

1 **Rule 23B. Motion to remand for findings necessary to determination of ineffective**
2 **assistance of counsel claim.**

3 (a) **Grounds for motion; time.** A party to an appeal in a criminal case may move the court
4 to remand the case to the trial court for entry of findings of fact, necessary for the
5 appellate court's determination of a claim of ineffective assistance of counsel. The motion
6 will be available only upon a nonspeculative allegation of facts, not fully appearing in the
7 record on appeal, which, if true, could support a determination that counsel
8 was ineffective.

9 The motion must be filed before or at the time of the filing of the appellant's brief. Upon
10 a showing of good cause, the court may permit a motion to be filed after the filing of the
11 appellant's brief. After the appeal is taken under advisement, a remand pursuant to this
12 rule is available only on the court's own motion and only if the claim has been raised and
13 the motion would have been available to a party.

14 (b) **Content of motion.** The content of the motion must conform to the requirements of
15 Rule 23. The motion may incorporate by reference the statement of the case from the
16 principal brief. The motion must identify the ineffectiveness claims and specify the
17 factual issues relevant to each such claim to be addressed on remand. The motion must
18 include or be accompanied by affidavits or declarations alleging facts not fully appearing
19 in the record on appeal that show the claimed deficient performance of the attorney. The
20 affidavits or declarations must also allege facts that show the claimed prejudice suffered
21 by the appellant as a result of the claimed deficient performance. The motion must also
22 be accompanied by a proposed order of remand that identifies the ineffectiveness claims
23 and specifies the factual issues relevant to each such claim to be addressed on remand.

24 (c) **Orders of the court; response; reply.** If a motion under this rule is filed at the same
25 time as appellant's principal brief, any response and reply must be filed within the time
26 for the filing of the parties' respective briefs on the merits, unless otherwise specified by
27 the court. If a motion is filed before appellant's brief, the court may elect to defer ruling
28 on the motion or decide the motion prior to briefing.

29 (1) If the court defers the motion, the time for filing any response or reply will be the
30 same as for a motion filed at the same time as appellant's brief, unless otherwise
31 specified by the court.

32 (2) If the court elects to decide the motion prior to briefing, it will issue a notice that
33 any response must be filed within 30 days of the notice or within such other time
34 as the court may specify. Any reply in support of the motion must be filed within ten
35 ~~210~~ days after the response is served or within such other time as the court
36 may specify.

37 (3) If the requirements of paragraphs ~~s~~ (a) and (b) ~~of this rule~~ have been met, the
38 court ~~may~~ order that the case be temporarily remanded to the trial court to enter
39 findings of fact relevant to a claim of ineffective assistance of counsel. The remain
40 order ~~of remand~~ will identify the ineffectiveness claims and specify the factual issues
41 relevant to each such claim to be addressed by the trial court. The order will also direct
42 the trial court to complete the proceedings on remand within 90 days ~~of~~ issuance of
43 the remain order ~~of remand~~, absent a finding by the trial court of good cause for a
44 delay of reasonable length.

45 (4) If it appears to the appellate court that the appellant's attorney of record on the
46 appeal faces a conflict of interest upon remand, the court will direct that counsel
47 withdraw and that new counsel for the appellant be appointed or retained.

48 (d) **Effect on appeal.** If a motion is filed at the same time as appellant's brief, the briefing
49 schedule will not be stayed unless ordered by the court. If a motion is filed before
50 appellant's brief, the briefing schedule will be automatically stayed until the court issues
51 notice of whether it will defer the motion or decide the motion before briefing.

52 (e) **Proceedings before the trial court.** Upon remand the trial court will promptly conduct
53 hearings and take evidence as necessary to enter the findings of fact necessary to
54 determine the claim of ineffective assistance of counsel. Any claims of ineffectiveness not
55 identified in the remain order ~~of remand~~ will not be considered by the trial court on

56 remand, unless the trial court determines that the interests of justice or judicial efficiency
57 require consideration of issues not specifically identified in the order ~~of remand~~.
58 Evidentiary hearings will be conducted without a jury and as soon as practicable after
59 remand. The burden of proving a fact will be upon the proponent of the fact. The standard
60 of proof will be a preponderance of the evidence. The trial court will enter written
61 findings of fact concerning the claimed deficient performance by counsel and the claimed
62 prejudice suffered by appellant as a result, in accordance with the remand order ~~of~~
63 ~~remand~~. Proceedings on remand must be completed within 90 days of entry of the
64 remand order ~~of remand~~, unless the trial court finds good cause for a delay of reasonable
65 length.

66 (f) **Preparation and transmittal of the record.** At the conclusion of all proceedings before
67 the trial court, the ~~clerk of the~~ trial court clerk will immediately prepare the record of the
68 supplemental proceedings as required by these rules. If the record of the original
69 proceedings before the trial court has been transmitted to the appellate court, the ~~clerk of~~
70 ~~the~~ trial court clerk will immediately transmit the record of the supplemental proceedings
71 upon preparation of the supplemental record. If the record of the original proceedings
72 before the trial court has not been transmitted to the appellate court, the ~~clerk of the~~ court
73 clerk will transmit the record of the supplemental proceedings upon the preparation of
74 the entire record.

75 -(g) **Appellate court determination.** Errors claimed to have been made during the
76 trial court proceedings conducted pursuant to this rule are reviewable under the
77 same standards as the review of errors in other appeals. The findings of fact entered
78 pursuant to this rule are reviewable under the same standards as the review of findings
79 of fact in other appeals.

80 -Effective May 1 ~~November 1~~, 20262

81 **Advisory Committee Note**

82 “Declaration” refers to an unsworn declaration as described in Title 78B, Chapter 18a,
83 Uniform Unsworn Declarations Act.

84 *Note A*adopted 2022