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**UNITED STATES DISTRICT COURT**

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**DISTRICT OF ARIZONA**

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Samuel W. Swoopes,

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CV 93-471 TUC DCB

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Petitioner,

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v.

)

**ORDER**

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Sam Sublett,

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Respondent.

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Pending before this Court is Petitioner's Motion for Reconsideration of and Relief from Judgement, filed on October 7, 2005. (document 78) Respondent filed its response on October 14, 2005. (document 82) Then, on October 19, 2005, before giving this Court an opportunity to rule on his Motion for Reconsideration, Petitioner filed a Notice of Appeal to the Ninth Circuit on October 19, 2005. (document 82)

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By filing his Notice of Appeal, however, Petitioner has not divested this Court of jurisdiction to consider the pending Motion for Reconsideration. *See, Miller v. Marriott International, Inc.*, 300 F.3d 1061, 1064 (9<sup>th</sup> Cir. 2002).

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On July 20, 2005, this case was reassigned to Judge David C. Bury from Judge William D. Browning. (document 74) On August 15, 2005, Judge Bury issued an order for Petitioner to show written cause why this case should not be dismissed for lack of prosecution. (document 75). On September 19, 2005, after receiving no response to the order to show cause, Judge Bury dismissed this case with prejudice, pursuant to Rule 41(b), Fed.R.Civ.P. (document 76) Judgement was entered the same day. (document 77)

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1 In the motion, Petitioner's counsel avows that neither he nor his office received any  
2 of the aforementioned orders and was wholly unaware of them until October 6, 2005.  
3 (Motion at 3-4) Counsel further avows that on October 7, 2005, he went to the Office of the  
4 Clerk of Court in the Tucson division, where he was advised by the Clerk's employees that  
5 neither the July 20, 2005 order of reassignment nor the August 15, 2005 order to show cause  
6 were sent or delivered to Petitioner's counsel, the State's counsel, or to Petitioner himself.  
7 (Motion at 4) Furthermore, according to Petitioner's counsel, while the Clerk's office did  
8 claim to have delivered the September 19, 2005, order of dismissal to the office of  
9 Petitioner's counsel, no one in that office has any recollection of such and the order is  
10 nowhere to be found in counsel's office. (Motion at 4, 5)

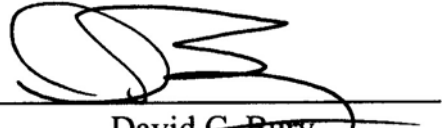
11 Based upon the avowals of Petitioner's counsel (avowals which this Court has no  
12 reason to disbelieve), it is clear that Petitioner did not receive notice of any of the orders  
13 leading up to and resulting in the dismissal of Petitioner's action. In short, due exclusively  
14 to the failings of the Clerk's office, and through no fault of his own, Petitioner finds himself  
15 severely prejudiced by this Court's judgement. The circumstances which led to the dismissal  
16 of Petitioner's action clearly constitute "any other reason justifying relief from the operation  
17 of the judgment." Rule 60(b)(6), Fed.R.Civ.P.

18 **Accordingly,**

19 **IT IS ORDERED** that Petitioner's Motion for Reconsideration and Relief (document  
20 78) is **GRANTED**.

21 **IT IS FURTHER ORDERED** that this Court's Orders of August 15, 2005, and  
22 September 19, 2005, (documents 75, 76), as well as the Clerk's Judgment of September 19,  
23 2005, (document 77) are **VACATED** and this case is **REINSTATED** and **RESTORED** to  
24 this Court's active docket.

25 DATED this 25<sup>th</sup> day of October, 2005.

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David C. Bury  
United States District Judge

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