

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
4 court 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
6 motion will be available only upon a nonspeculative allegation of facts, not fully
7 appearing in the record on appeal, which, if true, could support a determination that
8 counsel 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
13 and 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 must include or be accompanied by affidavits or declarations
16 alleging facts not fully appearing in the record on appeal that show the claimed
17 deficient performance of the attorney. The affidavits or declarations must also allege
18 facts that show the claimed prejudice suffered by the appellant as a result of the
19 claimed deficient performance. The motion must also be accompanied by a proposed
20 order of remand that identifies the ineffectiveness claims and specifies the factual issues
21 relevant to each such claim to be addressed on remand.

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

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

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

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

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

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

51 (e) Proceedings before the trial court. Upon remand the trial court will promptly
52 conduct hearings and take evidence as necessary to enter the findings of fact necessary
53 to determine the claim of ineffective assistance of counsel. Any claims of ineffectiveness

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

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

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

78 Effective December 1, 2018

79 | [Advisory Committee Note](#)

80 | [“Declaration” refers to an unsworn declaration as described in Title 78B, Chapter 18a,](#)
81 | [Uniform Unsworn Declarations Act.](#)