ANDERS REQUIREMENTS
August 2015 North Carolina Appellate Boot Camp
Emily Davis, Assistant Appellate Defender

ANDERS DOCUMENTS

These docs are handouts and appear on 2015 boot camp CD:
(1) IDS and OAD *Anders* Guidelines
(2) IDS *Anders* policy
(3) Example memo for OAD submission
(4) *Anders* brief checklist
(5) Examples of improper argumentative assertions
(6) Example client letter appended to *Anders* brief before filing

These docs are not handouts and only appear on 2015 boot camp CD:
(7) *Anders v. California* opinion on 2015 boot camp CD
(8) *Anders* briefs on 2015 boot camp CD
   (i) Bass brief
   (ii) Biggs brief
   (iii) Lester brief
   (iv) Scales brief
IDS and OAD ANDERS GUIDELINES

1. **IDS policy prohibits filing an Anders brief without first submitting the case to OAD for review:** If you conclude the record in your case fails to reveal any issue with sufficient merit to support a meaningful argument for relief on appeal, you must submit the case to OAD for Anders review before filing an Anders brief. See IDS Policy; *Anders v. California* (recognizing tension between duty to zealously represent client and duty not to raise frivolous issues on appeal).

2. **If you submit your case to OAD for Anders review:** it necessarily means you have already completed these things:

   (i) thoroughly considered, researched, analyzed, and rejected every potential issue you were able to identify,

   (ii) obtained and reviewed the complete court files, including all documents for dismissed charges and acquittals,

   (iii) obtained and reviewed the complete transcript, including transcripts of pretrial hearings and proceedings not initially ordered in the clerk’s transcript order on the appellate entries,

   (iv) obtained and reviewed copies of exhibits, including DVDs of video recordings and CDs of audio recordings,

   (v) determined every charging document was legally sufficient,

   (vi) determined the indictments, instructions, verdicts, and judgments correlated, matched up, supported each other, or were otherwise legit,

   (vii) determined sentence imposed was authorized for the actual offense class and proper prior record level under the applicable sentencing chart for the offense date,

   (viii) determined waiver of counsel colloquy was sufficient if defendant proceeded *pro se*,

   (ix) determined guilty plea colloquy and factual basis were sufficient if defendant pled guilty, and

   (x) determined notice of appeal was sufficient to confer jurisdiction upon the Court of Appeals or determined notice of appeal was potentially defective and identified ways to address the problem.

IDS and OAD Anders guidelines
3. **Requirements for submitting case to OAD for *Anders* review:** To comply with IDS and OAD policy, you have to submit your request for *Anders* review and the required documents to Jane Allen during the proposed record stage or earlier. See IDS Policy; example memo for submission to OAD.

   (i) **WHAT TO SUBMIT TO OAD:**

   i. complete transcript of proceedings,
   
   ii. complete court files,
   
   iii. proposed record on appeal,
   
   iv. copies of exhibits, including documents, photos, videos, audio files, etc., and
   
   v. **YOUR DETAILED MEMO** containing this information:

   (i) detailed procedural summary,

   (ii) detailed factual summary,

   (iii) your list of potential issues,

   (iv) your analysis of each issue, and

   (v) your analysis showing why each issue was rejected.

4. **What happens after submission:** Jane assigns your case to an assistant appellate defender for *Anders* review. As soon as convenient, the attorney reviews your case as she would review her own case.

5. **You are responsible for obtaining extensions while your case is being reviewed:** Because the attorney reviewing your case has her own professional responsibilities, immediate turnaround should not be expected. You are responsible for obtaining extensions while your case is being reviewed by OAD. Failure to initially submit all required documents will extend the process.

6. **Client communication:** Based on experience, OAD strongly suggests waiting until OAD has completed the *Anders* review before telling your client you were unable to find an issue and submitted the case to OAD. The reason: If OAD finds an issue, you will have to tell the client your initial conclusions about the case were wrong. This could be detrimental to your relationship with the client and your ability to advocate.

7. **What happens when *Anders* review is complete:** After counsel has completed review, she will contact you with her determinations about the case.

**IDS and OAD *Anders* guidelines**
8. **Anders brief content and format:** If you end up filing an *Anders* brief in a case assigned to you by the Appellate Defender, the brief must be non-argumentative and must contain specific information. See *Anders* brief checklist; examples of improper argumentative assertions; example client letter; *Anders* opinion and briefs on 2015 boot camp CD.

(i) **Issue presented in an *Anders* brief:** MR. SMITH ASKS THIS COURT TO CONDUCT AN INDEPENDENT REVIEW OF THE RECORD IN ACCORDANCE WITH *ANDERS V. CALIFORNIA* TO DETERMINE WHETHER PREJUDICIAL ERROR OCCURRED.

(ii) **Statement of the case in an *Anders* brief is the same as a regular brief:** A short summary of procedure ending with notice of appeal. N.C. R. App. P. 28(b)(3).

(iii) **Ground for review in an *Anders* brief is the same as a regular brief.** Here are some examples:

   i. The ground for review is a final judgment in a criminal case pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 15A-1444(a).

   ii. The ground for review is a final judgment in a criminal case in which the denial of a suppression motion was preserved for appeal pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 15A-979(b).

(iv) **Statement of facts in an *Anders* brief:** Like a regular brief, the statement of facts in an *Anders* brief must be non-argumentative. N.C. R. App. P. 28(b)(5).

(v) **Argument statement in an *Anders* brief:** MR. SMITH ASKS THIS COURT TO CONDUCT AN INDEPENDENT REVIEW OF THE RECORD IN ACCORDANCE WITH *ANDERS V. CALIFORNIA* TO DETERMINE WHETHER PREJUDICIAL ERROR OCCURRED.

(vi) **Body of the argument section in an *Anders* brief:** The argument section must be NON-ARGUMENTATIVE and must contain specific information. In the argument section:

   i. Counsel has to show the client was advised of his rights under *Anders* to submit pro se arguments and provided a copy of the brief, transcripts, and record on appeal.

**IDS and OAD *Anders* guidelines**
ii. Counsel has to ask the Court to “allow [Mr. Smith/client’s name] time to raise any points [] he chooses” in support of the appeal. *Anders v. California*, 386 U.S. at 744.

iii. Counsel has to assist the Court in its review by referencing “anything in the record that might arguably support the appeal,” *id.*, by providing specific “reference[s] [to] the record” and relevant “legal authorities.” *Id.* at 745.

(vii) **Conclusion in an *Anders* brief:** For the foregoing reasons, counsel respectfully requests that this Court conduct an independent examination of the record for any prejudicial error.

(viii) ***VERY IMPORTANT*** Counsel must append required client letter to *Anders* brief. In the letter, advise the client of his rights under *Anders*, explain how to file arguments, and provide the transcript, record on appeal, the *Anders* brief, and mailing address of the Court of Appeals. A copy of the client letter must be appended to the *Anders* brief when the brief is filed. *See* *Anders* brief checklist; example client letter.

9. ***Anders* briefs MUST be non-argumentative:** Non-argumentative means not making any assertions or drawing any conclusions for or against your client. *See* *Anders* brief checklist; examples of improper argumentative assertions.

Here is why *Anders* briefs must be non-argumentative:

(i) You have a duty to zealously advocate for your client.

(ii) **IN SHARP CONTRAST** to federal courts, North Carolina courts do **NOT** require counsel to explain in an *Anders* brief why each potential issue is meritless or was rejected by counsel.

(iii) If you explain in an *Anders* brief why an issue is meritless or was rejected by counsel or make other assertions against your client -- *"It was not error because XYZ,"* or *"Counsel rejected the issue because ABC"* -- you have abandoned your role as an advocate.

(iv) On the other hand, if you make assertions an issue has merit or defendant is entitled to relief -- *"The trial court erred because XYZ"* -- you should be writing a regular brief, not an *Anders* brief.

(v) As a result, to comply with North Carolina courts and your duty to advocate for your client, an *Anders* brief must be non-argumentative.
10. **What non-argumentative looks like:** Avoid making assertions for or against the client. Even parentheticals should be non-argumentative. *Compare Matias* (explaining actual or constructive possession) *with Matias* (actual or constructive possession is sufficient to establish possession).

**Non-argumentative template:** Facts. Applicable law. Request review.

(i) **Argumentative -- AVOID doing this in an Anders brief:** The trial court properly denied Mr. Smith’s motion to dismiss the charge of cocaine possession. (Tp. 40) To support a conviction, the State was required to prove (i) possession of (ii) cocaine. N.C. Gen. Stat. § 90-95. Witness testimony showed Mr. Smith had cocaine in his pocket and in his house. Digital scales, baggies, and cash were also found in Mr. Smith’s house. *State v. Matias*, 354 N.C. 549, 552, 556 S.E.2d 269, 270-71 (2001) (actual or constructive possession is sufficient to establish possession and presence of drug paraphernalia may support constructive possession).

i. **Non-argumentative -- TRY THIS INSTEAD:** [[facts]]

The trial court denied Mr. Smith’s motion to dismiss the charge of cocaine possession. (Tp. 40) [[applicable law]] To support a conviction, the State was required to prove (i) possession of (ii) cocaine. N.C. Gen. Stat. § 90-95; *State v. Matias*, 354 N.C. 549, 552, 556 S.E.2d 269, 270-71 (2001) (explaining actual or constructive possession). [[request review]] This Court should review the record *de novo* to determine whether evidence was sufficient. *See, e.g.*, *State v. Nabors*, 365 N.C. 306, 312, 718 S.E.2d 623, 626 (2011) (explaining sufficiency analysis).

(ii) **Argumentative -- AVOID doing this in an Anders brief:** The trial court admitted testimony about prior larcenies committed by Mr. Smith. The evidence was relevant and admissible under Rules 401-404. Without the testimony, it is likely the jury would have reached the same outcome.

i. **Non-argumentative -- Try this instead:** [[facts]]

The trial court admitted testimony about prior larcenies committed by Mr. Smith. (Tp. 40) [[applicable law and request review]] This Court should consider whether testimony about prior larcenies was admissible. N.C. Gen. Stat. § 8C-1, Rules 401-404 (explaining relevancy). *See* N.C. Gen. Stat. § 15A-1443 (explaining prejudice standard for preserved error); *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (explaining plain error prejudice standard applicable to unpreserved evidentiary error).

*IDS and OAD Anders guidelines*
11. **How the argument section looks in a typical *Anders* brief:**

ARGUMENT

MR. SMITH ASKS THIS COURT TO CONDUCT AN INDEPENDENT REVIEW OF THE RECORD IN ACCORDANCE WITH *ANDERS V. CALIFORNIA* TO DETERMINE WHETHER PREJUDICIAL ERROR OCCURRED.

After careful and repeated review of the record and applicable law and consultation with several colleagues in the Office of the Appellate Defender, counsel is unable to identify any issue with sufficient merit to support a meaningful argument for relief on appeal. Pursuant to *Anders v. California*, 386 U.S. 738, 18 L. Ed. 2d 493 (1967), and *State v. Kinch*, 314 N.C. 99, 331 S.E.2d 665 (1985), counsel respectfully requests that this Court conduct a full examination of the record for prejudicial error and to determine if any non-frivolous issue has been overlooked.

In accordance with *Anders* and *Kinch*, counsel advised Mr. Smith of his right to file supplemental arguments on her own behalf and provided Mr. Smith with a copy of this brief, the record on appeal, transcript, and the mailing address of this Court. (App. 1-2) Counsel respectfully requests that the Court “allow [Mr. Smith] time to raise any points [] he chooses” in support of this appeal. *See Anders*, 386 U.S. at 744, 18 L. Ed. 2d at 498.

To fulfill her obligation to refer the Court to “anything in the record that might arguably support the appeal,” *see id.*, counsel provides the following information.

1. **Sentence Imposed:** This Court should determine whether sentence imposed was authorized by statute. (Rp. 90) N.C. Gen. Stat. § 15A-1340.17.

2. **Indictment:** This Court should determine whether the indictment was legally sufficient. *State v. Wilson*, 128 N.C. App. 688, 691, 497 S.E.2d 416, 419 (1998) (defective indictment may be raised for the first time on appeal and constitutes reversible error).

Counsel is unable to identify any other specific matter upon which she believes a theory of relief might be predicated.

CONCLUSION

For the foregoing reasons, counsel respectfully requests that this Court conduct an independent examination of the record for any prejudicial error.
ANDERS BRIEFS IN CRIMINAL AND DELINQUENCY APPEALS

IDS Policy:
If appointed appellate counsel in a criminal or juvenile delinquency case concludes that there are no meritorious issues to be raised on appeal, counsel must notify the Appellate Defender of this conclusion and afford the Appellate Defender a reasonable opportunity to review the appellate record for the existence of an appealable issue before filing a brief in the Appellate Division pursuant to *Anders v. California*, 386 U.S. 738 (1967). In all cases submitted for *Anders* review, counsel must provide the Appellate Defender with a detailed procedural history of the case, a detailed summary of the facts of the case, and a list of the potential issues that counsel considered briefing and the reasons counsel concluded they had no merit. The procedural history, summary of facts, and list of issues do not need to be polished or filing-ready text and can be in outline format, but must accurately convey the history, facts, and counsel’s issue analysis.

If appointed appellate counsel fails to follow this procedure, he or she will not be compensated for work on the appeal. Appointed appellate counsel who files an *Anders* brief must note in the fee application that he or she has done so and has complied with this procedure.


Authority:
G.S. 7A-498.3(c); IDS Rules 3.3(a), 3.4(f).
Example memo for submission to OAD

Requirements for submission to OAD for Anders review: When you submit your case to OAD, you have to send detailed procedural and factual summaries, a list of potential issues, issue analysis, and your reasons for rejecting each issue.

Here is an example of the information you should submit to OAD. Identifying information was redacted or changed.

To: Office of the Appellate Defender
From: XXX
Date: August 28, 2014
Re: Anders Review – State v. XXX, 09-CRS-XXX, XXX (XXX Cty.)

PROCEDURAL SUMMARY:

The alleged assault occurred on January 1, 2009. Defendant was arrested on January 14 pursuant to a warrant. A probable cause hearing was held and the court found probable cause on February 4, 2009. Defendant was indicted for (1) assault with a deadly weapon inflicting serious injury on March 9, 2009; and (2) being a habitual felon on August 31, 2009. Defendant pled not guilty to the charges.

There was a long delay until trial. Part of the delay appears to have been due to defendant switching counsel in 2011. It also appears that there were around 15 unrelated charges filed against defendant in 2009 and 2010 that were being handled by his same counsel. Defendant filed a motion to continue in October 2013. Defendant was out on bail before trial.

The case came on for trial at the April 29, 2014 Criminal Session of XXX County Superior Court, before Judge ABC. The jury found defendant guilty of assault with a deadly weapon inflicting serious injury. On April 30, defendant pled guilty pursuant to Alford of being a habitual felon. On that day, Judge ABC entered Judgment, sentencing D to 107 to 138 months of imprisonment. D gave notice of appeal of that judgment in court on April 30, 2014.

FACTS:

The victim (V) had a casual relationship with D’s mother. They were out on New Year’s Eve and got into an argument that night. D’s mother called D and asked him to pick her up. V and D’s mother waited on the front porch of V’s house for defendant to arrive.
According to V, when D arrived, he came up to the porch and punched him. Two friends of D got out of the car and joined in beating V. D punched V a number of times. He then picked up a metal folder chair (standard chair for big meetings) and struck V with it. The last blow hit V’s face and he felt severe pain in his mouth.

The next day, V called the police and reported the incident. He went to the hospital a couple of days later and was found to have a fractured jaw. He subsequently had surgery and his jaw was wired shut for six weeks. V was the State’s only witness. The only defense witness was Detective Smith, who was on the case. He interviewed V on January 9 and his notes are consistent with V’s testimony. A patrol officer interviewed V on January 2 and there were some minor discrepancies between this earlier report and V’s testimony. This report says 4 assailants instead of 3. Part of the report says they use metal chairs but another part says V does not recall much except that they “hit” him.

POTENTIAL ISSUES CONSIDERED, ANALYSIS, AND REASONS REJECTED:

1. **Were the indictments sufficient to confer subject matter jurisdiction and charge the offenses for which Defendant was convicted? (R pp. 4-5)**

The assault indictment states that defendant “unlawfully, willfully, and feloniously did assault V with a metal chair, a deadly weapon, inflicting serious injury” on or about January 1, 2009.

The indictment appears sufficient because it alleges the date, victim, statutory reference, and location that were proved during the trial, as well as identifying the deadly weapon. *See* N.C. Gen. Stat. 15A-924(a); *State v. Powell*, 10 N.C. App. 443, 448 (1971); *State v. Moses*, 154 N.C. App. 332, 334-37 (2002). Describing the serious injury is unnecessary. *State v. Gregory*, 223 N.C. 415, 420, 27 S.E.2d 140, 143 (1943).

The habitual felon indictment alleges that defendant (1) committed common law robbery on July 27, 1999, and was convicted March 15, 2000; committed possession of a Schedule II substance on March 15, 2000, and was convicted on September 24, 2003; and committed cocaine possession with intent on February 26, 2005, and was conviction on August 6, 2007. All necessary dates and jurisdictions are proper and correspond to the judgments. One mistake in listing District Court instead of Superior Court would not be a fatal variance, and amendment was consented to by defense counsel. *See State v. Lewis*, 162 N.C. App. 277, 284, 590 S.E.2d 318, 324 (2004) (no fatal variance where county is wrong).

Although one felony was committed while defendant was 15 years old, that is permitted under N.C. Gen. Stat. § 14-7.1

2. **Did the trial court err in denying D’s motion for a continuance on 29 April 2014? (T p. 3)**

At the very start of the trial, defendant moved for a continuance because they could not yet locate D’s mother to testify. The motion was denied.

There was no abuse of discretion in the denial of the continuance. Defense counsel made no argument in favor of the motion and stated that the best course was to proceed with trial in hopes that his
investigator would be able to find D’s mother in time. No proffer of evidence was made about the testimony D’s mother would provide. Also, any testimony she provided could have been impeached because she made two completely contradictory reports to the police regarding the assault.

There is no constitutional violation because defendant and his counsel had over five years to prepare for the straightforward assault case.

3. **Did the trial court err in excluding evidence regarding statements of D’s mother to Detective Smith? (T pp. 104, 124)**

D’s mother made statements to Detective Smith that (1) when she and V got into an argument, he hit her and she did not hit him; and (2) when defendant came to the house, he punched V but did not use a chair. She made another statement the next day, saying that she had lied the day before because her son never hit V; she had struck him with the chair.

D’s mother’s statements to the detective are hearsay and inadmissible. Counsel did not identify any hearsay exception that would apply. D’s mother’s statements that her son only punched V are not statements against penal interest. The catchall exception does not seem to apply because there are no “circumstantial guarantees of trustworthiness of D’s mother particularly because D’s mother made contradictory statements to the police.

The ADA did not open the door because he did not elicit any testimony regarding the contents of D’s mother’s statement to the detective. *See State v. Choudhry*, 206 N.C. App. 418, 427, 697 S.E.2d 504, 510 (2010).

Any constitutional argument about the exclusion of testimony may be waived because defense counsel did not make any specific arguments; he simply cited the Confrontation Clause, Due Process, and equivalent State provisions. Plain error analysis should still apply though.

Regardless, the Confrontation Clause is inapplicable because it guarantees the right to confront (exclude hearsay), not admit hearsay. And the due process right to present a defense does not include the right to present inadmissible evidence unless the rule of admissibility is arbitrary. *See State v. McGrady*, 753 S.E.2d 361, 370 (N.C. Ct. App. 2014) review allowed, 758 S.E.2d 864 (N.C. 2014) (“Criminal defendants do not have a right to present evidence that the trial court, in its discretion, deems inadmissible under the rules of evidence.”); *Nevada v. Jackson*, 133 S. Ct. 1990, 1992 (2013). Hearsay rules are not arbitrary; it has hard to see them being overridden. *See State v. Alston*, 161 N.C. App. 367, 372, 588 S.E.2d 530, 534 (2003) aff’d 3-3 w/o precedential weight, 359 N.C. 61, 602 S.E.2d 674 (2004) (“The trial court does not deprive a criminal defendant of the right to present a defense by requiring that defendant follow the North Carolina Rules of Evidence.”).

4. **Did the trial court err in denying D’s motion to dismiss the assault charge at the close of the State’s evidence and at the close of all the evidence? (T pp. 89, 124)**

The elements of assault with a deadly weapon inflicting serious injury are “(1) an assault (2) with a deadly weapon (3) inflicting serious injury (4) not resulting in death.” *State v. Aytche*, 98 N.C. App. 358, 366, 391 S.E.2d 43, 47 (1990); *see also* N.C. Gen. Stat. § 14-32(b) (2001). The first element is
obviously met. The metal chair is a deadly weapon so the second element is met. See State v. Mills, 726 S.E.2d 926, 929 (N.C. Ct. App. 2012) (lawn chair is deadly weapon); State v. James, 735 S.E.2d 627, 631 (N.C. Ct. App. 2012) (kitchen table chair is deadly weapon).

Because V suffered a broken jaw that required surgery and then being wired shut, the third element was met. See State v. Hope, 737 S.E.2d 108, 115 (N.C. Ct. App. 2012) (serious injury where victim suffered a severely broken jaw, requiring it to be wired shut and a metal plate to be installed, several lost teeth, lacerations on his face, arms and legs, and substantial blood loss). One could argue that the injury was not serious because V did not go to the hospital immediately and he did not appear hurt to Detective Smith on January 9, but given the standard of review, that seems extremely weak.

5. Did the trial court commit plain error in the instructions? (R pp. 9-15) (T pp. 158-64)

The Judge gave jury instructions 101.05 (Function of the jury), 101.10 (burden of proof and reasonable doubt), 101.15 (credibility of witnesses), 101.20 (weight of the evidence), 101.30 (effect of defendant’s decision not to testify), 104.05 (circumstantial evidence), photographs or diagrams as illustrative evidence, 105.20 (prior statements), 208.15 (assault with a deadly weapon inflicting serious injury), 208.60 (assault inflicting serious injury), and 101.35.

Because the evidence is undisputed that V suffered a broken jaw, it is apparent that he suffered a serious injury. See State v. Uvalle, 151 N.C. App. 446, 455, 565 S.E.2d 727, 733 (2002). Instruction on assault or assault with a deadly weapon was not necessary. Also, defense counsel admitted to assault inflicting serious injury in his closing. (Harbison was followed.)

The only possible problem is that in giving the AISI lesser included, the Judge described the assault in line with the prosecution’s theory (striking with metal chair) instead of the defense theory (only striking with his fists). Arguably, if the AISI elements were described as defense counsel argued in his closing, that could have made a difference. Note that it’s really hard to understand what defense counsel argued in his closing because it is so convoluted.

However, it seems like a stretch to say this constitutes plain error. The only impeachment of the victim’s testimony were some prior statements in the January 2 police report that were not really contradictory. His detailed statement to the detective on January 9 was completely consistent with his testimony. If the victim’s testimony is not impeached, the undisputed evidence is that defendant hit him with a chair.

Defense counsel somewhat argued that V’s jaw was broken was he was punched instead of when he was hit by the chair, so it was not a deadly weapon that actually inflicted the serious injury. There’s no evidence specifically supporting this theory, but it is conceivable. If so, the AISI instruction would have been inconsistent with that theory. There is case law that failure to give an instruction as promised is reversible error without further objection. State v. Withers, 179 N.C. App. 249, 255, 633 S.E.2d 863, 867 (2006). Perhaps that could apply, although the trial court did not make any promises about how exactly the AISI instruction would be phrased. Nor have I seen any precedent stating that a defendant has the right to a lesser included instruction phrased in a particular fashion.

Assault with a deadly weapon inflicting serious injury is a Class E felony. § 14-32(b). Habitual felon status raises it to a Class C.

Defendant stipulated to two prior felonies for prior record points, an AWDWISI in 2000 and felon possession of a firearm in 2007. The former is a Class E; the latter is a class G. § 14-415.1. This leads to 8 points. There is an extra point for the same prior offense under § 15A-1340.14(b)(6). Neither prior offense was used as a predicate offense for habitual felon status. Although one prior offense and one habitual felon offense were committed during the same week, that is permitted. *State v. Truesdale*, 123 N.C. App. 639, 642, 473 S.E.2d 670, 672 (1996).

For offenses committed before December 1, 2009, 9 points was prior record level IV. The presumptive range in 2009 for Class C and level IV was 107-133 months. The sentence was at the bottom of the presumptive range so cannot be challenged.

7. **Did the trial court err in failing to dismiss a juror who knew the victim? (T pp. 84-85)**

There was no objection so this would require ineffective assistance of counsel to make the claim instead of plain error.

Regardless, there was no error because the Judge did not abuse his discretion in not excusing a juror who realized he knew the victim from work. *See State v. Jones*, 166 N.C. App. 761, 604 S.E.2d 367 (2004); *State v. McLamb*, 313 N.C. 572, 576, 330 S.E.2d 476, 479 (1985). The juror stated that he could remain impartial. Nor is there any way to make a showing of prejudice.

8. **Was there ineffective assistance of counsel for failing to raise constitutional claim of speedy trial violation?**

Four facts for speedy trial violation are (i) the length of delay, (ii) the reason for the delay, (iii) the defendant's assertion of his right to a speedy trial, and (iv) whether the defendant has suffered prejudice as a result of the delay. *State v. Grooms*, 353 N.C. 50, 62, 540 S.E.2d 713, 721 (2000). Here the delay was five years, which is long. The reason for the delay appears to be the time to handle the other changes against defendant, defendant switching counsel, and then some defense-requested continuances. That cuts against defense. Defendant never asserted speedy trial rights, and even asked for a continuance on the first day of trial; that cuts against the claim. Finally, defendant suffered little prejudice because he was not in jail during the delay. So, a speedy trial claim seems slim. *See id.* (rejecting claim with 4-year delay.)

Even if there were a violation, the IAC standard would have to be met. Because it seems that defendant initiated most of the delay, it is hard to say that it was substandard performance to not file a speedy trial claim.
**ANDERS REQUIREMENTS**  
August 2015 North Carolina Appellate Boot Camp  
Emily Davis, Assistant Appellate Defender

**ANDERS BRIEF CHECKLIST**


(2) Include statement of the case, ground for review, and statement of facts as you would in any brief. *See Anders briefs on 2015 boot camp CD.*

(3) Unlike federal courts, North Carolina courts do not require counsel to demonstrate why an issue is not meritorious or was rejected. For cases assigned to you by the Appellate Defender, *you must follow requirements in this checklist and IDS and OAD Anders guidelines.*

(4) *Do not discuss client communication in the brief.* Do not divulge client requests to raise a particular issue. Do not discuss why the particular issue was not briefed. Each violates attorney-client privilege.

(5) *Do not explain why an issue is meritless or was rejected by counsel. Do not draw any conclusions or make any argumentative assertions for or against the client.* If you conclude the trial court erred or defendant is entitled to relief, you have written a regular brief, not an *Anders* brief. If you conclude the trial court did not err or defendant is not entitled to relief, you have abandoned your role as advocate and written the State’s brief. *See IDS and OAD Anders guidelines; examples of improper argumentative assertions; Anders briefs on 2015 boot camp CD.*

(6) *Direct the Court’s attention to any issue that might possibly support the appeal and cite relevant legal authority.* *Anders* requires counsel to reference “anything in the record that might arguably support the appeal,” *Anders*, 386 U.S. at 744, by providing specific “reference[s] [to] the record” and relevant “legal authorities.” *Id.* at 745. *See IDS and OAD Anders guidelines; Anders briefs on 2015 boot camp CD.*

(7) *When you file the brief, you must provide the client with* the record on appeal, transcript, instructions on how to submit his own arguments to the Court of Appeals, and the mailing address of the Court. In the brief, you must demonstrate the client was provided the required documents, instructions, and information. In the brief, you must ask the Court to allow sufficient time for the client to file *pro se* arguments. *See example client letter; Anders briefs on 2015 boot camp CD.*

(8) *Before you file the brief, you must attach the client letter to the brief.* In the letter, advise the client you filed an *Anders* brief and provide the required documents and instructions on filing *pro se* arguments. *See id.*

*Anders* brief checklist
Example client letter appended to *Anders* brief

**Required client letter appended to *Anders* brief before filing:** Before filing the brief, you must append a copy of the client letter showing required notifications. Make sure a signed copy is appended to the brief.

Here is an example. Identifying information was redacted or changed.

June 24, 2015

Mr. John Smith  
Inmate No. xxx  
Alexander Correctional Institution  
633 Old Landfill Road  
Taylorsville, NC 28681

Re:  *State v. Smith*, COA15-xxx  
09 CRS 99999, from Durham

Dear Mr. Smith:

Enclosed is the brief filed today on your behalf in the above-referenced case. Regretfully, I have been unable to identify any issue that in my professional opinion would support a finding of prejudicial error by the Court of Appeals. I have reached this conclusion with great reluctance and only after repeated review of the record in your case and relevant law.

Our courts have developed procedures to safeguard your right to appeal in this situation. In accordance with the United States Supreme Court decision in *Anders v. California*, I have asked the Court of Appeals to conduct an independent review of the record in your case to determine whether your case presents any prejudicial error.

While the Court has your case under review, you may submit your own written arguments to the Court. I have asked the Court to give you sufficient time to decide whether to submit your own arguments. If you decide to submit arguments, the enclosed transcript and record on appeal may be helpful. If you decide to submit your
own arguments, you must immediately notify the Court of your decision and submit your arguments as quickly as possible.

Notice of your intention to submit an argument and the argument itself must be sent to the following address:

Mr. John Connell, Clerk of Court
North Carolina Court of Appeals
Post Office Box 2779
Raleigh, North Carolina 27602

Any correspondence to the Court should include the case name and number as shown on the brief cover page.

Again, I regret my efforts to find a meaningful issue in your case have been unsuccessful. Under the circumstances, I believe you will be better served by a full review by the Court of Appeals, as required by Anders, than any attempt on my part to present an argument with no meaningful chance of success.

Please contact me with any questions.

Yours sincerely,

Emily H. Davis
Assistant Appellate Defender

Enclosures: brief
record on appeal
transcript

Example client letter appended to Anders brief
**Examples of IMPROPER argumentative assertions**

* There was no reversible error in this case.
* Mr. Smith’s sentence was authorized by statute.
* There was no motion to dismiss.
* The issue was not preserved.
* The trial court properly denied Mr. Smith’s motion to dismiss.
* There was sufficient evidence.
* Mr. Smith’s head in the sand defense was unavailing.
* It was obvious Mr. Smith intended to keep the proceeds for himself.
* Mr. Smith did not affirmatively argue the defense of necessity.
* Undersigned counsel has examined and rejected the following issues.
* The only evidence concerning value was the officer’s testimony.
* It was reasonable for the trial court to submit the case to the jury.
* The jury concluded Mr. Smith should have known.
* The trial court properly advised Mr. Smith about his decision to represent himself.
* The trial court did not impose a sentence outside the presumptive range.
* The indictments were sufficient to confer jurisdiction upon the trial court.
* Counsel rejected this issue because of *State v. Jones*.
* Counsel is unable to provide any information that might possibly support this appeal.
* Admission of the hearsay evidence was not error.
* Even if admission of the evidence was error, the error did not prejudice Mr. Smith.
* Failure to continuously object to same or similar evidence waived the issue.