

1 recommendations and refers the matter back to the currently assigned magistrate judge for further
2 proceedings consistent with this order.

3 The magistrate judge recommends that plaintiff's civil rights action under 42
4 U.S.C. § 1983 should be dismissed with prejudice for failure to state a claim because the claim
5 "does not rise to the level of a constitutional violation." Findings & Recommendations
6 ("Findings"), ECF No. 13 at 3. The magistrate judge relies on *Stevenson v. Koskey*, for the
7 proposition that "an isolated instance or occasional opening of legal mail outside the inmate's
8 presence" does not rise to the level of a constitutional violation. Findings at 3 (citing 877 F.2d
9 1435, 1441 (9th Cir. 1989)).

10 However, *Stevenson* does not appear to address the constitutionality of "isolated"
11 or "occasional" instances of opening an inmate's legal mail. 877 F.2d at 1441. Rather, the Ninth
12 Circuit in that case addressed whether the defendant, a probation officer, was "out of the chain of
13 causation for the alleged constitutional deprivation," which may have been caused by a
14 corrections officer when the defendant handed him the plaintiff's mail and he opened it. *Id.* at
15 1438. The court explained, "[i]t matters not whether plaintiff's constitutional rights were violated
16 by the corrections officer. Defendant did not participate in such violation." *Id.* The court implies
17 that defendant may have been liable for a constitutional violation if her conduct had risen "above
18 negligence," but held that "an official's negligent act does not implicate the due process clause."
19 *Id.* at 1440-41 (citations omitted).

20 Because the Findings hinge on a misreading of *Stevenson*, the matter is referred
21 back to the magistrate judge for review and revision in light of this order.¹

22 Accordingly, IT IS HEREBY ORDERED that:

- 23 1. The findings and recommendations filed July 20, 2018, are not adopted;
24 and

25 ¹ At page 3, lines 4-5, the findings and recommendations indicate that the court in *Oliver v. Pierce*
26 *County Jail*, 2007 WL 1412843 (W.D. Wash, May 9, 2007), cites to a Sixth Circuit case. *Oliver*
27 relied on both Sixth Circuit and Third Circuit authority, and quotes language from the Third
28 Circuit case of *Bieregu v. Reno*, 59 F.3d 1445 (3d Cir. 1995). Fundamentally in this respect the
Findings are correct, and this correction of the reference to Circuit authority does not affect the
court's conclusion in this order.

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2. This matter is referred back to the assigned magistrate judge for further proceedings consist with this order.

DATED: November 6, 2018.


UNITED STATES DISTRICT JUDGE