

**.News From The Courts**  
**Reprinted from the SMART Recovery<sup>®</sup> News & Views**  
**Federal Court Rules Against Coerced Attendance at Religious Recovery Meeting**

by Steve McCullough, Certified Legal Assistant and Coordinator, So. Florida

The very foundation of the 12-step movement was rocked on August 27, 1996 when the United States Court of Appeals for the Seventh Circuit issued a decision in the case of Kerr v. Farrey which held that the Narcotics Anonymous program contained explicit religious content" and that "the state (of Wisconsin) has impermissibly coerced inmates to participate in a religious program (Narcotics Anonymous)." The 7th Circuit oversees and has mandatory precedential authority over Federal District Courts in Wisconsin, Illinois and Indiana. James W. Kerr, at the time this case arose, was an inmate at the Oakhill Correctional Institution, a minimum security facility in Oregon, Wisconsin. (See the story as told by James in "Standing Up For Your Rights".) Catherine J. Farrey was the warden at Oakhill. Mr. Kerr objected as soon as he was told that he would be required to attend NA meetings, but he was told that he "didn't have a choice in the matter; that attendance was mandatory; that if (he) didn't go, (he) would most likely be shipped off to a medium (i.e. higher) security prison, and denied hope of parole." His affidavit filed with the federal District Court averred that the Oakhill NA meetings always began with a prayer invoking the Lord and that all members were encouraged to read the NA book, which is similar to the AA "Big Book" and contains many references to spirituality and God. "To force me to attend (NA)," Mr. Kerr affirmed, "is at least as offensive as many people would find forced attendance of services at a Mosque, a Jewish Temple, or a meeting of Pentecostals (sic) to be." NA was the only substance abuse program available to the Oakhill inmates. In what very well may be the most well reasoned opinion yet to have been published on the question of whether choice less,, state mandated 12-step "counseling" constitutes a violation of the Establishment Clause of the 1st Amendment to the U.S. Constitution, the Seventh Circuit's three judge panel rejected, without dissent, the Federal District Court's application of the "Lemon test" and held it to be "beyond dispute that the Constitution guarantees that the government may not coerce anyone to support or participate in religion or its exercise." "In our view, when a plaintiff claims that the state is coercing him or her to subscribe to religion generally, or to a particular religion," the Court wrote, "only three points are crucial: first, is it the state who has acted; second, does the action amount to coercion; and third, is the object of the coercion religious or secular?" The Court held that, in Mr. Kerr's case, the first two criteria were easily determined in his favor. And they went on to hold that the twelve steps themselves were, on their face, sufficient to prove that the object of the State's coercion was religious. They rejected Warden Farrey's representation that the "higher being" concept "was viewed as a very personal matter and could range from a religious concept of God to the non-religious concept of individual willpower." "A straightforward reading of the 12 steps shows clearly that the steps are based on the monotheistic idea of a single God or Supreme Being," the Court held. "True, that God might be known as Allah to some, or YHWH to others, or the Holy Trinity to still others, but the 12 steps consistently refer to 'God, as we understood Him.'" And that's some truth about the 12 steps. They really wrote that without dissent. Now wasn't all that business about the Steps being spiritual but not religious just silly?

In other news from the Courts, the New York State Department of Corrections filed a petition with the United States Supreme Court on September 9, 1996 asking that Court to hear the case of Griffin v. Coughlin, No. 73, 1996 WL 317180 (N.Y. June 11, 1996) -- see "News from the Courts", SMART<sup>®</sup> News & Views, July 1996. As of December 11, 1996) the U.S. Supreme Court has not reached a decision to grant or deny DOCS' request. Also on September 9, 1996, a three judge panel of the US Court of Appeals for the Second Circuit issued a two to one decision which upheld the ruling of a Federal District Court in the case of Warner v. Orange County Department of Probation, 95 F.3d 202 (2nd Cir. 1996), which held that a DWI probationer's sentence ordering him to attend meetings of Alcoholics Anonymous "essentially required him to attend religious exercises" in violation of the Establishment Clause of the First Amendment to the U.S. Constitution. Orange County (N.Y.) Attorney Richard B. Golden said the 2nd Circuit's September 9th ruling was "wrongly decided.") He is reported to have pledged that he will ask the full 2nd Circuit Appeals Court to rehear his arguments en banc and, failing that, he vows to appeal to the U.S. Supreme Court. The 2nd Circuit oversees and has mandatory precedential authority over Federal District Courts in New York, Connecticut, and Vermont.

#### NEWS FLASH

On Jan 6th, 1997 the US Supreme Court denied the NY State Department of Corrections' request to hear the Griffin v. Coughlin case. The Griffin case now stands as persuasive but not mandatory authority for civil courts outside the state of New York considering the constitutionality of government required 12-step attendance. This decision does not prevent the Supreme Court from considering the same issue at a later time.

#### 2ND CIRCUIT PANEL AMENDS WARNER DECISION AND REMANDS CASE FOR FURTHER FINDINGS

by Steve McCullough, Certified Legal Assistant and Coordinator, So. Florida

On May 14, 1997, a three judge panel of the United States Court of Appeals for the 2nd Circuit amended its prior opinion in the case of Warner v. Orange County (NY) Department of Probation ("OCDP"), Dk295-7055, remanded the case to the federal district court for further findings of fact, and vacated both its prior and its amended opinions pending further review. The prior opinion, decided September 9, 1996, has not been published in the hardcover edition of the Federal Reporter, 3rd Series. The amended opinion is largely as previously written. It remains a 2 - 1 decision in which the majority holds, "Because sending Warner to A.A. as a condition of his probation, without offering a choice of other providers, plainly constituted coerced participation in a religious exercise, we find a violation of the Establishment Clause (of the First Amendment to the U.S. Constitution)." See SMART<sup>®</sup> News and Views, "News from the Courts," April 1997. Even the dissenting judge writes, "I hasten to add that I do not view compulsory activity with a substantial religious component as a valid penal measure, at least where equally effective secular rehabilitative programs are available." The dissenting judge felt that Mr. Warner's claim would have been more properly pursued as a violation of the Free Exercise (of Religion) Clause of the First Amendment. But as previously reported in this column, the Warner case is highly unusual in that Mr. Warner is the first and only plaintiff litigating this issue who has succeeded in piercing the shield of governmental immunity from liability for monetary damages. The 2nd Circuit had affirmed the federal district court's award of damages in the amount of \$1.00 plus attorneys' fees.

The award of only nominal damages was due to the federal district court's finding that "Warner managed to avoid indoctrination." (Author's note: If Warner had not managed to avoid indoctrination, would he have brought suit?) It is only the issue of the award of damages, any damages, that is addressed by the 2nd Circuit's May 14, 1997 Amendment. In the Amendment the majority notes, "At the time OCDP recommended sending Warner to A.A. (November 1990), there were no court decisions suggesting that this was an abridgment of constitutional rights." "Furthermore," they write, "it is clear that (OCDP's) purpose was not to promote religion but to help free alcoholics from addiction . . ." "We have misgivings about awards of damages for such violations," the majority now holds. Citing "interest" by "(other) judges of this court (i.e. the 2nd Circuit)", the amended decision now remands this case back to the federal district court to determine "whether Warner was sufficiently aware at the time of his sentence of the extent of the religious practices of the A.A. meetings (so) that his failure to object to, or appeal from, his sentence should be deemed a consent, or a waiver or forfeiture of his claim." Prior to sentencing, Mr. Warner had attended "about four" A.A. meetings, because he believed "that the court would look upon me more favorably in the sentencing procedure if I (could) show that I was pursuing a program of rehabilitation." The dissenting opinion in the appeal has already argued that "Warner's voluntary pre-sentence attendance at A.A. meetings gave him sufficient awareness of the extent of their religious content (so) that his failure to object at the time of sentencing or to appeal should be construed as a consent or waiver (emphasis added)." The honorable judges of the 2nd Circuit appear, in this writer's opinion, to be blissfully unaware of what all newcomers and the public at large are told (over and over and over again) about 12-step programs; that anything can be your Higher Power and 12-step programs aren't religious, they're spiritual. In other news from the courts, the printed legal citation of the Griffin v. Coughlin case is now available. It is Griffin v. Coughlin, 649 N.Y.S.2d 903 (N.Y. 1996), cert. denied, 117 S.Ct. 681 (1997). In Griffin, New York State's highest Court of Appeals held in a 5 - 2 decision that "doctrinally and as actually practiced in the 12-step methodology, adherence to the A.A. fellowship entails engagement in religious activity and religious proselytization," and that conditioning an inmate's access to conjugal visits upon participation in a 12-step program violated the Establishment Clause of the First Amendment.

#### FEDERAL DISTRICT COURT REINSTATES WARNER DECISION

by Steve McCullough, Certified Legal Assistant and Coordinator, So. Florida

A United States District Court judge for the Southern District of New York issued a finding on June 27, 1997 reinstating his earlier decision in the case of Warner v. Orange County Department of Probation, 870 F.Supp. 69 (S.D.N.Y. 1994), which held that requiring a DWI probationer to attend A.A. meetings violated the Establishment Clause of the First Amendment to the U.S. Constitution, because "the A.A. meetings (Mr. Warner) attended were the functional equivalent of religious exercise." (See "News from the Courts," SMART<sup>®</sup> News and Views, April 1997 and July 1997.) On remand from the U.S. Court of Appeals for the 2nd Circuit, the district court was charged with resolving two questions: first, "whether (Warner) was sufficiently aware at the time of the (DWI) sentence of the extent of the religious practices of A.A. (so) that his failure to object to, or appeal from, his sentence should be deemed a consent, waiver or forfeiture of his (constitutional) claims, and second, whether (OCDP properly) asserted at trial that there had been (such) a waiver or forfeiture.

" With respect to the first question, Mr. Warner testified that he had attended "four or five A.A. meetings" prior to his DWI sentencing. He had previously testified that 'the A.A. program participants lied to him by telling him that the program was not religious, while at the same time telling him that he must pray in order to succeed in his rehabilitation.' In this most recent hearing, Mr. Warner testified that 'he (only) gradually decided that (the program participants) were wrong and were attempting to trick him.' Judge Gerald L. Goettel held as follows: 1) "the A.A. program for combating addictive alcoholism is deeply religious," and 2) Mr. Warner did not "voluntarily, knowingly and intelligently" waive his constitutional claims by failing to object to the A.A. attendance requirement of his probation at the time of his DWI sentencing (emphasis added). With respect to the second question, the district court held that "throughout the proceedings and at trial, the position of the defendant County was (and still is) that the A.A. program is not religious." He also notes, "(I am) at a loss to understand the position taken by (the defendant County) . . . in that regard." Aren't we all? Warner was awarded nominal damages of \$1.00 plus attorneys' fees. In other news from the courts, Recovery Book author and 12-step expert, Al J. Mooney, M.D., testified under oath on September 4, 1997 in a matter with which I've been involved for over six years (completely unrelated to Warner) that someone who has been alcohol dependent is still "actively" alcohol dependent, even if they are abstinent, if they are "self-centered." Any determination on the part of an alcohol dependent person to exert "self-control" over her emotions and behavior "is a trait that must be overcome in order to achieve recovery," Dr. Mooney explained. Opining that recovery was something distinct from abstinence, Dr. Mooney stated, "self-centeredness and failure to participate in a strong recovery program leads to relapse." "Recovery ends before first use," he testified. Extolling A.A. as "good medicine" and A.A.'s white chip as the "surrender chip," Dr. Mooney spoke at length about what he believes to be the science of altered brain chemistry present in the biology of substance dependent persons which has the effect of giving them an inordinate amount of pleasure from ingestion of substances like alcohol. He then cited without specificity "recent research (which) shows that eighty to ninety percent of first time DWI offenders are alcoholics." (Both Court TV and ABC News have reported that over one and one-half million arrests are made each year in the U.S. for DWI.) In his Recovery Book (at page 580), Dr. Mooney writes, "With approximately ten people in every hundred estimated to be abusing chemical substances, the odds are good that if (an employer) has ten employees, at least one is a catastrophe waiting to happen; or is gradually happening already. If you have 1,000 employees, you have 100 time bombs on staff." He then goes on to praise the option of treatment, in part because the employer can "ensure that the employee is working the A.A. program." In his recent testimony, Dr. Mooney also categorically denied that 12-step treatment centers engage in tactics like isolation, group confrontation, repetition, and assignment of demeaning tasks in order to brainwash their clients. And he said that it was inconceivable that anyone could actually be harmed by unwanted

**12-step treatment. Yes, Dr. Mooney. And I'm the tooth fairy.****NEWS FROM THE COURTS****Reprinted from the July 1998 issue of the SMART Recovery<sup>®</sup> News & Views**

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A RECAP Since there appear to be no new court decisions within jurisdictions wherein the issue isn't already settled, I thought it might be useful to provide a recap of the significant rulings holding on the question of whether government coerced 12-Step participation violates Americans' religious freedoms. I believe that there are four significant court decisions ruling on the question of whether government coerced 12-Step participation violates the Establishment Clause of the First Amendment to the U.S. Constitution. The Establishment Clause basically proscribes undue government entanglement with or sponsorship of religion. What makes these rulings significant is that they are published by Courts with mandatory authority over other courts within their jurisdictions. In the case of *Griffin v. Coughlin*, 88 N.Y. 2d 674, 649 N.Y.S.2d 903, 673 N.E. 2d 98 (NY Ct. of Appeals 1996), US cert. denied 136 LE2d 607, 117 SC 681, New York State's highest Court of Appeals ruled that "the fundamental A.A. doctrinal writings" are "unequivocally religious in theme and proselytizing in content." "Doctrinally and as actually practiced in the 12-step methodology, adherence to the AA fellowship entails engagement in religious activity and religious proselytization," the majority wrote. They went on to hold, by a vote of 5 – 2, that conditioning the privilege of conjugal visits upon participation in a 12-step program violated the Establishment Clause. Decisions published by the New York State Court of Appeals carry mandatory authority over all state courts within New York State considering the same question. In the case of *Kerr v. Farrey*, 95 F.3d 472 (7th Cir. 1996), the United States 7th Circuit Court of Appeals unanimously ruled it to be "beyond dispute that the Constitution guarantees that the government may not coerce anyone to participate in religion or its exercise." In their published decision, the Court wrote, "A straightforward reading of the 12 steps shows clearly that the steps are based on the monotheistic idea of a single God or Supreme Being. True, that God might be known as Allah to some, or YHWH to others, or the Holy Trinity to still others, but the 12 steps consistently refer to God as we understood Him." They held, by a vote of 3 – 0, that threatening an inmate with transfer to a higher security prison based upon his refusal to participate in meetings of Narcotics Anonymous violated the Establishment Clause. Decisions from the U.S. 7th Circuit Court of Appeals carry mandatory authority over all federal district courts with the states of Wisconsin, Illinois and Indiana considering the same question. In the case of *Arnold v. Tennessee Board of Paroles*, 956 SW2d 478 (TN 1997), the Tennessee State Supreme Court unanimously held that the lower courts in that state erred when they summarily dismissed co-plaintiff Evans' demand that the Tennessee Parole Board be prohibited from considering participation in 12-Step programs in their decisions to grant or deny parole. In their published decision, the Court wrote, "There is no debate that a government policy that requires participation in a religious activity violates the Establishment Clause." Decisions from the Tennessee Supreme Court carry mandatory authority over all state courts within the state of Tennessee considering the same question. The case of *Warner v. Orange County Dep't of Probation*, 968 F.Supp 917 (S.D. N.Y. 1997) is possibly the most important litigation in this area of constitutional law, because plaintiff Warner was actually awarded \$1.00 in damages as a consequence of having been sentenced to attend AA meetings as a condition of probation.

In Warner, a Federal District Court held, "The AA program for combating addictive alcoholism is deeply religious," and that the AA attendance requirement therefore violated the Establishment Clause. The award of damages was largely based upon the argument that the 'Orange County (NY) Department of Probation ("OCDP") was . . . obligated to use reasonable care to inform itself of the suitability of therapy programs it recommended to the court, especially where such recommendations were repeatedly made as a matter of policy.' OCDP has appealed the District Court's ruling in Warner to the United States Court of Appeals for the 2nd Circuit, and their decision to affirm or reverse is pending. If the award of damages is upheld, that decision could conceivably provide a precedent for more than just nominal damages for victims of government coerced 12-Step participation within the 2nd Circuit's jurisdiction. Decisions from the U.S. 2nd Circuit Court of Appeals carry mandatory authority over all federal district courts within the states of New York, Connecticut and Vermont considering the same question. The decision in Griffin referenced above overturned a ruling from an Intermediate Appellate Court in New York State which held, by a vote of 5 – 0, that "in the 12-step program, the word 'God' is used as (just) a term of art to express the concept of a higher power outside the participant's ego." See Griffin v. Coughlin, 211 NYA2d 187. I am aware of no decision published by any other Appellate Court holding that government coerced 12-step participation does not violate the Establishment Clause. None of the decisions reported upon in this article prohibit government from requiring certain people to participate in alcohol or drug counseling programs when a non-religious alternative is provided.

### **News From The Courts**

**Nov. 1999**

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#### **NEWS FROM THE COURTS**

**NY Probation Dept. Appeals Warner Decision to US Supreme Court**

**by Steve McCullough, Certified Legal Assistant and Coordinator, So. Florida**

On about July 18, 1999 the Orange County (NY) Department of Probation filed a petition for a writ of certiorari to the United States Supreme Court, asking the Court to review and overturn the decision reached by the US Court of Appeals for the 2nd Circuit in the case of Warner v. Orange County Dep't of Probation, 173 F3d 120, (2nd Cir., 1999).

In its April 19, 1999 decision in Warner, the 2nd Circuit held it to be a violation of Americans' First Amendment religious freedoms for a probationer to be required to attend 12-step meetings without being provided with a non-religious alternative. The 2nd Circuit's decision reinstated its earlier holding in the case of Warner v. Orange County Dep't of Probation, 115 F3d 1068 (2nd Cir., 1997) in which it found that "Warner . . . was required to participate in a long-term program of group therapy that repeatedly turned to religion as the basis of motivation." The 2nd Circuit also found the Probation Department's assertion that the non-denominational nature of the AA experience rendered it something other than a religious program was "at the very least, factually misleading."

As this case was proceeding, the County attorney of Orange County, NY, Richard B. Golden, Esq., was quoted in an article published in The Washington Times on November 4, 1996 as follows: "Throughout New York State and, I believe, throughout the country, it is a standard condition that probationers in DWI cases attend AA. There are alternatives out there. Do the probation officials think they are satisfactory? Absolutely not. There is no other suitable alternative that comes anywhere close to the effectiveness of AA." Mr. Golden was responding to information provided by Warner's attorney, Robert Isseks, Esq. of Watertown, NY, to the effect that SMART Recovery was among totally secular and meaningful rehabilitation programs.

Of particular concern to 12-step zealots like Mr. Golden is the fact that Warner was actually awarded damages as a consequence of the violation of his constitutional freedoms. Though the award was only for \$1.00, this decision could conceivably lead to larger awards if it is allowed to stand. The US Supreme Court can be expected to reach a decision whether or not to hear the case by the fall of 1999.

Please note: It is extremely important for the reader to understand that this column is not intended to impart any kind of legal advice. Anyone contemplating decisions or actions based in whole or in part upon their perception of their legal position is strongly urged to seek and follow the advice of a competent and experienced attorney.

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