

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

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

10
11 The motion ~~shall~~ must be filed ~~prior to~~ before or at the time of the filing of the appellant's
12 brief. Upon a showing of good cause, the court may permit a motion to be filed after the
13 filing of the appellant's brief. ~~In no event shall the court permit a motion to be filed after~~
14 ~~oral argument. Nothing in this rule shall prohibit the court from remanding the case~~
15 ~~under this rule.~~ After the appeal is taken under advisement, a remand pursuant to this
16 rule is available only on the court's own motion at any time and only if the claim has
17 been raised and the motion would have been available to a party.

18
19 (b) Content of motion; ~~response; reply~~. The content of the motion ~~shall~~ must conform to
20 the requirements of Rule 23. The motion ~~shall~~ must include or be accompanied by
21 affidavits alleging facts not fully appearing in the record on appeal that show the claimed
22 deficient performance of the attorney. The affidavits ~~shall~~ must also allege facts that
23 show the claimed prejudice suffered by the appellant as a result of the claimed deficient
24 performance. The motion shall also be accompanied by a proposed order or remand
25 that identifies the ineffectiveness claims and specifies the factual issues relevant to
26 each such claim to be addressed on remand.

27 ~~A response shall be filed within 20 days after the motion is filed. The response shall~~
28 ~~include a proposed order of remand that identifies the ineffectiveness claims and~~
29 ~~specifies the factual issues relevant to each such claim to be addressed by the trial~~
30 ~~court in the event remand is granted, unless the responding party accepts that proposed~~

31 ~~by the moving party. Any reply shall be filed within 10 days after the response is served.~~

32

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

38

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

42

43 (c)(2) If the court elects to decide the motion prior to briefing, it will issue a notice that
44 any response must be filed within 30 days of the notice or within such other time as the
45 court may specify. Any reply in support of the motion must be filed within 20 days after
46 the response is served or within such other time as the court may specify.

47

48 (c)(3) If the requirements of parts (a) and (b) of this rule have been met, the court may
49 order that the case be temporarily remanded to the trial court for the purpose of entry of
50 to enter findings of fact relevant to a claim of ineffective assistance of counsel. The
51 order of remand shall will identify the ineffectiveness claims and specify the factual
52 issues relevant to each such claim to be addressed by the trial court. The order shall will
53 also direct the trial court to complete the proceedings on remand within 90 days of
54 issuance of the order of remand, absent a finding by the trial court of good cause for a
55 delay of reasonable length.

56

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

60

61 ~~(d) Effect on appeal. Oral argument and the deadlines for briefs shall be vacated upon~~

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62 ~~the filing of a motion to remand under this rule. If a motion is filed at the same time as~~
63 ~~appellant's brief, Other procedural steps required by these rules shall~~ the briefing
64 schedule will not be stayed by a motion for remand, unless a stay is ordered by the
65 court ~~upon stipulation or motion of the parties or upon the court's motion. If a motion is~~
66 filed before appellant's brief, the briefing schedule will be automatically stayed until the
67 court issues notice of whether it will defer the motion or decide the motion before
68 briefing.

69
70 (e) Proceedings before the trial court. Upon remand the trial court ~~shall~~ will promptly
71 conduct hearings and take evidence as necessary to enter the findings of fact
72 necessary to determine the claim of ineffective assistance of counsel. Any claims of
73 ineffectiveness not identified in the order of remand ~~shall~~ will not be considered by the
74 trial court on remand, unless the trial court determines that the interests of justice or
75 judicial efficiency require consideration of issues not specifically identified in the order of
76 remand. Evidentiary hearings ~~shall~~ will be conducted without a jury and as soon as
77 practicable after remand. The burden of proving a fact ~~shall~~ will be upon the proponent
78 of the fact. The standard of proof ~~shall~~ will be a preponderance of the evidence. The trial
79 court ~~shall~~ will enter written findings of fact concerning the claimed deficient
80 performance by counsel and the claimed prejudice suffered by appellant as a result, in
81 accordance with the order of remand. Proceedings on remand ~~shall~~ must be completed
82 within 90 days of entry of the order of remand, unless the trial court finds good cause for
83 a delay of reasonable length.

84
85 (f) Preparation and transmittal of the record. At the conclusion of all proceedings before
86 the trial court, the clerk of the trial court ~~and the court reporter shall~~ will immediately
87 prepare the record of the supplemental proceedings as required by these rules. If the
88 record of the original proceedings before the trial court has been transmitted to the
89 appellate court, the clerk of the trial court ~~shall~~ will immediately transmit the record of
90 the supplemental proceedings upon preparation of the supplemental record. If the
91 record of the original proceedings before the trial court has not been transmitted to the

92 appellate court, the clerk of the court ~~shall~~ will transmit the record of the supplemental
93 proceedings upon the preparation of the entire record.

94

95 (g) Appellate court determination. ~~Upon receipt of the record from the trial court, the~~
96 ~~clerk of the court shall notify the parties of the new schedule for briefing or oral~~
97 ~~argument under these rules.~~ Errors claimed to have been made during the trial court
98 proceedings conducted pursuant to this rule are reviewable under the same standards
99 as the review of errors in other appeals. The findings of fact entered pursuant to this
100 rule are reviewable under the same standards as the review of findings of fact in other
101 appeals.