

THE PUBLIC LAWYER

PUBLIC LAWYERS SECTION

October 7, 2005



NEVADACASES

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Rico v. Rodriguez, 121 Nev. Adv. Op. No. 71 (October 6, 2005). “In this appeal, we examine whether a district court may consider a parent’s immigration status and its derivative effects as a factor in determining a child’s best interests. Appellant Araceli Perez Rico contends that the district court (1) abused its discretion by granting respondent Jose Rodriguez custody of the children based, in part, upon an erroneous interpretation of a repealed immigration statute; and (2) violated her due process and equal protection rights when it used her immigration status in making the child custody determination. We are not persuaded that the district court abused its discretion in making its custody determination or that appellant Rico’s constitutional rights were violated. Additionally, although the district court improperly considered respondent’s erroneous explanation of a repealed immigration statute, this error was harmless. We therefore affirm the district court’s order.”

Howard v. City of Las Vegas, 121 Nev. Adv. Op. No. 70 (October 6, 2005). “In this opinion, we consider the extent to which a firefighter who retires and, thereafter, suffers a heart attack, is entitled to temporary total disability benefits. Although Nevada law is clear that retired firefighters who sustain a disability post-retirement are entitled to medical benefits, we conclude that the Legislature’s method

for calculating compensation precludes an award for temporary total disability benefits when the retired firefighters are not earning wages at the time of the disability.”

Lader v. Warden, 121 Nev. Adv. Op. No. 69 (October 6, 2005). “The primary issue we address in this appeal is appellant Philip Lader's post-conviction claim that his trial and appellate counsel were ineffective for failing to adequately argue that his two prior felony convictions for driving under the influence of alcohol (DUI) in Nevada could not be used to enhance a subsequent DUI conviction to a felony, pursuant to NRS 484.3792, and in the same criminal proceeding adjudicate him a habitual criminal, pursuant to NRS 207.010. Lader argues that such dual use or "stacking" of prior felony DUI convictions to achieve habitual criminal adjudication is prohibited because NRS 484.3792 provides a specific enhancement scheme for recidivist DUI offenders, while NRS 207.010 provides for a more general habitual criminal determination.

We disagree. NRS 484.3792 and NRS 207.010 are compatible, and neither statute precludes the application of one to the other. Moreover, the argument advanced by Lader would lead to an unreasonable result that is contrary to both the purpose of habitual criminal adjudication and the interests of protecting the public from recidivist DUI offenders. We therefore affirm the district court's denial of Lader's claim on this issue, as well as its denial of several other claims raised by Lader seeking post-conviction relief.”

Nevada Serv. Employees Union v. Orr, 121 Nev. Adv. Op. No. 68 (September 29, 2005). “In this appeal, we consider whether an employer and a union can be held liable for willfully interfering with an employee’s rights under a collective bargaining agreement when through inaction they failed to provide the employee with a pre-termination hearing on her request. We affirm the district court’s decision and conclude that such inaction amounted to willful interference with the employee’s attempt to exercise her rights under the collective bargaining agreement.”

May v. Anderson, 121 Nev. Adv. Op. No. 67 (September 22, 2005). “In this case, all parties agreed to the essential terms of a release in reaching a global settlement, but three parties later refused to execute the release document. We therefore consider whether the essential terms of a release are a material part of a settlement agreement, without which the settlement agreement is never formed, or whether the release’s terms are inconsequential in determining whether the parties have reached a settlement agreement. We conclude that the release’s essential terms are material and therefore required for an enforceable settlement agreement to exist. However, what is an essential release term necessarily varies with the nature and complexity of the case. Because a settlement contract is formed when the parties have agreed to its material terms, even though the exact language is finalized later, a party’s refusal to later execute a release document after agreeing upon the release’s essential terms does not render the settlement agreement invalid.”

Whealon v. Sterling, 121 Nev. Adv. Op. No. 66 (September 22, 2005). “In this opinion, we define the term “employment” for purposes of the statutes regulating private employment agencies.[1] Because employment is service performed for wages, we conclude that an agent for a hotel stage show is not required to hold an employment agency license under the statutes.”

Sandstrom v. Second Judicial Dist. Court, 121 Nev. Adv. Op. No. 65 (September 22, 2005). “This original petition for a writ of certiorari or in the alternative a writ of mandamus challenges the district

court's jurisdiction to entertain an appeal by the State from a justice court order granting a motion to dismiss a misdemeanor criminal complaint. Because of the absence of any specific case law interpreting the statute at issue, we have addressed the merits of the petition in this published opinion. We hold that the district courts have jurisdiction under NRS 177.015 to review on appeal orders of the justice courts granting motions to dismiss misdemeanor criminal complaints. Accordingly, we deny this petition.”

Gaxiola v. State, 121 Nev. Adv. Op. No. 64 (September 22, 2005). “Appellant Jose Gaxiola was charged with and convicted of five counts of sexual assault of a minor under the age of fourteen years and two counts of lewdness with a child under the age of fourteen years. On appeal, he asserts the following assignments of error: (1) NRS 51.385, which allows admission of a child sexual assault victim’s statements to third parties, violates the Confrontation Clause of the United States Constitution; (2) jury instructions stating that a sexual assault victim’s testimony need not be corroborated unduly emphasize one witness’s testimony; (3) one of his lewdness convictions violates the corpus delicti rule; (4) his lewdness convictions are redundant to the sexual assault convictions; and (5) multiple instances of prosecutorial misconduct.

We conclude that: (1) the admission of a child-victim’s statements to third parties pursuant to NRS 51.385 does not violate the Confrontation Clause when the child-victim testifies at trial; (2) the no-corroboration instruction was not improper; (3) one of the lewdness convictions violates the corpus delicti rule; (4) the remaining lewdness conviction was redundant; and (5) while some prosecutorial misconduct occurred, it did not rise to the level of plain error warranting reversal. Accordingly, we affirm the convictions for sexual assault and reverse the convictions for lewdness.”

Amazon.com v. Magee, 121 Nev. Adv. Op. No. 63 (September 22, 2005). “In this appeal, we consider whether an employee who is treated for injuries sustained on the job is considered temporarily totally disabled or temporarily partially disabled when she is able to return to work on a part-time basis. We conclude that a worker released to work with restrictions is only temporarily partially disabled; therefore, her position and salary need not comport with NRS 616.475, which sets forth standards regarding when an employer, by offering modified employment, can cease making temporary total disability payments. Thus, a temporarily partially disabled employee must be compensated at the rate set forth in NRS 616C.500(1).”

DeStefano v. Berkus, 121 Nev. Adv. Op. No. 62 (September 22, 2005). “In this appeal, we determine whether the enactment of NRS 293.182 in 2001, by setting forth a new procedure by which election candidates’ qualifications may be contested, rendered invalid the district court’s authority to hear declaratory relief actions concerning questions of a candidate’s residency under an existing statute, NRS 281.050. We conclude that the two statutes provide alternative and equally viable methods of resolving challenges to a candidate’s declaration of residency.”

Miller v. Wilfong, 121 Nev. Adv. Op. No. 61 (September 22, 2005). “In this opinion, we conclude that awards of attorney fees to pro bono counsel are proper, provided a legal basis exists and proper factors are applied in making the award. We further hold that in paternity actions, district courts may award attorney fees under NRS 126.171.”

Potter v. Potter, 121 Nev. Adv. Op. No. 60 (September 22, 2005). “This appeal involves whether Nevada’s relocation statute, NRS 125C.200, applies to parties who share joint physical custody of their minor children. We conclude that it does not. When one parent in a joint physical custody arrangement desires to move outside of Nevada with the minor children, the correct procedure is to file a motion for change of custody under NRS 125.510(2) for the purpose of relocation. The district court must then determine whether the best interests of the children are better served by living outside of Nevada with the relocating parent as the primary physical custodian or living in Nevada with the nonmoving parent having primary physical custody. Because the district court improperly applied NRS 125C.200 to the instant joint physical custody case, we reverse the district court’s order granting relocation and remand for the district court to apply the best interest of the child standard in accordance with this opinion and NRS 125.510(2).”

Waid v. Eighth Judicial Dist. Court, 121 Nev. Adv. Op. No. 59 (September 22, 2005). “This original petition for a writ of mandamus challenges a district court order disqualifying petitioner Noel Gage and his firm, petitioner Gage & Gage, LLP, from representing petitioners Frederick Waid and M. Nafees Nagy, defendants in the underlying action. We conclude that petitioners have not demonstrated that the district court abused its discretion in ordering disqualification. First, we adopt the Seventh Circuit’s test for evaluating when a prior matter and a current matter are substantially related, and we determine that the district court did not abuse its discretion in this regard. Second, petitioners have not met their burden to demonstrate that the district court’s conclusion, that the real parties in interest Vestin Fund I and Vestin Fund II were Gage’s former clients, was arbitrary or capricious. Accordingly, we deny the petition.”

Phillips v. State, 121 Nev. Adv. Op. No. 58 (September 15, 2005). “In this appeal, we consider the meaning of the terms ‘libel,’ ‘disgrace’ and ‘secret’ as used in Nevada’s extortion statute, NRS 205.320. We conclude that ‘libel’ refers to the publication of a false statement of fact, ‘disgrace’ means to humiliate or cause loss of favor or standing, and ‘secret’ means a fact that is unfavorable to the interest of a person and unknown to the public and that a person would wish to conceal.

Because the district court failed to properly instruct the jury about the elements of extortion, resulting in a verdict based on a legally insufficient theory of culpability, we conclude that the extortion convictions must be reversed and remanded for a new trial.

We further conclude that the district court erred in admitting prior bad acts evidence, but this error was harmless as to the remaining counts of aggravated stalking and preventing or dissuading a witness from testifying, and we therefore affirm those convictions.”

Weber v. State, 121 Nev. Adv. Op. No. 57 (September 15, 2005). “Appellant Timmy J. Weber lived in Las Vegas with his girlfriend of about five years, Kim. Kim’s 17-year-old son C., 15-year-old son A., and 14-year-old daughter M. also lived with Kim and Weber. Weber subjected M. to ongoing sexual abuse during this time and took pornographic photographs of the abuse. On the morning of April 4, 2002, Weber sexually assaulted M. and murdered A. and Kim. He immediately fled and traveled through several states. He reappeared in Las Vegas on April 14, the day of A. and Kim’s funeral, when he attempted to murder C. and another person.

Weber was arrested two weeks later and charged with 17 felony counts, including two counts of

murder with the use of a deadly weapon. After a jury trial, Weber was convicted of all the charges. For A.'s murder, the jury found 13 aggravating circumstances and returned a verdict of death. For Kim's murder, Weber was sentenced to life in prison without the possibility of parole.

Weber raises several issues on appeal. Although we conclude that some trial error occurred, any error was harmless beyond a reasonable doubt. We therefore affirm Weber's judgment of conviction and sentence of death.”

State, Dep't of Taxation v. DaimlerChrysler, 121 Nev. Adv. Op. No. 56 (September 15, 2005). “In this case, we consider whether a person who provides primary financing of a retail sale may exercise the retailer’s right to sales tax refunds from the State under Nevada’s bad-debt statute, NRS 372.365(5). We conclude that the statute unambiguously precludes a finance company from obtaining tax refunds and therefore reverse.”

Mineral County v. State, Bd. Equalization, 121 Nev. Adv. Op. No. 55 (September 15, 2005). “In this appeal, we consider whether a county may seek judicial review of decisions issued by the State Board of Equalization (State Board) under NRS Chapter 233B, the Nevada Administrative Procedure Act (APA). We conclude that it may.”

Southern Nevada Op. Eng’rs Contract Compliance Trust v. Johnson, 121 Nev. Adv. Op. No. 54 (September 15, 2005). “In this appeal, we address whether the Labor Commissioner’s decision to exclude a class of workers from receiving the prevailing wage under a public works contract constituted a determination in a contested case or a regulation that was subject to the Nevada Administrative Procedure Act’s (APA) rulemaking procedures. We conclude that the Labor Commissioner’s decision effectively deleting an entire class of workers from a previously adopted regulation constituted administrative rulemaking, which required the Labor Commissioner to follow the APA’s provisions. Because the Labor Commissioner failed to follow the APA’s procedures, we reverse the district court’s order upholding the Labor Commissioner’s decision.”

Jacobson v. Estate of Clayton, 121 Nev. Adv. Op. No. 53 (September 15, 2005). “In this appeal, we revisit our 1969 decision in *Bodine v. Stinson* in which we determined that the probate statutes of NRS Chapter 147 provide the statutory scheme for the administration of estates and must be followed in every case regardless of the existence of insurance. We conclude that *Bodine* is superseded by the Legislature’s 1971 amendment of NRS 140.040 to specifically allow suits against a special administrator, in place of probate proceedings, when the estate’s sole asset is a liability insurance policy.”

NINTH CIRCUIT CASES

(Ninth Circuit cases can be found at <http://www.ca9.uscourts.gov/ca9/neopinions.nsf>)

United States v. Jensen, No. 04-30094 (October 6, 2005). “It was an excess of speed that initially brought him to the attention of authorities, but bad news eventually caught up with Defendant-Appellant Douglas Jensen. Jensen was convicted for possession of methamphetamine with intent to distribute in violation of 21 U.S.C. § 841(a)(1) and sentenced to life imprisonment without parole under 21 U.S.C. § 841(b)(1)(A) and 21 U.S.C. § 851(a)(1). On appeal, Jensen contends that the district court erred in denying his motion under Fed. R. Crim. P. 12(b)(3) to suppress the evidence seized from his vehicle and residence on the grounds that his arrest and the seizure of his vehicle were executed without probable cause and, accordingly, all of the evidence in the case was seized in violation of the Fourth Amendment.

Jensen also appeals his sentence on the ground that the sentencing scheme under which he was sentenced, 21 U.S.C. § 841(b)(1)(A) and 21 U.S.C. § 851(a)(1), is unconstitutional insofar as it violates: (1) the constitutional separation of powers and non-delegation doctrines; (2) Jensen’s due process rights; and (3) the Eighth Amendment’s prohibition on cruel and unusual punishment. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm Jensen’s conviction and sentence.”

Levinson v. Baldwin, No. 03-16532 (September 30, 2005). “An attorney is subject to Rule 11 sanctions, among other reasons, when he presents to the court “claims, defenses, and other legal contentions . . . [not] warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law[.]” Fed. R. Civ. P. 11(b)(2). When, as here, a “complaint is the primary focus of Rule 11 proceedings, a district court must conduct a two-prong inquiry to determine (1) whether the complaint is legally or factually baseless from an objective perspective, and (2) if the attorney has conducted a reasonable and competent inquiry before signing and filing it.” *Christian v. Mattel, Inc.*, 286 F.3d 1118, 1127 (9th Cir. 2002) (internal quotations and citation omitted). As shorthand for this test, we use the word “frivolous” “to denote a filing that is *both* baseless *and* made without a reasonable and competent inquiry.” *Moore v. Keegan Mgmt. Co (In re Keegan Mgmt. Co., Sec. Litig.)*, 78 F.3d 431, 434 (9th Cir. 1996). The district court determined that the complaint filed by Levinson was frivolous and therefore a proper basis for the Rule 11 sanctions against him. We agree.”

United States v. Dare, No. 04-30202 (September 23, 2005). “Stephen Douglas Dare appeals his statutory mandatory minimum ten-year sentence imposed pursuant to 18 U.S.C. § 924(c) for discharging a firearm during the course of a drug trafficking crime. He contends that he was sentenced in violation of the Sixth Amendment and that the district court erred in using a preponderance of the evidence standard when it found that he discharged a firearm. We hold that Dare’s mandatory minimum sentence imposed through judicial factfinding utilizing a preponderance of the evidence standard does not violate the Sixth Amendment, pursuant to *Harris v. United States*, 536 U.S. 545 (2002). We affirm the judgment.”

Jackson v. Roe, No. 02-56210 (September 23, 2005). “Fred Jackson filed a “mixed” 28 U.S.C. § 2254 habeas corpus petition. The district court refused to stay proceedings so that he could exhaust the unexhausted claim, which was at that time pending before the California Supreme Court. *Rhines v.*

Weber, 125 S. Ct. 1528 (2005), however, holds that a federal court must, in limited circumstances, stay a mixed petition to allow a petitioner to present an unexhausted claim to a state court for review. *Id.* at 1535. Under *Rhines*, a district court’s decision to grant or deny a stay is reviewed for abuse of discretion. *Id.* Because the district court in this case failed to apply the standards regarding staying a mixed habeas petition enunciated in *Rhines* — quite understandably, as Jackson’s petition was dismissed almost three years prior to the decision in *Rhines* — we vacate and remand to allow the district court the opportunity to do so.”

United States v. Kortgaard, No. 03-10421 (September 21, 2005). “Laron Kevin Kortgaard appeals his conviction and sentence for manufacturing marijuana. We have jurisdiction under 28 U.S.C. § 1291. We affirmed Kortgaard’s conviction in an unpublished Memorandum and deferred submission of the sentencing issues. *United States v. Kortgaard*, 119 Fed. Appx. 148 (9th Cir. Jan. 11, 2005). We now hold that upward departures under § 4A1.3 of the United States Sentencing Guidelines involve factual findings beyond the fact of a prior conviction. Because Kortgaard’s sentence was increased under § 4A1.3 and exceeds the maximum authorized sentence based solely on the jury’s verdict under the then-mandatory Sentencing Guidelines, we vacate the sentence and remand for resentencing in light of *United States v. Booker*, 125 S. Ct. 738 (2005).”

Tillison v. Gregoire, No. 04-35539 (September 19, 2005). “Appellant-Plaintiff John Tillison d/b/a West Coast Towing Services challenges Revised Code of Washington section 46.55.080(2), which restricts patrol and nonconsensual towing by: (1) requiring a towing company to obtain written authorization from a private property owner before towing a vehicle from the private property, or from a public official before towing a vehicle from public property, without the vehicle owner’s permission; (2) requiring the private property owner or the public official be present for the tow; and (3) prohibiting the towing company from serving as an agent for the private property owner or the public official. Tillison claims that Revised Code of Washington section 46.55.080(2) is preempted by the Federal Aviation Administration Authorization Act of 1994 (‘FAAAA’), Pub. L. No. 103-305, § 601(c), 108 Stat. 1569, 1606, 49 U.S.C. §§ 14501-14505, which governs the prices, routes, or services of motor carriers transporting property (including tow truck operators).

Tillison was recently unsuccessful in a similar challenge of a similar California law regulating patrol and non-consensual towing. *See Tillison v. City of San Diego*, 406 F.3d 1126 (9th Cir. 2005). Tillison timely appealed the district court’s order granting Washington State’s summary judgment motion and dismissing his cause of action. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.”

Burrell v. McIlroy, No. 02-15114 (September 19, 2005). “Stephen Burrell appeals the district court’s grant of summary judgment on behalf of various detectives of the Las Vegas Metropolitan Police Department in this 42 U.S.C. § 1983 action. This court reviews the grant of summary judgment de novo, and may affirm on any basis supported by the record. *Johnson v. County of Los Angeles*, 340 F.3d 787, 791 (9th Cir. 2003); *Hell’s Angels Motorcycle Corporation v. McKinley*, 360 F.3d 930, 931 n.1 (9th Cir. 2004). We have jurisdiction under 28 U.S.C. § 1331, and we affirm.”

United States v. Cruz, No. 03-35873 (September 16, 2005). “This appeal requires us to decide whether *United States v. Booker*, 125 S. Ct. 738 (2005), applies retroactively to cases on collateral review. We hold that *Booker* does not apply retroactively to convictions that became final prior to its publication.”

United States v. Hernandez, No. 04-50286 (September 14, 2005). “Appellant Arturo Hernandez appeals from his conditional plea conviction for importation of marijuana in violation of 18 U.S.C. §§ 952 and 960. Hernandez contends that border agents conducted an unreasonable search of his vehicle when the agents dismantled the interior panels of the doors of the vehicle, revealing packages of marijuana. Hernandez moved to suppress evidence of the marijuana, contending that the search was unreasonably destructive, and that because the search was unsupported by probable cause, the search violated the Fourth Amendment. We conclude that the initial search of the vehicle, which involved merely pulling back the interior panels of the doors on the vehicle in such a manner that they could be replaced without damage, was not especially destructive or otherwise carried out in an offensive manner. We therefore affirm the conviction.”

Dominguez-Curry v. Nevada Transp. Dep’t, No. 03-16959 (September 14, 2005). “Sylvia Dominguez-Curry sued her employer, the Nevada Department of Transportation, and her supervisor, Roc Stacey, alleging that they subjected her to a hostile work environment and failed to promote her on the basis of her gender, in violation of Title VII of the Civil Rights Act of 1964. Dominguez appeals the district court’s grant of summary judgment in favor of the Department and Stacey. We hold that Dominguez presented ample evidence from which a reasonable trier of fact could conclude that she was subjected to a hostile work environment and that the decision not to promote her was motivated at least in part by her gender. Accordingly, we reverse the district court’s judgment and remand for a trial on both of Dominguez’s Title VII claims.”

United States v. Chaudhry, No. 04-50421 (September 14, 2005). “Appellant Dora Chaudhry appeals from her conditional plea conviction for importation of marijuana in violation of 18 U.S.C. §§ 952 and 960. Chaudhry contends that border agents conducted an unreasonable search of her vehicle in violation of the Fourth Amendment when the agents drilled a 5/16-inch hole in the bed of her pickup truck, revealing a blue plastic material inside the bed of her truck. That discovery led agents to unveil several packages of marijuana located under a false bed of the pickup. Chaudhry moved to suppress the evidence, but that motion was denied. Because we conclude that a single hole with a diameter of 5/16 of an inch does not constitute a property search that is ‘so destructive as to require a different result,’ *United States v. Flores-Montano*, 541 U.S. 149, 156 (2004), we affirm.”

United States v. Flores-Montano, No. 04-50497 (September 14, 2005). “Appellant Manuel Flores-Montano appeals from the denial of his motion to suppress evidence and the resulting conditional-plea conviction for ‘illegal importation of merchandise’ after border inspectors found thirty-seven kilograms of marijuana in the gas tank of his vehicle during a search of Flores-Montano’s vehicle as he was at the border attempting to enter the country. Flores-Montano contends that inspectors unlawfully searched his gas tank in violation of 19 U.S.C. § 482, which he contends requires some ‘subjective’ or ‘good faith’ suspicion prior to conducting a search. We hold that 19 U.S.C. § 1581(a), not § 482, authorizes and governs vehicle searches at the border. Because § 1581(a) contains no suspicion requirement, we affirm the conviction.”

United States v. Smith, No. 03-10548 (September 13, 2005). “Defendants David Larry Smith and Herbert Arthur Bates appeal their convictions on multiple counts of tax fraud, mail and wire fraud, money laundering, and conspiracy, as well as their sentences. Defendants challenge: (1) arraignment by a magistrate judge, (2) multiplicity of the indictment resulting in a multiplicitous sentence on the

three conspiracy counts, (3) an indictment passed on by grand jurors not questioned about their feeling towards the IRS, (4) denial of a suppression motion based on alleged defects in the arrest and search warrants, (5) sufficiency of the evidence on the tax counts, (6) denial of a motion for a new trial based on alleged petit juror bias, and (7) denial of a multiple conspiracy instruction. In addition to disputing the district court's application of various sentencing guidelines, Smith and Bates make a *United States v. Booker*, 125 S. Ct. 738 (2005), challenge to sentencing based on facts not found by a jury, and an *ex post facto* challenge to application of an advisory guideline system to their sentences. We have jurisdiction under 28 U.S.C. § 1291 and affirm the convictions in all respects and remand on sentencing pursuant to *United States v. Ameline*, 409 F.3d 1073 (9th Cir. 2005) (en banc)."

ASW v. State of Oregon, No. 03-35950 (September 13, 2005). "Plaintiffs are parents of adopted children with special needs who receive adoption assistance payments from the State of Oregon. They appeal the district court's dismissal of their class action lawsuit under 42 U.S.C. § 1983, which alleged several violations of their statutory rights under the Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. §§ 620 *et seq.*, as well as their right to due process prior to reduction of their adoption assistance payments. Defendants, the State of Oregon and the Director of the Oregon Department of Human Services, moved to dismiss the action asserting that Plaintiffs failed to state a claim as a matter of law. The district court granted the State's motion. Because we conclude 42 U.S.C. §§ 671(a)(12) and 673(a)(3) create federal rights enforceable through a § 1983 cause of action, we reverse."

Lewis v. Norton, No. 03-17207 (September 13, 2005). "The plaintiffs-appellants are siblings who brought this action against the United States claiming that they are entitled to recognition as members of the Table Mountain Rancheria, a federally-recognized Indian tribe, and therefore to share in the revenue of that tribe's very successful casino near Fresno, California. Although their claim to membership appears to be a strong one, as their father is a recognized member of the tribe, their claim cannot survive the double jurisdictional whammy of sovereign immunity and lack of federal court jurisdiction to intervene in tribal membership disputes. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). We therefore must affirm the district court's dismissal of the action."

United States v. Scott, No. 04-10090 (September 9, 2005). "We consider whether police may conduct a search based on less than probable cause of an individual released while awaiting trial. This issue is one of first impression in our circuit. Somewhat surprisingly, it is an issue of first impression in any federal circuit and the vast majority of state courts. A lack of binding precedent does not, of course, excuse us from deciding a difficult issue when, as here, it is squarely presented.

The government concedes that there was no probable cause to test Scott for drugs. Therefore, Scott's drug test violated the Fourth Amendment. Probable cause to search Scott's house did not exist until the drug test came back positive. The validity of the house search, which led to both the shotgun and Scott's statement about the shotgun, is derivative of the initial drug test. That search is likewise invalid; its fruits must be suppressed."

United States v. Murillo, No. 04-30508 (September 9, 2005). "In this appeal we conclude that, notwithstanding the Supreme Court's decision in *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004), in determining whether a Washington state criminal conviction is of a crime punishable by a term exceeding one year for purposes of prosecution under 18 U.S.C. § 922(g)(1) (felon in

possession of a firearm), the maximum sentence for the prior conviction is defined by the state criminal statute, not the maximum sentence in the particular case set by Washington's sentencing guidelines.”

Barker v. Fleming, No. 04-35911 (September 8, 2005). “This petition for a writ of habeas corpus presents the question whether the prosecution in a robbery case suppressed evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). In analyzing this issue, the Washington Supreme Court failed to consider the cumulative effect of the undisclosed evidence and thus its decision was contrary to clearly established Supreme Court precedent. 28 U.S.C. § 2254(d)(1) (permitting grants of habeas corpus where the state court issued a decision that was contrary to, or an unreasonable application of, clearly established federal law); *Kyles v. Whitley*, 514 U.S. 419, 436-37 & n.10 (1995) (holding that the State's disclosure obligation under *Brady* turns on the cumulative effect of the withheld evidence, not an item by item analysis). Even so, we conclude on de novo review that the witness who would have been impeached by the suppressed evidence was so severely discredited and not so critical to the prosecution's case that there is no reasonable probability that the withheld evidence would have affected the outcome. Accordingly, we affirm the district court's denial of the petition.”

Osborne v. District Attorney's Office for the Third Judicial Dist., No. 04-35126 (September 8, 2005). “William Osborne, an Alaska prisoner, appeals the district court's dismissal of his action, brought under 42 U.S.C. § 1983, to compel the State to release certain biological evidence that was used to convict him in 1994 of kidnapping and sexual assault. Osborne, who maintains his factual innocence, hopes to subject the evidence, at his expense, to more sophisticated DNA analysis than was available at the time of his trial. He alleges that by refusing him post-conviction access to the evidence, the State has violated his constitutional rights under the First, Sixth, Eighth, and Fourteenth Amendments. Without reaching the question of whether there exists a constitutional right of post-conviction access to DNA evidence, the district court dismissed Osborne's action for failure to state a claim. It ruled that because Osborne seeks to ‘set the stage’ for an attack on his underlying conviction, his § 1983 action is barred by *Heck v. Humphrey*, 512 U.S. 477 (1994), and thus a petition for habeas corpus is his sole remedy.

On appeal, Osborne argues that the district court applied a more restrictive standard than that enunciated in *Heck*, and submits that success on the merits of his § 1983 claim would not ‘necessarily imply’ the invalidity of his state court conviction. We agree, and accordingly reverse the judgment of the district court and remand for further proceedings.”

Fairhurst v. Haegner, No. 04-35366 (September 8, 2005). “William Fairhurst appeals the district court's grant of summary judgment in favor of Jeff Hagener, director of the Montana Department of Fish, Wildlife and Parks. We hold that a pesticide applied to a river pursuant to an intentional scheme aimed at eliminating pestilent fish species is not a ‘pollutant’ for the purposes of the Clean Water Act, 33 U.S.C. §§ 1251-1387, and thus not subject to the Act's permit requirements. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm the district court.”

Earp v. Stokes, No. 03-99005 (September 8, 2005). “Ricky Lee Earp is on death row in San Quentin, California, after being convicted in Los Angeles County of the 1988 rape and murder of eighteen-month-old Amanda Doshier. The jury convicted Earp of first-degree murder and found three death qualifying special circumstances to be true: rape, sodomy, and lewd and lascivious conduct on a child

under the age of fourteen. In the separate penalty phase, the jury recommended that Earp be put to death for his crimes. The California Superior Court imposed that sentence on February 21, 1992.

All reviewing courts thus far have upheld Earp's conviction and sentence. Here we decide whether: (1) Earp alleges facts warranting an evidentiary hearing on his claim that the prosecutor committed prejudicial misconduct by dissuading Michael Taylor from testifying; (2) Earp alleges facts warranting an evidentiary hearing on his claim of ineffective assistance of counsel for failure to sufficiently investigate mitigation evidence; and (3) Earp's counsel suffered from a conflict of interest stemming from her intimate relationship with Earp during his trial and sentencing. We hold that Earp has alleged facts which, if proven true, may entitle him to relief on his prosecutorial misconduct and ineffective assistance of counsel claims."

Menendez v. Terhune, No. 03-55863 (September 7, 2005). "In this consolidated appeal, Lyle and Erik Menendez appeal the district court's denial of their petitions for habeas corpus. Pursuant to 28 U.S.C. § 2253(c), we granted a certificate of appealability on five issues: (1) whether the admission of a tape-recorded session between Petitioners and their therapist violated Petitioners' constitutional due process rights as elaborated in *Ake v. Oklahoma*, 470 U.S. 68 (1985); (2) whether the trial court's decision not to instruct the jury on imperfect self-defense violated Petitioners' rights to due process; (3) whether the exclusion of certain evidence violated Petitioners' due process rights in that the trial court required that they first lay a foundation, which as a logical matter could only be done if they testified; (4) whether the exclusion of certain lay and expert testimony violated Petitioners' due process rights and Sixth Amendment right to present a defense; and (5) whether Lyle's due process rights were violated when the prosecutor commented on the lack of evidence regarding abuse and the lack of experts, both of which the prosecutor had successfully moved to exclude.

We have jurisdiction pursuant to 28 U.S.C. § 2253; we reject all five contentions; and we affirm."

Williams v. Warden, No. 04-15465 (September 7, 2005). "Jessica Williams appeals the district court's denial of her habeas corpus petition. The district court concluded that the Nevada Supreme Court's rejection of Williams' double jeopardy claim neither contravened nor unreasonably applied clearly established federal law, as determined by the United States Supreme Court. At issue in this appeal is Williams' asserted simultaneous conviction and acquittal, under two separate theories, for violating the single offense of 'Driving Under the Influence of Intoxicating Liquor or Controlled or Prohibited Substance', pursuant to Nev. Rev. Stat. § 484.3795(1) (hereinafter NRS 484.3795(1)). Williams argues that because she was charged under two subsections of the statute and the trial court treated the alternate bases of criminal liability as separate offenses by having the jury return verdicts on each theory, her acquittal under one theory barred conviction under the other. We find this argument without merit and affirm the district court's denial of the petition."

United States v. Kelly, "The government appeals Nobel Kelly's 120-month sentence for possession with intent to distribute over 5 grams of cocaine base. The government contends that the district court erred in finding that Kelly's 1998 Washington state conviction for attempting to elude a police vehicle was not a 'crime of violence' under United States Sentencing Guideline (U.S.S.G.) § 4B1.2(a), and therefore not a predicate conviction for the career offender enhancement in U.S.S.G. § 4B1.1. We hold that Kelly's conviction for attempting to elude a police vehicle is not a 'crime of violence' within the meaning of U.S.S.G. § 4B1.2(a)(2), and we affirm the district court's decision on that issue."

Thornton v. City of St. Helens, No. 03-35994 (September 6, 2005). “Ralph and Cheryl Thornton own the only automobile wrecking yard in St. Helens, Oregon. The Thorntons claim that the City of St. Helens has unlawfully conditioned approval of their annual applications to renew a state wrecker’s certificate on compliance with local land use regulations. Following repeated delays in the processing of the Thorntons’ renewal applications, they filed suit in district court against the City and certain local officials. The Thorntons alleged, among other claims, that the certificate renewal procedures employed by the City had resulted in delays which amounted to a deprivation of property without due process of law. The district court denied relief. The court held that the Thorntons did not have a property interest in the timely approval of their renewal applications and that their related claims were without merit.

We affirm. An adverse judgment in a prior state court action brought by Mr. Thornton bars relitigation of the issue of whether the City has discretion to condition approval of renewal applications on compliance with local regulations. Because we must accept the state court’s determination that the City has discretion to deny a renewal application for noncompliance with local regulations, we hold that the Thorntons do not have a property interest in the timely renewal of their wrecker certificate. The Thorntons’ related claims fail as a matter of law.”

Washington v. Lampert, No. 04-35381 (September 6, 2005). “Kevin Washington, a state prisoner convicted of aggravated murder and other offenses, appeals the district court’s denial of his petition for a writ of habeas corpus. In his habeas petition, Washington asserts a claim of ineffective assistance of counsel (‘IAC’) in the negotiation and execution of his sentencing stipulation, which waived his right to appeal in exchange for a stipulated sentence of life imprisonment with the possibility of parole. While a district court has habeas jurisdiction under 28 U.S.C. §§ 2241 and 2254, whether the district court here had jurisdiction turns on whether Washington’s waiver of his right to file a federal habeas petition is enforceable with respect to an IAC claim that challenges the validity of the waiver itself. We have jurisdiction pursuant to 28 U.S.C. § 2253, and we affirm.”

Caruso v. Yamhill County, No. 04-35155 (September 6, 2005). “The State of Oregon appeals a district court order declaring Or. Rev. Stat. § 280.070(4)(a) unconstitutional and permanently limiting its enforcement. Section 280.070(4)(a) requires that ballots for initiatives proposing local option taxes include a statement: ‘This measure may cause property taxes to increase more than three percent.’ The district court deemed this requirement constitutionally infirm, concluding that inclusion of the ‘three-percent warning’ violated appellee Michael Caruso’s First Amendment rights as a petition circulator and his due process rights as a voter. We conclude that the requirement does not violate the U.S. Constitution, reverse the decision of the district court, and vacate the injunction limiting enforcement of section 280.070(4)(a).”

Equal Opportunity Employment Comm’n v. Christopher, No. 04-35201 (September 2, 2005). “This appeal presents the question whether harassing conduct directed at female employees may violate Title VII in the absence of direct evidence that the harassing conduct or the intent that produced it was because of sex. We hold that offensive conduct that is not facially sex-specific nonetheless may violate Title VII if there is sufficient circumstantial evidence of qualitative and quantitative differences in the harassment suffered by female and male employees.”

United States v. Stephens, No. 04-50170 (September 2, 2005). “Antonio Damon Stephens appeals the

sentence imposed by the district court upon the revocation of his supervised release. Stephens was on supervised release as part of his sentence following the entry of a guilty plea to importation of marijuana. The issue we confront in this appeal is whether the district court improperly delegated its authority to determine the number, frequency, timing, and manner of substance abuse testing and treatment to which Stephens would be subjected during the term of his supervised release. We hold that the requirement that Stephens participate in substance abuse treatment, including in-treatment drug testing, was an order of the district court. Thus, there was no improper delegation of Article III judicial authority to the probation department as to whether Stephens would participate. We also hold that, as part of a court ordered treatment program, a defendant may be required to undergo regular drug testing, in addition to the number of tests that are ordered as part of his supervised release. However, the testing condition, as imposed here, was an improper delegation of the district court's duty to set the maximum number of *non-treatment* drug tests to which Stephens would be subjected during the course of his supervised release. Accordingly, we vacate the sentence and remand."

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Today's Word:

Pandiculation (*Noun*)

1. **Pronunciation:** [pæn-di-kyê-'ley-shun]

Definition 1: Stretching the body and extremities when drowsy or tired, usually accompanied by yawning, especially when going to bed or waking; also, around the office, a pastime for those who work at a computer (I should know).

Usage 1: The verb is "pandiculate" and the agent noun is "pandicator." The term is used by those who not only do not eschew obfuscation but wallow in it with great relish.

Today's Word:

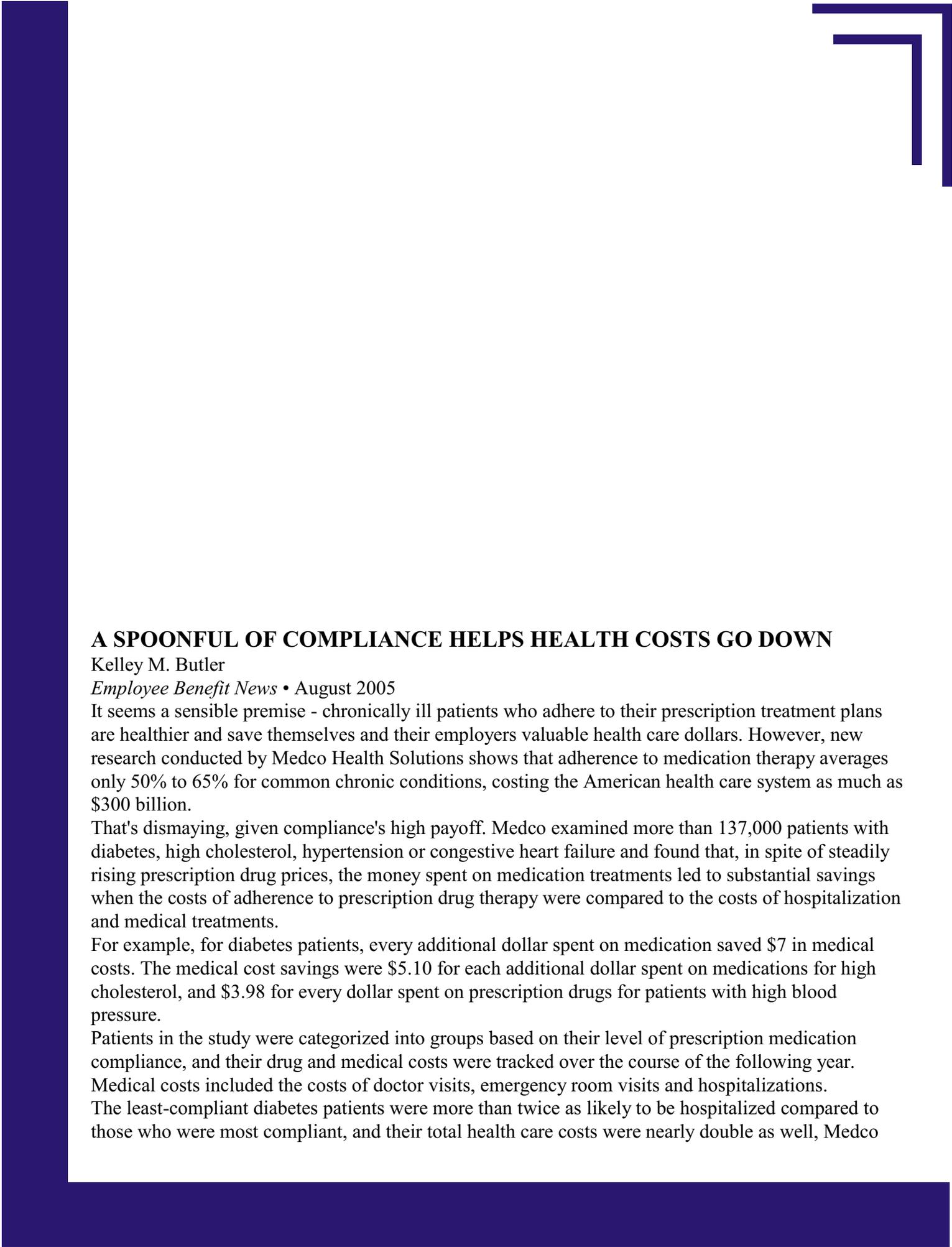
Velleity (*Noun*)

1. **Pronunciation:** [vê-'lee-ê-tee or -ti]

Definition 1: The lowest degree of volition or desire.

Usage 1: This word allows your vocabulary a wider gradation of volition: velleity, volition, desire, passion (for). It is used far too little.

Suggested usage: Now you have a word to express the lower end of your desires: "I haven't the least velleity for trying chitterlings, knowing what they are." "I do have some velleity to continue this conversation elsewhere," lets the hearer know the idea does not excite you.



A SPOONFUL OF COMPLIANCE HELPS HEALTH COSTS GO DOWN

Kelley M. Butler

Employee Benefit News • August 2005

It seems a sensible premise - chronically ill patients who adhere to their prescription treatment plans are healthier and save themselves and their employers valuable health care dollars. However, new research conducted by Medco Health Solutions shows that adherence to medication therapy averages only 50% to 65% for common chronic conditions, costing the American health care system as much as \$300 billion.

That's dismaying, given compliance's high payoff. Medco examined more than 137,000 patients with diabetes, high cholesterol, hypertension or congestive heart failure and found that, in spite of steadily rising prescription drug prices, the money spent on medication treatments led to substantial savings when the costs of adherence to prescription drug therapy were compared to the costs of hospitalization and medical treatments.

For example, for diabetes patients, every additional dollar spent on medication saved \$7 in medical costs. The medical cost savings were \$5.10 for each additional dollar spent on medications for high cholesterol, and \$3.98 for every dollar spent on prescription drugs for patients with high blood pressure.

Patients in the study were categorized into groups based on their level of prescription medication compliance, and their drug and medical costs were tracked over the course of the following year.

Medical costs included the costs of doctor visits, emergency room visits and hospitalizations.

The least-compliant diabetes patients were more than twice as likely to be hospitalized compared to those who were most compliant, and their total health care costs were nearly double as well, Medco

researchers found. Diabetes patients who are highly compliant with their treatment programs have a 13% hospitalization risk for a diabetes-related problem, but patients with low compliance have more than twice the risk at 30%. The combined drug and medical costs for the most compliant patients average \$4,570, which is almost 50 percent below the \$8,867 cost for the least compliant group. Among patients with high cholesterol, the hospitalization risk of the most-compliant patients is 12%, versus 15% in the least compliant group. The total health care cost is \$3,924 for the most compliant group, compared with \$6,888 in the least compliant group.

The study also looked at medical expenses that included cases in which patients have more than one ailment. Better compliance with drug therapy helped reduce the risk of being hospitalized for any medical condition, and it reduced the overall costs for a patient's health care. The least compliant group of diabetics had on average \$16,498 in total medical and drug costs compared with \$8,886 for the most compliant group. Among patients with high blood cholesterol, the total medical and drug costs were \$10,916 in the least compliant group versus \$6,752 in the most compliant category.

NONCOMPLIANCE ROOTS, REMEDIES

Reasons for poor medication compliance include cost, side effects, forgetfulness or a lack of symptoms that lead patients to prematurely stop taking medications. Patients with chronic conditions that show no visible symptoms, such as high cholesterol or high blood pressure, can think they are fine and don't require medication, even as their health deteriorates.

"Healthcare professionals, including pharmacists and PBMs, can play an important role in encouraging medication compliance," says Dr. Robert Epstein, a co-author of the study and Medco's chief medical officer. "Drugs have become increasingly complex and people are being prescribed more of them, which places greater demands on healthcare providers to educate patients and take proactive measures to ensure proper medication use."

Epstein also noted that going forward, generics will continue to play a key role in assisting patients with compliance due to cost concerns. Drugs with total U.S. sales of approximately \$35 billion could lose patent protection over the next three years, making way for much more cost-effective choices in a variety of therapeutic categories including hypertension, diabetes and high cholesterol medications.

"This research hammers home the dangers and the expense of not following a treatment regimen," Epstein says. "Increased medication compliance for chronic conditions can significantly cut medical costs and keep patients out of the hospital. Clearly it's important to reduce the need for hospitalization, both from a clinical and a cost standpoint."

Full results of the study, "Impact of Medication Adherence on Hospitalization Risk and Healthcare Cost," have been published in the June issue of *Medical Care*, a journal by the American Public Health Association.

COMPLIANCE COUNTS

Better compliance with drug therapy reduced overall costs for a patient's health care. Below are the prescription and medical costs for least compliant patients vs. most compliant.

Diabetes

Least compliant \$16,498

Most compliant \$8,886

High cholesterol

Least compliant \$10,916

Most compliant \$6,752

Source: Medco Health Solutions, 2005.

Bitter pill to swallow

Individuals with diabetes and high cholesterol can generate significant health care savings just by taking their medications as prescribed. Dollars spent on medications compared to dollars saved in health costs:

Diabetes

\$1 spent, \$7 saved

High cholesterol

\$1 spent, \$5.10 saved

Hypertension

\$1 spent, \$3.98 saved.