

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

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4 (a) Grounds for motion; time. A party to an appeal in a criminal case may move the court
5 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.

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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.

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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~~ must also be accompanied by a proposed order ~~or~~ of
25 remand that identifies the ineffectiveness claims and specifies the factual issues
26 relevant to each such claim to be addressed on remand.

27
28 ~~A response shall be filed within 20 days after the motion is filed. The response shall~~
29 ~~include a proposed order of remand that identifies the ineffectiveness claims and~~
30 ~~specifies the factual issues relevant to each such claim to be addressed by the trial~~
31 ~~court in the event remand is granted, unless the responding party accepts that proposed~~
32 ~~by the moving party. Any reply shall be filed within 10 days after the response is served.~~

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

39

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

43

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

48

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

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

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62 (d) Effect on appeal. Oral argument and the deadlines for briefs shall be vacated upon
63 the filing of a motion to remand under this rule. If a motion is filed at the same time as

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

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

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

95

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

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