

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

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

8 The motion shall be filed prior to the filing of the appellant's brief. Upon a showing of good cause, the
9 court may permit a motion to be filed after the filing of the appellant's brief. In no event shall the court
10 permit a motion to be filed after oral argument. Nothing in this rule shall prohibit the court from remanding
11 the case under this rule on its own motion at any time if the claim has been raised and the motion would
12 have been available to a party.

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

20 A response shall be filed within ~~20~~21 days after the motion is filed. The response shall include a
21 proposed order of remand that identifies the ineffectiveness claims and specifies the factual issues
22 relevant to each such claim to be addressed by the trial court in the event remand is granted, unless the
23 responding party accepts that proposed by the moving party. Any reply shall be filed within ~~40~~14 days
24 after the response is served.

25 **(c) Order of the court.** If the requirements of parts (a) and (b) of this rule have been met, the court
26 may order that the case be temporarily remanded to the trial court for the purpose of entry of findings of
27 fact relevant to a claim of ineffective assistance of counsel. The order of remand shall identify the
28 ineffectiveness claims and specify the factual issues relevant to each such claim to be addressed by the
29 trial court. The order shall also direct the trial court to complete the proceedings on remand within 90 days
30 of issuance of the order of remand, absent a finding by the trial court of good cause for a delay of
31 reasonable length.

32 If it appears to the appellate court that the appellant's attorney of record on the appeal faces a conflict
33 of interest upon remand, the court shall direct that counsel withdraw and that new counsel for the
34 appellant be appointed or retained.

35 **(d) Effect on appeal.** Oral argument and the deadlines for briefs shall be vacated upon the filing of a
36 motion to remand under this rule. Other procedural steps required by these rules shall not be stayed by a

37 motion for remand, unless a stay is ordered by the court upon stipulation or motion of the parties or upon
38 the court's motion.

39 **(e) Proceedings before the trial court.** Upon remand the trial court shall promptly conduct hearings
40 and take evidence as necessary to enter the findings of fact necessary to determine the claim of
41 ineffective assistance of counsel. Any claims of ineffectiveness not identified in the order of remand shall
42 not be considered by the trial court on remand, unless the trial court determines that the interests of
43 justice or judicial efficiency require consideration of issues not specifically identified in the order of
44 remand. Evidentiary hearings shall be conducted without a jury and as soon as practicable after remand.
45 The burden of proving a fact shall be upon the proponent of the fact. The standard of proof shall be a
46 preponderance of the evidence. The trial court shall enter written findings of fact concerning the claimed
47 deficient performance by counsel and the claimed prejudice suffered by appellant as a result, in
48 accordance with the order of remand. Proceedings on remand shall be completed within 90 days of entry
49 of the order of remand, unless the trial court finds good cause for a delay of reasonable length.

50 **(f) Preparation and transmittal of the record.** At the conclusion of all proceedings before the trial
51 court, the clerk of the trial court and the court reporter shall immediately prepare the record of the
52 supplemental proceedings as required by these rules. ~~If the record of the original proceedings before the~~
53 ~~trial court has been transmitted to the appellate court, the clerk of the trial court shall immediately transmit~~
54 ~~the record of the supplemental proceedings upon preparation of the supplemental record. If the record of~~
55 ~~the original proceedings before the trial court has not been transmitted to the appellate court, the clerk of~~
56 ~~the court shall transmit the record of the supplemental proceedings upon the preparation of the entire~~
57 ~~record.~~

58 **(g) Appellate court determination.** Upon receipt of the record from the trial court, the clerk of the
59 court shall notify the parties of the new schedule for briefing or oral argument under these rules. Errors
60 claimed to have been made during the trial court proceedings conducted pursuant to this rule are
61 reviewable under the same standards as the review of errors in other appeals. The findings of fact
62 entered pursuant to this rule are reviewable under the same standards as the review of findings of fact in
63 other appeals.

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