

# What Landmark Ruling Means For Civil Rights Suits In Nevada

By **Austin Barnum** (February 24, 2023)

The Nevada Supreme Court's opinion and analysis in *Mack v. Williams*<sup>[1]</sup> places Nevada alongside Colorado and New Mexico as states ending the use of qualified immunity as a defense to violations of a state constitution.

However, the Nevada Legislature can effectively reverse the decision by codifying the defense.

But even if the defense is revived, the Mack opinion paves the way for bringing a private action requesting monetary damages for state actors conducting unreasonable searches and seizures, and provides the framework for future litigators to explore more self-executing protections.



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This begs the question: What other protections fall within the framework, and what pitfalls await future actions?

In the underlying case, Sonjia Mack was visiting High Desert State Prison when she was stopped by correctional officers and subjected to a strip search.

After no contraband was found, Mack was still removed from the facility and banned from future visitation.

Mack's counsel argued that the correctional officers executed an unreasonable search and seizure and violated Mack's right to due process by banning her from the prison.

The Mack opinion arose out of four certified questions from the U.S. District Court for the District of Nevada to the Nevada Supreme Court. Ultimately, the Nevada Supreme Court elected to reframe and answer only two of the questions.<sup>[2]</sup>

On Dec. 29, 2022, the Nevada Supreme Court affirmed that victims of unreasonable searches and seizures can hold bad actors to account by raising a cause of action based solely on the Nevada Constitution, and seeking monetary damages. Any person acting under color of state law — police officer, correctional officer, etc. — can be held to account directly through the Nevada Constitution.

This differs from a violation of federal civil rights, because violations of the U.S. Constitution require a statute to enforce the protections.<sup>[3]</sup>

The Mack court's analysis and opinion, however, provides Nevadans a path toward probing the viability of actions based on other Nevada constitutional protections, as well.

## The Framework

Before executing the newly adopted framework, plaintiffs must determine whether the constitutional provision they seek to enforce contains prohibitive language and is, therefore, self-executing according to the Nevada Supreme Court.

The Nevada Constitution's protection against unreasonable searches and seizures is

prohibitory in nature and is, therefore, a "self-executing provision ... not dependent on subsequent legislation to carry it into effect." [4]

Accordingly, plaintiffs seeking to file actions involving other Nevada constitutional provisions must first establish that the protection is prohibitory in nature and, therefore, self-executing.

After determining that the constitutional protection is self-executing, the plaintiff must next determine whether the provision is enforceable through a damages remedy. [5]

The Nevada Supreme Court adopted a three-step framework from California Supreme Court's 2002 decision in *Katzberg v. Regents of University of California*. [6] This framework first requires the plaintiff to review the language and history of the provision to determine if there is "an intention to grant or to withhold a private" action for damages. [7]

However, the Mack court found that "although the Nevada Constitution does not address enforcement of individual rights, it also does not foreclose an implied right of action for money damages based on violation of those rights." [8]

Without any language expressing an intent, the second step of the analysis turns to a constitutional tort analysis:

A remedy should exist for violations of a prohibitory constitutional provision if such a remedy is (1) "in furtherance of the purpose of the" provision and (2) "is needed to assure the effectiveness of the provision." [9]

In applying the second step, the Second Restatement of Torts lists six factors to consider, including the existence of alternative remedies. [10]

As the Mack court stated, the Nevada Legislature has not "'crafted a meaningful alternative remedy for ... constitutional violations,'" and, "[a]bsent a damages remedy here, no mechanism exists to deter or prevent violations of important individual rights." [11]

If the constitutional tort analysis favors a damages action, then the third and final step is that the court determines "whether any special factors counsel hesitation in recognizing a damages action." [12]

The Mack court, quoting the *Katzberg* decision, notes that those special factors include

deference to legislative judgment, avoidance of adverse policy consequences, consideration of government fiscal policy, practical issues of proof, and the competence of courts to assess particular types of damages. [13]

The court found the special factors supported the plaintiff's ability to bring a private right of action for monetary damages. [14]

## **Potential Future Applications**

How far the Mack opinion extends is yet to be seen. However, applying the first question used in Mack may yield surprising results.

Looking at just a few of the protections frequently discussed nationwide, which are also enshrined in Nevada's Constitution: Nevada's freedom of religion, [15] right to assemble [16]

and right to bear arms[17] do not contain prohibitive language.

Without prohibitive language these constitutional rights are not self-executing. Accordingly, the Mack opinion appears to require a statutory provision to bring a private right of action to enforce these Nevada constitutional rights.

On the other hand, Nevada's right to free speech and free press;[18] protection against cruel and unusual punishment, excessive fines and bail;[19] and right to due process[20] all appear to contain prohibitive language.

These rights and protections enshrined in the Nevada Constitution are, therefore, presumably capable of being pushed through the Mack framework for determining a monetary damages remedy.

Considering the Mack court's statement that the Nevada Constitution does not express any intent to permit or prohibit monetary damages as a remedy, the analysis turns on one of constitutional tort.

This, presumably, is where litigators and plaintiffs will focus most of their analysis and creativity in the future.

### **Qualified Immunity — Temporarily Banned or Excluded Indefinitely?**

The Nevada Supreme Court also expressly removed qualified immunity as a defense, at least for the time being.[21]

Qualified immunity has long been a focus of criminal justice reform advocates. As articulated by the U.S. Supreme Court in its 2011 *Ashcroft v. al-Kidd* decision, the defense protects "reasonable but mistaken judgments about open legal questions" resulting in violations of a person's constitutional protections, rendering those protections effectively unenforceable.[22]

Advocates for criminal justice reform believe qualified immunity overly protects law enforcement. Law enforcement defendants believe qualified immunity is an important component of protecting discretionary decisions in fast-moving and often times dangerous conditions.

However, the Nevada Supreme Court reasoned that Nevada's waiver of sovereign immunity is subject to expressly written exceptions.[23] And because "the Legislature has not provided for a state-law equivalent of qualified immunity," there is no exception when a plaintiff otherwise complies with the statute waiving sovereign immunity.[24]

I presume law enforcement agencies and state actors in Nevada will seek to codify the defense as an exception to waiver of sovereign immunity. In fact, Nevada's Legislature is currently in session, and I would not be surprised if a bill containing such a statute arises at some point.

However, even if the Legislature enacts qualified immunity, the Mack opinion may still be used to challenge the statute's constitutionality. The Nevada Supreme Court expressly stated,

Our caselaw makes clear that when it comes to the self-executing rights contained within our Constitution's provisions, the Legislature lacks the authority to pass legislation that abridges or impairs those rights.[25]

Even further, the Mack court expressly stated that self-executing rights "cannot be abridged or impaired by statute." [26]

The question here is whether a statutory provision for qualified immunity can withstand such language.

Qualified immunity protects reasonable mistakes that lead to violations of constitutional rights, rendering complaints against previously undiscussed violations unenforceable.[27]

With qualified immunity, a violation of a protection afforded by the Nevada Constitution does not necessarily mean a plaintiff is entitled to monetary damages if the issue has never arisen.

It seems such a defense is in direct contradiction with the strong language of Mack, and inapposite with Nevada's common law if not drafted carefully by the Legislature.

A statute that nullifies the self-executing protection by allowing an otherwise violative action to be forgiven because of a reasonable mistake appears to contradict the spirit of Mack.

### **Other Considerations and Limitations**

Filing civil rights cases against the state of Nevada in state court raises other limitations.

The state still expressly invokes immunity when there is a discretionary act.[28] This protection is, arguably, more broad than qualified immunity.

While defendants may be hard-pressed to argue that there is discretion in honoring Nevada constitutional rights, there are always gray areas for litigators to explore.

Second, any plaintiff seeking to enforce a self-executing private right of action for monetary damages created by the Nevada Constitution must be aware of the caps. An award for damages sounding in tort against an employee of the state is limited to \$200,000, and may not include punitive damages.[29]

Furthermore, civil rights litigation is typically protracted, arduous and emotionally draining. And while the state may be more inclined to negotiate while qualified immunity is not a viable defense, there is little to no incentive to settle for more than the statutory cap.

This limitation is one that plaintiffs and civil rights plaintiffs attorneys should consider before filing an action.

In conclusion, the Mack opinion provides a clear framework for determining which Nevada constitutional provisions are capable of being enforced in pursuit of monetary damages without a need for a statute to do so.

This opinion provides an entirely new avenue of approach for civil rights attorneys seeking justice against law enforcement agencies in Nevada.

Accordingly, the Mack opinion is a landmark decision in civil rights litigation in the Silver State, and its future impact will be watched closely by those of us in the field.

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[1] Mack v. Williams, 138 Nev. Adv. Op. 86, 522 P.3d 434 (2022).

[2] Mack, 522 P.3d at 441.

[3] See 42 U.S.C. § 1983.

[4] Mack at 442 (internal citations and punctuation omitted).

[5] Id. at 444.

[6] Katzberg v. Regents of Univ. of Cal., 29 Cal.4th 300 (2002).

[7] Mack at 444.

[8] Id. at 447.

[9] Id. at 447 (citing Restatement (Second) of Torts § 874A (Am. Law Inst. 1979)).

[10] See id. at 448.

[11] Id.

[12] Id. at 452.

[13] Id. at 449.

[14] Id. at 450.

[15] NV Const. Art. 1 § 4.

[16] NV Const. Art. 1 § 10.

[17] NV Const. Art. 1 § 11

[18] NV. Const. Art. 1 § 9.

[19] NV. Const. Artic. 1 § 6.

[20] NV. Const. Art. 1 § 8

[21] Mack at 450-51.

[22] Ashcroft v. al-Kidd, 563 U.S. 731, 743 (2011).

[23] Mack at 451.

[24] Id. at 450-51.

[25] Id. at 444.

[26] Id. at 442.

[27] Ashcroft v. al-Kidd, 563 U.S. 731, 743 (2011).

[28] See NRS 41.032.

[29] See NRS 41.035.