

**IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT, CHANCERY DIVISION**

ANTHONY JEFFERSON and GEORGE DAVIS,)
individually and on behalf of a class of similarly)
situated persons,)

Plaintiffs,)

v.)

RITA ALIESE FRY, Public Defender of)
Cook County,)

Defendant.)

No. 01 CH 3316

**FIRST AMENDED COMPLAINT FOR
DECLARATORY AND INJUNCTIVE RELIEF**

Plaintiffs Anthony Jefferson and George Davis, individually and on behalf of a class of similarly situated persons, by their undersigned attorneys, for their complaint against Rita Aliese Fry, Public Defender of Cook County, allege as follows:

INTRODUCTION

1. This complaint seeks injunctive relief and a declaratory judgment for criminal defendants represented by the appellate division of the Cook County Public Defender’s Office (the “Cook County PD”). The Cook County PD has a long established practice of unjustifiably filing motions to withdraw purportedly pursuant to the authority of Anders v. California, 386 U.S. 738 (1967), but in cases in which there are arguably meritorious issues. This practice results in the Cook County PD’s abandonment of *nearly half* of the indigent clients it is appointed to represent. Anders provides a vehicle for an appointed attorney in a criminal appeal to withdraw from appeals that are “wholly frivolous.” The Cook County PD does not limit its Anders motions to those cases in which such a motion is necessary to address the ethical conflict

presented by the Cook County PD's appointment to a wholly frivolous appeal. Rather, on information and belief, the Cook County PD uses Anders motions to reduce its backlog of unbriefed cases and to ease the workload for Assistant Public Defenders working on appeals. The Cook County PD simply chooses to advocate for only about half of the appellate clients whose cases are assigned to the office. This practice violates the due process rights and the right to counsel on appeal of the named plaintiffs and of the class of indigent persons they seek to represent.

JURISDICTION AND VENUE

2. This Court has jurisdiction of this action to redress violations of the rights of Illinois citizens under the United States and Illinois Constitutions. Venue is proper in Cook County because the defendants reside in Cook County and the transactions out of which this cause of action arises took place in Cook County.

THE PARTIES

3. Plaintiff Anthony Jefferson is a citizen of the State of Illinois who is currently incarcerated at the Menard Correctional Center in Menard, Illinois. Mr. Jefferson was convicted following a bench trial in the Circuit Court of Cook County of several criminal offenses and was sentenced to a total of 75 years to be served in the Illinois Department of Corrections. Mr. Jefferson perfected an appeal from those convictions on January 18, 2000 and the Cook County PD was appointed to represent him. On October 5, 2000, the Cook County PD filed a motion to withdraw from Mr. Jefferson's appeal pursuant to the Anders decision. The day following the filing of the original complaint in this case, the Cook County PD sought leave from the Illinois Appellate Court to withdraw the Anders motion. The Cook County PD has now filed a merits brief in Mr. Jefferson's case, arguing the issue that was identified in this complaint.

4. Plaintiff George Davis is a citizen of the State of Illinois who is currently incarcerated at the Western Illinois Correctional Center in Mt. Sterling, Illinois. Mr. Davis was convicted following a jury trial in the Circuit Court of Cook County of the offense of murder and was sentenced to a term of 48 years to be served in the Illinois Department of Corrections. Mr. Davis perfected an appeal from his conviction on November 30, 1999 and the Cook County PD was appointed to represent him. On January 5, 2001, the Cook County PD filed a motion to withdraw from Mr. Davis's appeal pursuant to the Anders decision. That motion is currently pending before the Illinois Appellate Court.

5. Defendant Rita Aliese Fry is the Public Defender of Cook County, a position to which Ms. Fry was appointed by the Cook County Board. As Public Defender, Ms. Fry is the person in charge of the representation of indigent, criminally charged persons in Cook County, including certain indigent persons seeking to appeal their convictions.

CLASS ACTION ALLEGATIONS

6. Plaintiffs bring this case on behalf of themselves and, pursuant to 735 ILCS 5/2-801, as the representatives of the class of persons who are being or will be represented on appeal by the Cook County PD and in whose cases the Cook County PD has filed or will file a motion to withdraw from the case pursuant to the Anders decision despite the fact that there are arguable issues that could and should be briefed in the appeal.

7. The plaintiff class is so numerous that joinder of all members is impracticable. Each year, the Cook County PD is appointed in just under 1500 appellate cases on average. In nearly half of these cases, the Cook County PD files motions to withdraw pursuant to the Anders decision. As evidenced by the Anders motion filed in the named plaintiffs' cases, there are

arguable issues that could and should be briefed in the appeal in a sufficient number of these cases to satisfy the numerosity requirement.

8. There are questions of fact or law common to the class, which predominate over questions affecting only individual members. The common questions of law or fact include, but are not limited to: the constitutionality of the Cook County PD's long established practice of unjustifiably filing motions to withdraw purportedly pursuant to the authority of Anders v. California, 386 U.S. 738 (1967), but in cases in which there are arguably meritorious issues.

9. The plaintiffs will fairly and adequately protect the interests of the class. The interests of the plaintiffs are the same as those of all class members because there are non-frivolous issues in the plaintiffs' appeals as to which the plaintiffs seek a merits brief. The plaintiffs' counsel are experienced in class action litigation.

10. A class action is an appropriate method for the fair and efficient adjudication of the controversy alleged in this complaint.

ALLEGATIONS OF FACT

The Anders Procedure

11. In Illinois, every convicted criminal defendant has an absolute right to appeal his conviction to the Illinois Appellate Court. No criminal conviction in Illinois is final until the defendant has either exhausted his direct appeal remedy or has elected not to appeal. The United States Supreme Court has determined that the Sixth Amendment entitles all defendants to counsel on appeal in jurisdictions like Illinois where each convicted defendant has the absolute right to appeal his conviction.

12. Notwithstanding the right to counsel on appeal, there are rare circumstances in which counsel appointed for an indigent criminal appellant may abandon a case to which he has

been appointed. In Anders v. California, 386 U.S. 738 (1967), the United States Supreme Court approved procedures for the withdrawal of appointed appellate counsel where, after reviewing the record, counsel concludes that the appeal is wholly frivolous. The Illinois Supreme Court and the Illinois Appellate Court have consistently held that counsel in Illinois seeking to withdraw from an appointed case must follow the procedures set out in Anders, which protect the rights of indigent criminal appellants to due process and to the effective assistance of counsel.

13. Under Anders, a motion to withdraw from representing an indigent criminal appellant may only be filed “if counsel finds his defendant’s case to be wholly frivolous.” If counsel makes this determination, then he is required to submit a brief in support of the motion to withdraw. The brief must “analyze the case legally;” it must clearly describe the record in the case and it must lay out all issues that could potentially be argued on the appellant’s behalf. A copy of the brief must be furnished to the client and the client must be given the opportunity to raise any issues he wants the court to consider. After the submission of the motion, the court must determine, with the benefit of counsel’s motion and brief, whether the case is wholly frivolous, *i.e.*, whether the case lacks any *arguable* issues. If the court so determines, counsel should be given permission to withdraw.

14. An Anders motion should be filed only in the rare case in which appointed counsel faces a true ethical conflict between his duty to zealously represent his client and his duty as an officer of the court not to argue issues that are frivolous. Anders does not furnish public defender agencies with a means to control their dockets or winnow their caseloads.

The Cook County PD’s Abuse of the Anders Procedure

15. The Cook County PD files Anders motions in approximately half of the appellate cases to which the office is appointed. In fiscal year 1999 (December 1998 through November

1999), the office filed Anders motions in 450 cases; it filed opening merits briefs in 449 cases. In the first seven months of fiscal year 2000 (December 1999 through June 2000), the office filed Anders briefs in 226 cases and filed opening merits briefs in 254 cases. Thus, in the most recent 19 month period for which statistics are available, 49% of the original briefs filed by the Cook County PD have been briefs in support of Anders motions seeking to withdraw from representation of the client on appeal. The Cook County PD chooses to advocate for only about half of the appellate clients whose cases are assigned to the office.

16. The Cook County PD is appointed each year to just under 1500 new criminal appellate cases. The Cook County PD has a staff of only 56 attorneys. According to the calculations of the office, 56 attorneys are sufficient to handle only approximately 1100 new criminal appeals per year.

17. In order to manage its excess caseload, the Cook County PD requires each of the attorneys in its appeals division to prepare 20 original opening documents (i.e., an opening merits brief or an Anders brief or a dispositive motion) each fiscal year. Attorneys who fail to complete 20 dispositions per year are subject to discipline.

18. To help the appellate attorneys meet the 20 disposition requirement, supervisors in the Cook County PD allocate “simple” appeals to relatively inexperienced assistants in the appellate division. To this end, before making a case assignment, the supervisors perform a cursory pre-assignment review of the record in each case, seeking to assess the strength and complexity of the issues.

19. In roughly half of the cases, a supervisor, on information and belief, will mark the file jacket with the notation “P.A.” (i.e., “probable Anders”), which means that, based on the supervisor’s cursory review, the case should probably be disposed of with an Anders brief and

motion. It is the view of the supervisors in the appellate division that the preparation of an Anders brief is a relatively simple task. Therefore, as a matter of policy, cases designated as “probable Anders” are assigned to relatively inexperienced assistants in the appellate division.

20. In fact, properly prepared, an Anders brief should be far more difficult and complex than a brief arguing the merits of one or two issues presented in a case. Unlike a merits brief, the Anders process requires counsel to thoroughly describe the factual and procedural record of the case and to lay out *all* possible issues that could be raised in the appeal.

21. The attorneys in the Cook County PD do not properly prepare their Anders briefs. Anders briefs filed by the Cook County PD do not thoroughly describe the factual and procedural record of the case and do not lay out all of the possible issues that could be argued on behalf of the client. Instead, Anders briefs filed by the Cook County PD typically do no more than “argue” that the record supports the finding of the defendant’s guilt. The Anders briefs filed on behalf of plaintiff Anthony Jefferson (described more fully in paragraphs 27 - 28 below) and on behalf of plaintiff George Davis (described more fully in paragraphs 33 - 34 below) are typical of the Anders briefs that the Cook County PD files in nearly half of its cases.

22. Because of the Cook County PD’s failure to properly prepare their Anders briefs, the Illinois Appellate Court is forced to decide whether to dismiss appeals as frivolous without having the benefit of experienced counsel’s thorough review of the record and without a brief that clearly and exhaustively lays out all possible issues for appeal. The Cook County PD thereby fails to discharge its responsibilities not only to its clients but to the Appellate Court as well.

23. The Cook County PD files Anders briefs in many cases in which there are non-frivolous issues and as to which the United States and Illinois constitutions entitle the defendant to a brief on the merits.

24. Indigent defender organizations in other major metropolitan areas file Anders briefs at much lower rates than the Cook County PD:

- The Criminal Appeals Bureau of the New York Legal Aid Society, which is appointed to handle approximately 85% of the criminal appeals arising from convictions in New York City, files Anders motions and briefs in only about 6% of the cases to which it is appointed.
- The Michigan Office of the State Appellate Defender, which is appointed to handle approximately one third of the criminal appeals in Michigan, filed *no* Anders motions and briefs in fiscal year 2000.
- The Office of the Ohio Public Defender typically files Anders motions and briefs in less than 1% of the criminal appeals to which it is appointed.
- Attorneys appointed to represent indigent appellants in the Louisiana public defender system in the last calendar year filed Anders motions and briefs in only about 5% of their cases.

The Cook County PD's Violation of the Named Plaintiffs' Rights

Anthony Jefferson

25. Plaintiff Anthony Jefferson was convicted of the offenses of murder, home invasion and attempted murder following a bench trial in the Circuit Court of Cook County. On December 16, 1999, he was sentenced to a total term of 75 years: 55 years on the murder conviction; 20 years on the home invasion conviction, to run concurrent with the murder

sentence; and 20 years for attempted murder, to run *consecutive* to the other sentences pursuant to 730 ILCS 5/5-8-4(a)(i).

26. Mr. Jefferson's trial counsel filed a post-sentencing motion on December 19, 1999 arguing that the sentences were excessive. That motion was denied and Mr. Jefferson appealed on January 18, 2000. The Cook County PD was appointed to represent Mr. Jefferson in his appeal.

27. On October 5, 2000, the Cook County PD filed a motion to withdraw pursuant to Anders with an accompanying brief. A copy of this motion is attached hereto as Ex. A. The Anders motion and brief filed in Mr. Jefferson's appeal "argues" that "there was sufficient evidence for the court to find that [Mr. Jefferson] committed the offenses with which he was charged." The motion and brief make no reference to any other possible issue in Mr. Jefferson's case.

28. In particular, the Anders motion and brief in Mr. Jefferson's case fails to advise the court that Mr. Jefferson received consecutive sentences for murder and attempted murder pursuant to 730 ILCS 5/5-8-4(a)(i) based on the Circuit Court's finding that Mr. Jefferson had inflicted great bodily harm in the course of the attempted murder. The Anders motion and brief fails to lay out the potential issue that the imposition of consecutive sentences based upon a finding first made by the Circuit Court in the course of the sentencing hearing (after the conclusion of Mr. Jefferson's trial) violates due process for reasons explained by the United States Supreme Court's June 26, 2000 decision in Apprendi v. New Jersey, 530 U.S. 466 (2000).

29. In fact, the issue described in the preceding paragraph is a non-frivolous issue as to which Mr. Jefferson was entitled to a merits brief pursuant to the United States and Illinois constitutions.

30. On February 28, 2001, the day after Mr. Jefferson filed his original complaint in this case, the Cook County PD filed a motion in the Appellate Court to withdraw the Anders motion that she had filed in Mr. Jefferson's appellate case. The Cook County PD has now filed a merits brief in Mr. Jefferson's appeal, arguing the issue that is identified in this complaint.

George Davis

31. Plaintiff George Davis was convicted of the offense of murder following a jury trial in the Circuit Court of Cook County and was sentenced to a prison term of 48 years. Mr. Davis had been previously convicted of this offense in a prior jury trial. In an appeal of the earlier conviction, the Illinois Appellate Court reversed and remanded Mr. Davis's case for a new trial. People v. Davis, 287 Ill. App. 3d 677 (1st Dist. 1997).

32. Following Mr. Davis's second conviction, his trial counsel filed a post-trial motion arguing numerous errors in the Circuit Court's rulings on motions in limine and on matters occurring during the course of the trial. That motion was denied. On November 30, 1999, following the denial of the post-trial motion and sentencing, Mr. Davis appealed. The Cook County PD was appointed to represent Mr. Davis in his appeal.

33. On January 5, 2001, the Cook County PD filed a motion to withdraw pursuant to Anders with an accompanying brief. A copy of this motion is attached hereto as Ex. B. The Anders motion and brief filed in Mr. Davis's appeal "argues" that "any rational trier of fact could have found the essential elements of the first degree murder offense beyond a reasonable doubt." Apart from the bare assertion that "[Mr. Davis] was given a fair trial," the motion and brief make no reference to any other possible issue in Mr. Davis's case.

34. In particular, the Anders motion and brief in Mr. Davis's case fail to advise the court of the following issues, among many others:

- The evidence against Mr. Davis was weak enough to warrant the appellate argument that the verdict was against the manifest weight of the evidence. The prosecution claimed at trial that Mr. Davis killed the victim with a 9 mm handgun during a drive by shooting in the Englewood neighborhood of Chicago. The theory of Mr. Davis's defense was that, contrary to the prosecution's contention, the victim, who was a drug dealer, was killed during a dispute over drugs by one Anthony Fisher, another drug dealer, who was on the street with the victim at the time of the murder. Fisher became the prosecution's principal witness. The Anders motion and brief make no reference to the following evidence in the record, which casts doubt on the prosecution's theory and tends to support the defense:

- The State offered no physical evidence to connect Mr. Davis to this crime.
- The State claimed that Mr. Davis shot the victim from a certain black and gold Trans Am automobile. No evidence ever connected Mr. Davis to that car.
- Anthony Fisher, the prosecution witness, fled from the City immediately following the murder, without contacting the police, and was unavailable for over a year, returning to the City only after Mr. Davis had been charged with the offense.
- Fisher was a convicted felon who had reason to cooperate with the State. The Assistant State's Attorney who prosecuted Mr. Davis had previously testified on Fisher's behalf at a sentencing hearing for another offense and,

following the prosecutor's testimony, Fisher had been given the minimum possible sentence.

- Although a number of persons were on the street at the time of the shooting, Fisher was the *only* witness who identified Mr. Davis as the shooter.
- During the cross examination of the medical examiner, the defense developed evidence that the trajectory of the bullet that killed the victim was more consistent with the victim having been killed in the course of a fight on the street than as a result of a shot fired from a passing car.
- The State violated its discovery obligations under the Brady v. Maryland doctrine and under Illinois Supreme Court Rule 412 by failing to inform the defense prior to trial that one Donald Judkins, who testified for the State to an alleged admission made by Mr. Davis, had received \$100.00 from the Cook County State's Attorney's office to assist Judkins in obtaining a commercial driver's license.
- The court improperly denied the defense motion in limine to disqualify the Assistant State's Attorney because of his testimony on behalf of Fisher at sentencing in another case.
- The State made improper remarks during its opening statement regarding the motives of people who live in the Englewood community and regarding the credibility of Fisher.
- The court unfairly restricted the cross examination of Anthony Fisher in a variety of respects, including failing to permit the defense to develop evidence of Fisher's

familiarity with weapons and of the nature of the activities in which Fisher and others were engaged on the street at the time of the shooting.

- The prosecutor made an inflammatory and improper rebuttal argument in which he misrepresented the evidence at trial and belittled and attacked the motives and the credibility of the defense counsel.

35. In fact, each of the issues described in the preceding paragraph is a non-frivolous issue as to which Mr. Davis was entitled to a merits brief pursuant to the United States and Illinois constitutions.

COUNT I
(Injunction – Violation of Due Process)

36. Plaintiffs repeat and reallege paragraphs 1 through 35 as this paragraph 36 of Count I.

37. Plaintiffs bring Count I on their own behalf and on behalf of the class of similarly situated persons described in paragraph 5 of this Complaint.

38. Plaintiffs and the class of persons they represent have a due process right to a full and fair determination of whether there are any arguable issues in their appeals prior to the withdrawal of their appointed appellate counsel. The procedures for withdrawal of appointed counsel set forth in Anders and adopted by the Illinois Supreme Court and the Illinois Appellate Court were designed to ensure that the due process rights of the plaintiffs and the class of similarly situated persons are protected and preserved.

39. In order to ensure the protection of their due process rights, the plaintiffs and the members of the plaintiff class are entitled to an injunction directing the Cook County PD to adhere to the following procedures in connection with each and every decision to withdraw under Anders from an appeal to which the office is appointed:

- a. Perform a careful review of the entire record.
- b. Outline every possible issue that could be argued on the client's behalf.
- c. Analyze and exhaustively research every such issue.
- d. Determine, as to each and every issue, whether any argument could be made in support of the client's position.
- e. Convene a conference, in which a senior lawyer participates, to decide whether an Anders brief is appropriate.
- f. In the event an Anders brief is appropriate, file a brief that clearly reflects counsel's thorough and exhaustive consideration of all of the possible issues, with proper citation to the record and controlling legal authorities.

40. The Cook County PD fails to adhere to the procedures described in the preceding paragraph.

41. As a direct and proximate result of the Cook County PD's failure to adhere to proper Anders procedures, the plaintiffs and the members of the plaintiff class are deprived of their due process right to have a full and fair determination of whether there are any arguable issues in their appeals prior to the withdrawal of their appointed counsel.

42. The plaintiffs and the members of the plaintiff class have a clear right to relief in the form of an injunction directing the Cook County PD to adhere to proper Anders procedures.

COUNT II
(Injunction – Violation of the Right To Counsel)

43. Plaintiffs repeat and reallege paragraphs 1 through 42 as this paragraph 43 of Count II.

44. Plaintiffs bring Count II on their own behalf and on behalf of the class of similarly situated persons described in paragraph 5 of this Complaint.

45. The Cook County PD has a duty to file Anders motions and briefs *only* in those appeals in which there is no issue that could be argued on behalf of the indigent criminal appellant.

46. In cases in which there are arguable issues, the Cook County PD has a duty under the Sixth Amendment of the United States Constitution and the corresponding provision of the Illinois Constitution to file a merits brief on behalf of the appellant.

47. Notwithstanding the duties described in paragraphs 45 and 46, it is the policy of the Cook County PD to file Anders motions in cases, like those of the plaintiffs and the members of the plaintiff class, in which there *are* arguable issues that could and should be briefed in order to ease the workload for assistants in the Cook County PD and to reduce the backlog of unbriefed appeals.

48. As a direct and proximate result of the policy described in the preceding paragraph, the plaintiffs and the members of the plaintiff class are being deprived of their right to counsel in their appeals.

49. The policy described in paragraph 47 is an invalid procedure for withdrawal from an appellate appointment. Thus, this policy constructively denies the plaintiffs and the members of the plaintiff class an appellate lawyer in their cases *altogether* and, thus, presumptively prejudices the plaintiffs and the members of the plaintiff class in their appeals.

50. The plaintiffs and the members of the plaintiff class have a clear right to an injunction directing the Cook County PD to withdraw the Anders motions heretofore filed in their cases; to file merits briefs in their appeals; and, henceforth, to file Anders briefs and motions only in those cases in which there are no arguable issues that could be briefed on behalf of the indigent criminal appellant.

COUNT III
(Declaratory Judgment)

51. Plaintiffs repeat and reallege paragraphs 1 through 50 as paragraph 51 of this Count III.

52. Plaintiffs bring Count III on their own behalf and on behalf of the class of similarly situated persons described in paragraph 5 of this Complaint.

53. There is an actual controversy between the plaintiffs and the members of the plaintiff class, on the one hand, and the defendants, on the other hand, concerning whether the practices of the Cook County PD regarding the filing of Anders motions violate the rights of the plaintiffs and the plaintiff class to due process and to counsel in their appeals.

54. The plaintiffs and the members of the plaintiff class are entitled to a declaration that their due process rights and their right to counsel in their appeals are violated by the defendants' failure to adhere to proper procedures for the filing of Anders briefs and motions as alleged herein.

PRAYER FOR RELIEF

The plaintiffs therefore pray that this Court enter an order:

- A. Certifying this case as a class action.
- B. Declaring that the due process rights and the right to counsel on appeal of the plaintiffs and the members of the plaintiff class are violated by the defendants' failure to adhere to the proper procedures for the filing of Anders briefs and motions.
- C. Issuing an injunction directing defendant Rita Aliese Fry to adhere to the proper procedures for the filing of Anders briefs and motions, including, in every such case in which an Anders motion is being considered:

- a. Performing a careful review of the entire record.
 - b. Outlining every possible issue that could be argued on the client's behalf.
 - c. Analyzing and exhaustively researching every such issue.
 - d. Determining, as to each and every issue, whether no non-frivolous argument could be made in support of the client's position.
 - e. Convening a conference, in which a senior lawyer participates, to decide whether an Anders brief is appropriate.
 - f. In the event an Anders brief is appropriate, filing a brief that clearly reflects counsel's thorough and exhaustive consideration of all of the possible issues with citations to the record and controlling legal authorities.
- D. Issuing an injunction directing defendant Rita Aliese Fry to withdraw the Anders motions heretofore filed in the appeals of the plaintiffs and the members of the plaintiff class; to file merits briefs in their cases; and, henceforth, to file Anders briefs and motions only in those cases in which there is no non-frivolous issue that could be argued on behalf of the indigent criminal appellant to whose case the Cook County PD has been appointed.

- E. Awarding costs and attorneys fees to the plaintiffs.
- F. Granting such further and additional relief as this Court deems just and equitable.

Respectfully submitted,

ANTHONY JEFFERSON
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By: _____
One of their attorneys

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Mathew Harrington, a second year student at the University of Chicago Law School, also assisted in the preparation of this document.