kentucky. KRS § 532.135(2) (2008).
- Louisiana. La. C. Cr. P. art. 905.5.1(C)(1) (2008) (If by jury, during the capital sentencing hearing. If by the court, then prior to trial).
- Mississippi. See *Chase v. State*, 873 So. 2d 1013, 1029 (Miss. 2004).
- Nevada. Nev. Rev. Stat. Ann. § 174.098.2 (2008).
- North Carolina. N.C. Gen. Stat. § 15A-2005(c), (f), (g) (2008) (pre-trial by the court or at trial by jury).
- Oklahoma. See *Blonner v. State*, 2006 OK CR 1, 6-8 (Okla. Crim. App. 2006).
- Pennsylvania. See *Commonwealth v. VanDivner*, 2009 Pa. LEXIS 174, at *4 (Pa. Jan. 23, 2009) (noting that the trial judge held a four day hearing prior to trial in response to defendant's pre-trial petition to bar death penalty).
- South Carolina. See *Franklin v. Maynard*, 588 S.E.2d 604, 606 (S.C. 2003).
- South Dakota. S.D. Codified Laws § 23A-27A-26.3 (2009) (pre-trial, with opportunity for the court to correct itself at trial, after the hearing but before sentencing).
- Utah. Utah Code Ann. § 77-15a-104 (2008).

The determination may be made at trial in the following states:

- Georgia. O.C.G.A. § 17-7-131(c)(3) (2008) (determined by jury or the court by finding at trial and specified in the verdict at trial).

- North Carolina. N.C. Gen. Stat. § 15A-2005(c), (f), (g) (2008) (pre-trial by the court or at trial by jury).
- Ohio. *State v. Were*, 118 Ohio St. 3d 448, 477 (Ohio 2008).
- South Dakota. S.D. Codified Laws § 23A-27A-26.3 (2009) (pre-trial, with opportunity for the court to correct itself at trial, after the hearing but before sentencing).
- Tennessee. Tenn. Code Ann. § 39-13-203(e) (2008) (issue may be raised at trial, but statute does not explicitly provide for or forbid pre-trial hearing).
- Texas. See *Williams v. State*, 270 S.W.3d 112, 132 (Tex. Crim. App. 2008); *Ex Parte Briseno*, 135 S.W.3d 1, 11 (Tex. Crim. App. 2004) (hearing may be conducted by the jury during trial, or by the convicting trial judge upon a post-conviction appeal).

The determination may be made post-trial or at a separate sentencing phase in the following states:

- Alabama. See *Morrow v. State*, 928 So. 2d 315, 316 (Ala. Crim. App. 2004) (sufficient to raise issue to court at sentencing hearing).
- Arkansas. A.C.A. § 5-4-618(d)(2) (2008) (determination made pre-trial by the court with right to do novo determination by jury during sentencing).
- California. Cal. Pen. Code. § 1376(b)(1) (2008) (determination made pre-trial by the court, or at the conclusion of the phase of the trial in which the jury has found the defendant guilty if by the jury).
- Connecticut. Conn. Gen. Stat. § 53a-46a(b) (2008)
- Florida. Fla. Stat. Ann. § 921.137(4) (2008) (after advisory jury has returned a recommended sentence of death, but before the court's final sentencing hearing)
- Kansas. Kan. Stat. Ann. § 21-4623(a) (2007) (post-trial but pre-sentencing).
- Louisiana. La. C.Cr.P. Art. 905.5.1(C)(1) (2008) (If by jury, during the capital sentencing hearing. If by the court, then prior to trial).
- Maryland. *Oken v. State*, 835 A.2d 1105 (Md. 2003).
- Missouri. Mo. Rev. St. § 565.030.2-4 (2008) (at second stage of trial concerning punishment, by the same trier as first stage of trial).
- Nebraska. Neb. Rev. Stat. § 28-105.01(4),(5) (2008).