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NOT FOR PUBLICATION

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Vasile Valy Rosca, Petitioner, vs. Warden Gilky, Respondent.	No. CV-08-0963-PHX-FJM **ORDER**

The court has before it petitioner's petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241 (doc. 1); respondent's answer and motion to dismiss (doc. 9); petitioner's response, which we construe as a Rule 41(a)(2), Fed. R. Civ. P., motion for voluntary dismissal of his habeas petition (doc. 10); respondent's response to the Rule 41(a)(2) motion (doc. 12); and petitioner's reply (doc. 13). We also have before us the report and recommendation of the United States Magistrate Judge, recommending that we grant petitioner's Rule 41(a)(2) motion to dismiss without prejudice (doc. 14). No objection to the report and recommendation was filed.

Petitioner asserted in his habeas petition that he is entitled to sentencing credit for time spent in home detention pending the unsuccessful appeal of his criminal conviction. He now concedes that this position is not legally supportable and moves to dismiss his petition. Petitioner's Response at 1. He seeks dismissal without prejudice, however, in order to

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preserve his second ground for relief—that his time spent in home detention should serve as a basis for discretionary modification of his term of supervised release under 18 U.S.C. § 3583(e)(2). Because plaintiff has conceded that his claim for sentence reduction is without merit, respondent is entitled to a dismissal with prejudice on this claim. However, because the respondent does not argue that it will suffer "legal prejudice" as a result of the dismissal, see Westlands Water Dist. v. United States, 100 F.3d 94, 96 (9th Cir. 1996), the dismissal is without prejudice to petitioner's claim regarding modification of his term of supervised release.

Accordingly, **IT IS ORDERED GRANTING** petitioner's Rule 41(a)(2) motion to dismiss his petition for writ of habeas corpus with prejudice with respect to the sentence reduction claim, and without prejudice with respect to the claim for modification of the term of supervised release.

DATED this 8th day of October, 2008.

Frederick J. Martone
United States District Judge