

Patients Not Prisoners

How the *Ross* settlement agreement seeks to improve the treatment and release of patients adjudicated NGRI.

BY ANDREW BIVIANO AND EMILY COOPER



In 2014, people found not guilty by reason of insanity (NGRI) and sent to the state psychiatric hospitals for treatment brought a lawsuit against the Department of Social and Health Services (DSHS). *Ross v. Inslee*, No. CV-14-00130-TOR (E.D. Wash., 2014). The named plaintiffs are six individual NGRI patients at

the treatment and release of NGRI patients.

Most significantly, the agreement states that conditional release with community supervision should be prioritized over extended hospitalization for clinically-ready patients. Similarly, patients who are no longer dangerous or who no longer require hospitalization will be prioritized in the discharge process. DSHS has agreed that patients should receive an individualized treatment plan upon admission, care in the least restrictive clinically appropriate setting, and that DSHS would base its decision on clinical judgment rather than be bound by the recommendations of the Public Safety Review Panel.

We conducted the first training in the last week of November 2016 and plan to go back to the state hospitals in March and July 2017 to provide updates on our progress in implementing changes to the treatment and release process. The summary of DSHS's settlement commitments and the implementation timeline, along with the settlement agreement and other related material, can be reviewed and downloaded at http://www.disabilityrightswa.org/NGRI_patient_rights.

The goal of the parties, pursuant to the agreement, is to fully implement its terms and end the monitoring period by November 30, 2017. Before we turn to the agreement itself, we wanted to first provide a brief background.

Background

For decades prior to the lawsuit, NGRI patients received treatment that gradually reintegrated them into the community as they recovered, through supervised trips to visit family or go to a store. According to hospital data and an independent review authorized by the state, this careful and deliberate release planning resulted "extremely low recidivism rates."¹

In 2010, in response to a highly publicized elopement from a hospital field trip, the state legislature enacted a series of new laws that restricted freedoms and slowed the release process for NGRI patients. For example, NGRI patients are now generally required to obtain a court order to leave the hospital, including for family

Patients' rights were being systematically violated due to inadequate treatment and release planning, and overly punitive and restrictive treatment that failed to follow clinical standards

Western State Hospital (WSH) and Eastern State Hospital (ESH) as well as Disability Rights Washington (DRW). The complaint alleged, in part, that patients' rights were being systematically violated due to inadequate treatment and release planning, and overly punitive and restrictive treatment that failed to follow clinical standards and recommendations. This lawsuit resulted in a settlement agreement between the plaintiffs and the DSHS that calls for changes in

Plaintiffs' counsel (Disability Rights Washington and Andrew Biviano) are collaborating with DSHS to fully implement the terms of the settlement agreement through changes in policies and practices. To this end, the parties worked collaboratively by jointly drafting a summary of DSHS's settlement commitments and an implementation timeline to present to patients and staff at both state hospitals so that they may learn about the settlement agreement.

visits or taking a walk off of hospital grounds, even if doctors recommend this for treatment and recovery, or to determine release readiness through a series of deliberate steps.² These laws also created the Public Safety Review Panel (PSRP), which provides an additional layer of review before NGRI patients are permitted to leave the secure areas of the hospitals.³ The PSRP is not comprised of the patient's treatment team and instead is an advisory panel composed of a psychiatrist, a psychologist, a prosecutor, a law enforcement representative, a consumer and family advocate representative, and a public defender.

Following these changes, the inde-

pendent consultant determined that the "lengths of time that Washington NGRI acquttees spend hospitalized before conditional release is striking, both relative to their clinical needs and national norms."⁴ These national experts noted that patients adjudicated NGRI are more likely to be discharged to a geriatric hospital or coroner's office than receive conditional release.⁵ They also found that Washington treats NGRI patients both *too much* like prisoners (by restricting their liberty and access to the community) and *too little* like prisoners (by failing to provide treatment interventions and ongoing supervision in the community).⁶

While a number of factors contribute to these unnecessarily long hospital stays, this lawsuit focused on legal barriers and process improvements in an effort to ensure timely clinical decision-making while respecting the safety of patients and the public. The plaintiffs alleged, in part, that the state was violating patients' rights to:

1. the least restrictive treatment possible and reintegration into the community,
2. treatment consistent with the professional judgment of clinicians that gives them a realistic chance to be cured or improve their condition, and

"Our Store" on the grounds of Western State Hospital.



3. the right to equal treatment under the law.

The lawsuit asked the U.S. District Court to strike the recently enacted laws as unconstitutional and/or preempted by federal law, and enjoin the state from unnecessarily confining patients or delaying their treatment or release. The parties determined, however, that a positive outcome could be reached without needing to litigate the case all the way to trial, and a settlement agreement was reached.

The Settlement Agreement

Consistent with the patient handout we provide at the state hospital trainings, the parties agreed that there are several steps DSHS can take to improve the treatment and release process within the bounds of the current law, and thereby bring significant benefits to patients without having to involve the court. For example, it was agreed that treating clinicians are in the best position to make individualized treatment decisions. DSHS also agreed to help patients obtain necessary court orders and begin reintegration as clinically appropriate. It also agreed that when a patient no longer meets the legal criteria for civil commitment, the petitioning process for release should promptly begin.

Below are some of the commitments that DSHS has made to improve patient care and release at the state hospitals.

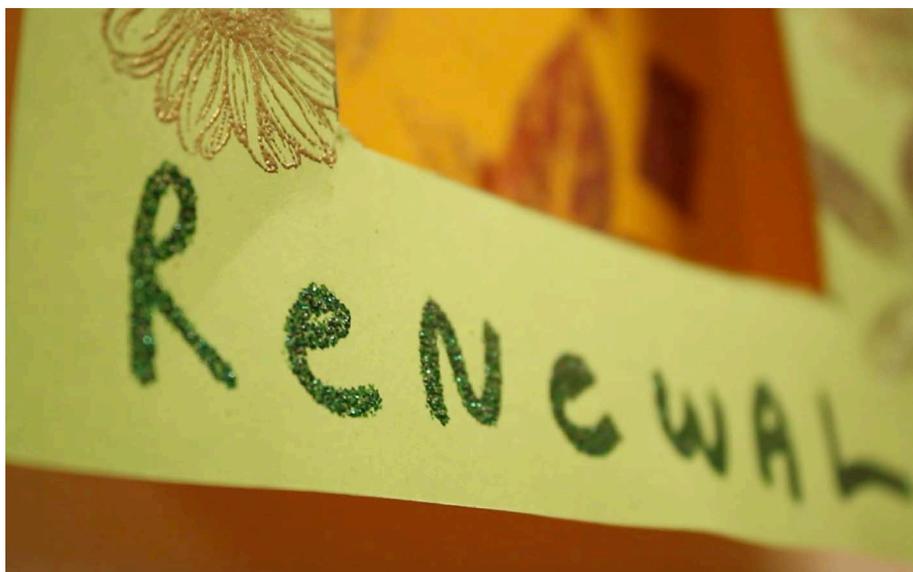
1. Individualized Treatment

Plans: Patients will have an individualized treatment plan. Beginning at admission, the hospitals shall assess the patient and then offer treatment to assist persons acquitted as NGRI in preparing for the release process to account for the safety and security of the individual and of the public.

2. **Grounds Privileges:** The grounds privileges process will be improved and streamlined. For example, readiness for both grounds privileges and release will be assessed within 30 days of admission and at least every three months afterward during quarterly treat-

the request. Clinical factors, conduct, history, and public safety risk — rather than a simple categorization of offenses — will determine an individual's fitness for release.

4. **Restraints Used Only When Clinically Indicated:** Restraints will not be uniformly used on all



Patient art.

ment meetings. A court order will not be required to obtain grounds privileges in all circumstances.

3. **Release:** The release process (partial, conditional, and final) will be streamlined with deadlines for the hospitals' Risk Review Board, the Public Safety Review Panel, and the Secretary of DSHS to respond and submit timely recommendations with the courts. The goal of the agreement is that implementation of a partial, conditional, or final release is accomplished as promptly as possible after it is deemed clinically appropriate. The hospitals will offer assistance to patients to advocate for their own release, even if the hospital is not in agreement with

patients leaving the hospital. Instead, a doctor's order is required saying why restraints are needed for that individual patient.

5. **The Level System:** Both ESH and WSH will create a more uniform NGRI patient level system policy.
6. **Patients' Role in Treatment and Release Planning:** Patients have a right to their treatment records and to participate in a review of their treatment plans every 90 days. Patients will be given opportunity to offer input in the development of post-discharge conditions such as appropriate housing and inpatient or outpatient addiction or mental health treatment.

7. **Personal Property:** Staff must take the safety of all patients into account when approving access to personal property, but any restrictions must be consistent with clinical judgment and hospital accreditation standards. The agreement supports allowing patients' access to their personal belongings as part of an individualized care and

with clinical judgment. Patients disagreeing with a level drop can contact the patient advocate, who will have the power to request independent review. Inadvertent and minor violations of hospital policies, including policies that may be ambiguous or misinterpreted, are not automatic grounds for reducing a patient's level, placing a

the state hospitals for compliance with the agreement. This review will include looking at incident reports and the records of patients who authorize this review. If the necessary changes aren't made by May 31, 2017, DRW will notify the hospitals if there are issues and concerns and the parties will try to resolve them. If we can't, plaintiffs can go back to court to ensure the agreement is enforced.



Eastern State Hospital

treatment plan.

8. **Strip Searches Prohibited without a Doctor's Order:** Patients will not be strip searched unless there is clear clinical documentation that the patient has expressed or implied suicidal or homicidal ideation, or there is a reasonable suspicion that the patient has potentially harmful items on his or her person.

9. **Prohibition of Staff Retaliation:** Any level drops or ward holds will be documented in the patient's chart and must be consistent

with clinical judgment. Patients disagreeing with a level drop can contact the patient advocate, who will have the power to request independent review. Inadvertent and minor violations of hospital policies, including policies that may be ambiguous or misinterpreted, are not automatic grounds for reducing a patient's level, placing a

Settlement Implementation

The settlement agreement is currently in effect and work has begun in assessing current policies and procedures and work teams are being developed. The agreement anticipates that by May 31, 2017, both state hospitals will have modified their policies and put into place all of the commitments noted above consistent with the agreement.

In February 2017, DRW and Andrew Biviano will begin reviewing

How You Can Help

Separate and apart from their joint efforts with DSHS, plaintiff's counsel hope to engage with and assist attorneys representing NGRI patients in Washington, as defense counsel play a key and indispensable role in holding DSHS to its commitments and advocating for patient rights. While all NGRI patients are "entitled to the assistance of counsel" throughout their commitment pursuant to RCW 10.77.020, it is undeniably difficult to advocate on a client's behalf against the weight of the hospital's policies, systems, and opinions. Because courts are reluctant to rule against the opinion of the hospital, bureaucratic delays can have a large effect on patients' rights.

We hope that the settlement agreement will provide you a valuable tool in advocating for your clients. Conversely, we hope that you will help us make sure the settlement agreement is fully implemented after May 2017. We ask you take the following steps:

- **Bring motions of behalf of clients, early and often.** Because court orders are now required for every stage of the reintegration process, patients and their attorneys will need to proactively push for these orders to be issued. While the agreement aims to streamline and expedite the hospital review

process, we should not rely solely on hospitals to move patients through the process as quickly as possible. The filing of motions is often a needed impetus to review a patient's status and can lead to an expedited process. Please consider bringing motions for all of the following matters, as well as any others that arise in your clients' situations:

- ✓ Independent treatment plan at admission, with discharge plan;
 - ✓ Grounds privileges, as early as 30 days after admission (if privileges are denied, clinical reason for denial and steps required for privileges must be in treatment record);
 - ✓ Forensic risk assessments, to be completed as soon as possible when necessary to evaluate request;
 - ✓ Authorized leaves and other forms of partial conditional release;
 - ✓ Conditional release; and
 - ✓ Final discharge.
- **Don't wait for a client to be "fully recovered" before seeking reintegration.** The entire purpose of gradual reintegration is to help patients recover more quickly and fully. Small steps — such as grounds privileges or short authorized leaves — provide critical therapeutic value to those who are still progressing in their recovery. Too often, patients are not even considered for these steps for months or years, even if they are safe to do so, out of a concern that they will be denied approval unless they are symptom-free. Please remind hospitals and courts that the standard for these early steps is lower than the

standard for final discharge.

- **Don't wait for, or feel beholden to, the PSRP.** The agreement reiterates a key legal distinction: while the law provides the PSRP with an opportunity to offer its recommendation on requests for release, the Secretary of DSHS is not bound by the PSRP and can provide the court a different recommendation. Additionally, the Agreement makes clear that any PSRP delays in providing a recommendation should not slow down a patient's review process.
- **Obtain Independent Assessments.** Independent reviews from outside experts are often critical to patients' release.
- **Help us build a brief bank.** DRW would like to have a library of briefs, research and other tools to assist defense counsel in carrying out the extra burdens placed on them by the new legal requirements and challenges. It would help us to have copies of any materials you have prepared, to share with other attorneys in similar situations.
- **Report possible violations of the settlement agreement.** After the policies and procedures are in place in June 2017, please let us know if you think the spirit or letter of the agreement is not being followed in your client's case. We may be able to help resolve the issue, while also making systemic improvements.
- **Please allow us to help!** This important task will take collective effort, with all of us pulling together. Please ask us for sample briefs or advice. We will be glad to help in any way we can. 

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Notes

1. W. Neil Gowensmith, Daniel C. Murrie, Ira K. Packer, *Forensic Mental Health Consultant Review Final Report*, (Groundswell Services, Inc, June 30, 2014), 47, <https://aclu-wa.org/sites/default/files/attachments/Groundswell%20Rep.pdf>.
2. RCW 10.77.145.
3. RCW 10.77.270.
4. Gowensmith, Murrie and Packer, *Forensic Mental Health*, 44.
5. *Ibid.*
6. *Ibid.* 45.

WACDL Amicus Committee

WACDL's Amicus Committee files amicus curiae briefs in cases of importance to the defense bar. If you are working on a case where amicus support might be helpful, please contact one of the co-chairs of the Amicus Committee:

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