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No. \_\_\_\_\_

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In the

# **Supreme Court of the United States**

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**CHI MAK**, Petitioner

v.

**UNITED STATES OF AMERICA**, Respondent

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On Petition for Writ of Certiorari to the  
United States Court of Appeals  
for the Ninth Circuit

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## **Petition for Writ of Certiorari**

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## **Questions Presented**

Whether the district court abused its direction and acted unreasonably in denying Mak's motion for compassionate release under 18 U.S.C. §3582(c), by, *inter alia*, failing to identify the correct legal rule; making factual findings that were clearly erroneous, illogical, implausible and/or unsupported by the record; failing to address nonfrivolous arguments; and failing to give adequate weight to all the statutory factors.

## **Statement of Related Proceedings**

- *United States v. Chi Mak*,  
8:05-cr-293-CJC-1 (C.D. Cal. June 11, 2020)
- *United States v. Chi Mak*,  
20-50171 (9th Cir. August 19, 2021)

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**CHI MAK**, Petitioner

v.

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## **Petition for Writ of Certiorari**

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Petitioner Chi Mak respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals of the Ninth Circuit in this case.

## **OPINIONS BELOW**

The Ninth Circuit’s August 19, 2021 Memorandum affirming the judgment of the district court in *United States v. Chi Mak*, Ninth Circuit Case No. 20-50171, is unreported. (See Appendix A, “Memorandum”) The District Court issued a written Order Denying Defendant’s Motion for Compassionate Release on June 11, 2020 in *United States v. Chi Mak*, Central District Court No. 05-293-CJC. (See Appendix B, “Order”)

## **JURISDICTION**

The Ninth Circuit entered its judgment on August 19, 2021. This petition is filed within 90 days of the Ninth Circuit's judgment.

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The district court had jurisdiction pursuant to 18 U.S.C. §3231, and the Ninth Circuit had jurisdiction pursuant to 28 U.S.C. §1291 and 18 U.S.C. §3742.

## **STATUTORY PROVISIONS INVOLVED**

**18 U.S.C. § 3582** states, in relevant part:

“(c) Modification of an Imposed Term of Imprisonment.—The court may not modify a term of imprisonment once it has been imposed except that—

(1) in any case—

(A) the court, upon motion of the Director of the Bureau of Prisons, or upon motion of the defendant after the defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant's behalf or the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility, whichever is earlier, may reduce the term of imprisonment (and may impose a term of probation or supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment), after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that—

(i) extraordinary and compelling reasons warrant such a reduction;...

and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.”

**18 U.S.C. § 3553(a)** states, in relevant part:

“(a) Factors to be considered in imposing a sentence.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection.

The court, in determining the particular sentence to be imposed, shall consider—

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; . . .

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and (B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.”

## STATEMENT OF THE CASE

### A. October 25, 2006 Second Superseding Indictment (“Indictment”)

The indictment alleged that Mak was a senior electrical engineer employed by defense contractor Power Paragon. Count One alleged that Mak conspired with his wife Rebecca Chiu (“Chiu”), his brother Tai Mak (“Tai”), Tai’s wife Fuk Li (“Li”), and Tai and Li’s son Billy Mak (“Billy”), to export to the People’s Republic of China (“China”) defense articles that were covered by the United States Munitions List without first obtaining from the Department of State the requisite license or other approval for such export, in violation of 22 U.S.C. §2778(b)(2) and 22 C.F.R. §127.1(a)(3).

The indictment alleged that China would provide Mak with task lists of information that China wanted. Mak would collect information. Mak and Chiu would review the information, select the material requested by China, and copy the material onto disks. Tai and Billy would encrypt the material. Tai and Li would carry the material to China.

Counts Two and Three charged Mak with attempting to export or exporting defense articles (the Solid State and QED Documents, respectively) to China without obtaining the requisite license or authorization, in violation of 22 U.S.C. §2778(b)(2), (c); 22 C.F.R. §127.1(a)(1), (d); and §127.3.

Count Six charged Mak with acting as an agent of a foreign government,

namely China, without giving prior notification to the Attorney General of the United States, in violation of §951.

Count Eleven charged Mak with making false statements to the FBI in violation of §1001. Specifically, according to the indictment, Mak claimed that he had given documents to Tai so that Tai could select engineering books for Mak when Tai was in Hong Kong, when in fact Mak had given the documents to Tai for delivery to the government of China.

#### **B. May 10, 2007 Jury Verdict**

The jury convicted Mak of counts 1-3, 6 and 11.

#### **C. Sentencing**

##### **1. August 6, 2007 PSR and September 10, 2007 Recommendation Letter**

The PSR reported that in 2004 the FBI opened an investigation during which wiretaps were placed on the home telephone of Mak and Chiu, microphones were placed in their residence and vehicle, and a camera was placed above their dining table. Wiretaps were placed on telephones belonging to Tai and Li, and a microphone was placed in one of their vehicles.

On October 28, 2005, Tai and Li were arrested at LAX as they prepared to board their flight to China. In Li's luggage was a CD which contained encrypted copies of the Solid State Document which was co-written by Mak and presented by Mak at the American Society of Naval Engineers ("ASNE") symposium on February 17, 2005. The CD also contained an encrypted copy

of the QED Document which had been presented by Mak at the ASNE symposium on November 16-17, 2004.

The PSR stated that the Solid State document contained information that should have been classified as Confidential/NOFORN (“no foreign nationals”). The QED document contained unmarked classified information. Mak had not obtained authorization from Power Paragon to present the papers at the symposia. Both documents were found to constitute defense articles under the United States Munitions List, and the QED document was later classified. During a search of Mak’s residence and workplace, agents recovered hundreds of defense-related documents.

After his arrest on October 28, 2005, Mak was interviewed by case agents in a videotaped and recorded interview. Mak stated that he gave the disks to Tai so that Tai could buy engineering books for him in Hong Kong.

The government claimed that Mak was reinterviewed by case agents on October 30, 2005, in an interview that was neither videotaped nor recorded. The government alleged that in the unrecorded interview, Mak acknowledged that he had a tendency to want to help others. His desire to share technical information was a hobby. He would answer questions at conferences. If information was not classified, he would send it to others. He acknowledged that the disks he gave to Tai were intended for China. He began sending Navy and company technical documents to China in 1983. Mak never

received any money or rewards for providing information to China. He knew that he was not supposed to take documents home from work, but regularly did so because he worked at home to meet deadlines.

During an interview with the probation officer, defense counsel stated that Mak continued to profess his innocence and to deny that he made the alleged October 30, 2005 confession to case agents about sending sensitive information to China. Mak believed that the disks contained unclassified information that was in the public domain because it had been presented at international symposia open to foreigners. Furthermore, both Mak's employer and law enforcement officials were aware of Mak's public presentations of the papers at the conferences.

The PSR calculated base offense level 30 under §2M3.2(a)(2). The PSR reported that if top secret information had been involved, the base level would have been 35. However, the PSR stated that although the information gathered by Mak was export-controlled, the information was neither top secret nor marked as classified.

The PSR applied a four-level role enhancement on the ground that Mak had used the assistance of four relatives. The PSR imposed a two-level enhancement for abuse of trust on the ground that Mak's security clearance and position as a senior electrical engineer gave him access to information.

The PSR calculated total offense level 36.

Mak had no prior record of convictions. Zero criminal history points established criminal history category I.

With respect to Personal and Family Data, the PSR reported that Mak was born in 1940 in China. He had four siblings. Two resided in California; one in Guangzhou, China; and one in Hong Kong. Mak was raised in a family with modest means.

Mak married his wife Rebecca in 1968. They immigrated to the United States in 1978 and became naturalized United States citizens in 1985. They have no children. Since 1981 they lived in a two-bedroom home measuring approximately 720 square feet in Downey. The probation officer reported that the home was modestly furnished, with no indications of wealth. The appearance and condition of the home reflected a frugal living standard.

With respect to Education, the PSR reported that Mak graduated from University in China in 1960 with a bachelor's degree in electrical engineering. He held no professional licenses.

Concerning Employment, the PSR reported that from 1994 until the date of his arrest, Mak was employed as an engineer for Power Paragon. His performance evaluations for the last five years exceeded standards. He presented white papers at ASNE and APEC engineering conferences.

Mak had been employed as an engineer continuously since 1972. He worked in Hong Kong until 1978, at Brown Boveri Electric from 1978-1981,

Teledyne from 1981-1992, and EPE Technologies from 1992-1994.

With a sentencing guidelines range of 188-235 months, generated by offense level 36 and criminal history category I, the probation officer recommended a high-end sentence of 235 months.

## **2. March 10, 2008 Defendant's Sentencing Position; Letters**

The defense told the court that prior to Mak's arrest, the focus of his life was on two things: his fascination with power electronics technology, and the love and companionship of his wife, with whom he had been in constant company since 1967. Mak had lost the two loves of his life. The defense pointed out that Mak was not convicted of espionage or treason. The letters showed that Mak was a worthwhile human being who deserved leniency.

The defense argued that a sentence of 10 years was "just punishment" for a 67-year-old man who had spent the last 28 years of his professional life producing important technology for the benefit of the United States.

Testimony or interviews from the only engineers who were on the QED team and who had experience with this technology – Robert Lee, Thomas Lipo, Chi Mak, and Yuri Khersonsky – demonstrated that both the QED and the Solid State Documents could not have revealed anything that would compromise United States national security. The fact that the QED and Solid State Documents did not compromise national security was also reflected by the

fact that Khersonsky and Mak presented these documents at international ASNE conferences, attended by Chinese nationals, and also attended by representatives of the Office of Naval Research, officers, including Admirals, in the Navy, and agents of both the NCIS and the FBI. Disks containing the QED and Solid State Documents were widely distributed to the international community present at the conferences and were purchased by the international community online. If the Documents at issue truly had the remote potential to damage national security, the government would not have permitted this widespread dissemination.

Mak did not earn any income, nor did he receive any compensation from China.

When Mak was released after serving his sentence, any technological information that Mak had acquired through his last day of employment in October 2005, would be so outdated that Mak would not have any technological information to disclose. As demonstrated at trial, the QED technology at issue in the case had been disseminated on a Chinese industrial nonmilitary website by the time of trial in March 2007.

The defense submitted numerous letters from colleagues, neighbors and family members reflecting Mak's character and life history. He was a hardworking engineer who helped his colleagues and contributed tremendous gains to the technological advance of the United States.

Mak's prior employer and a government witness, the president of Power Paragon, told the court that Mak was a valued employee. Mak would investigate a problem, evaluate the alternative solutions, and make a recommendation to solve the problem. Other engineers who worked with Mak praised his dedication to his work and his commitment to assisting other engineers with their projects.

The Vice-President of a Teledyne division told the court that Mak was well regarded by his engineering colleagues and worked well with his peers. A coworker told the court that Mak was known as a detail-oriented and generous person as well as a good friend. Mak provided clear directions and calculations. If there was any doubt in the test result he would deeply analyze it. He spent his own time to help others to solve technical problems. He was eager to solve problems.

Another employee told the court that Mak was unique. He offered his knowledge and was patient and kindhearted. He always tried to make others feel comfortable. Every time an employee experienced hardship, Mak was there. He was always considerate of those around him.

Thus, Mak's colleagues universally spoke about his generous nature and his unwavering commitment to assisting them in their technological projects. No witness even remotely opined that Mak had any intention to harm the United States.

In fact, throughout the trial, witness after witness from Power Paragon, and from Mak's prior companies, testified about Mak's expertise, his reliability, and that he was the ultimate team player. Evidence at trial demonstrated that Mak's evaluations from his employers were outstanding. No one could dispute the tremendous positive impact Mak had on his company and his coworkers in developing technology for the benefit of the United States.

Mak lived a life marked by generosity and support to his neighbors and friends. Mak had lived in Downey for 25 years. His neighbor Andrea told the court that as a child she remembered times when she fell off her bicycle and Mak would come running to make sure she was okay. She recollected times when her father was unloading heavy items and Mak would always come over asking if they needed help. The Maks were very pleasant people. Andrea recalled when the Maks first flew the American flag. They had just received their citizenship and were extremely excited. They had such pride and asked Andrea's father, a Vietnam veteran, about flag etiquette.

Dennis, who had lived across the street since the Maks moved in 25 years ago, stated that he was privileged to write a letter regarding Mak. Dennis stated that the Maks were wonderful people and Dennis was very honored to call them not only great neighbors but also dear friends.

Mak's niece Alice reported that Mak was always kind, gentle and

reasonable. He encouraged them to seek knowledge and learn. He was the most kind and forgiving person she had ever known and the most law-abiding person. She did not think he was motivated by greed or financial gain. He lived in a modest small home in a less than average neighborhood. She speculated that the desire to share knowledge was his downfall.

At trial, every witness, including government witnesses, who knew Mak praised him. Every witness – including Dotson, the former President of Power Paragon; Mohamed Zazeh, his co-author on the Solid State document; Utomchoke Bhavilai, his co-worker at Teledyne in the early 1980s; and Saba Saba, his colleague at Brown Boveri – the company he worked for when he first came to the United States which made commercial circuit breakers for utilities -- spoke about Mak’s commitment to his work, his willingness to help other engineers on technological problems, his unending desire to learn and increase his knowledge, and the good person that he is.

The court should also impose a 120-month sentence to avoid unwarranted sentence disparity. Mak’s codefendants were sentenced, respectively, to 36 months, probation, 120 months, and 11 months.

### **3. March 10, 2008 Government’s Sentencing Position**

The government argued that the court should impose an upward adjustment for obstruction of justice. The government argued that Mak perjured himself at trial and attempted to obstruct justice during his post-

arrest interviews. The government also requested an additional upward adjustment to reflect Mak's allegedly long history of spying, the volume of material he sent to China, and the damage to national security.

#### **4. March 18, 2008 Defendant's Response to Government's Sentencing Position**

The defense argued that by the DOJ's own manual, the prosecutors were required to charge Mak with the most serious readily provable offense. Thus the most serious readily provable offense committed by Mak was acting as an agent of a foreign government without prior notification, carrying a ten-year statutory maximum, in violation of §951. The defense had reviewed all the sentences imposed in the United States in 2005-2007 for violation of §951, and the sentences ranged from 24 to 181 months, averaging 84.5 months.

The government chose not to charge Mak with aiding a foreign government. There was no evidence that Mak intended to harm the United States.

Additionally, Mak's employment history negated the claim he was a spy. His first job in the United States was for a company making commercial power circuit breakers, with no military contracts. And when his employer Teledyne began focusing on military projects, in 1992 Mak applied for and moved to an exclusively commercial company. If Mak were a spy, he would want to stay at a company involved with sensitive military technology.

Numerous witnesses who worked with Mak described him as someone who was fascinated by technology, regardless of civilian or military application.

Additionally, evidence at trial showed that Mak repeatedly declined to attend high-level conferences about new United States military technology, including nuclear submarine and electric ship conferences. Instead, trial testimony unequivocally established that Mak's career path was motivated by his desire to work on projects that presented technological challenges, rather than military projects.

The government produced no evidence that Mak provided any technical documentation to China prior to the events at issue in the indictment.

### **5. March 24, 2008 Sentencing Hearing**

The government contended that Mak was a spy and a traitor, and a 30-year sentence was warranted. Although the defense asked the court to focus on the two charged Documents, the government contended that the §951 charge was based upon the more than 1000 documents in Mak's home. One thing that could never be ascertained was what knowledge Mak took to China in his head. The government summarily dismissed the character letters submitted on Mak's behalf on the ground that an unassuming friendly man who was dedicated to his work was the perfect spy.

The defense argued that §3553 required the court to look at Mak's history and characteristics. Mak's supporting letters had been submitted by people

who had known Mak for up to 25 years. Several engineers, including a government witness, and every trial witness who knew Mak, attested to his hard-working industrious nature, his generosity, his love of technology, and his willingness to help his fellow engineers advance their projects, which ultimately advanced the security of the United States. The witnesses talked about Mak's character of being a good and honorable person and a good human being.

The defense asked the court to consider Mak's age. The defense requested a ten-year sentence, meaning Mak would leave custody when he was 75. He would have no secrets or technological insights at that time. His knowledge would be outdated and stale.

With regard to harm, the defense proved from every single engineer who worked on those committees, that there was nothing for the government to fear by the distribution of the two charged Documents.

And the government did not believe that there was anything to fear. The FBI and the NCIS were surveilling Mak for a year and a half. Mak presented the two charged Documents, the QED and the Solid State Documents, in an international ASNE Forum. Representatives of the Office of Naval Research attended these forums. Chinese nationals attended these forums. Disks of this technology were distributed.

The subject technology was in the hands of the Chinese government a year and a half before Mak was charged, two and a half years before trial. If the documents had the possibility of damaging the country, the government's priority would have been to stop the distribution of the technology. But the government did nothing. The defense showed the court that the technology was on the internet. It had been distributed throughout the worldwide web. None of the agents, none of the Office of Naval Research, none of the admirals, none of the private technology represented had any concern about these documents.

Mak would have nothing to pass in the future of any importance. Technology was advancing and he would not have access to technology. Mak was a good man. People who knew him felt honored to know him and explained the quality of his character to the court. The defense asked the court to consider the sentencing letters and the lack of evidence that Mak was a spy. The defense asked the court to look at Mak's career path -- which negated spying -- and not sentence him based on generalizations or a need to send a message to a terrible regime. The court was sentencing a U.S. citizen who had spent the last 25 years of his life working hard for this country.

Mak told the court that he had been living in the United States for almost 30 years. His home, career and friends were here. This was his country. His career was engineering. He devoted himself to his company and all their

customers. He worked not only in the office but also at home, while traveling, even on vacation. The study of engineering technology was his hobby on which he had been most focused in his life. He enjoyed helping people. If they asked questions, he always tried to help. This was his nature. He thought exchanging was nothing wrong but was instead a benefit to the society and the industry. There were many technical exchanges. This was the driving force to advance the whole world.

Mak had never intended to violate the law. He never intended to hurt this country. He loved this country. He did not believe that he had hurt this country.

The probation officer told the court that a high-end sentence of 19-1/2 years was appropriate. No one disputed the mitigating factors of Mak's personal characteristics. He was a very good citizen, with significant educational and professional accomplishments, a good family man, and a good positive member of the community. There was a reasonable view that those factors -- Mak's humble law-abiding life -- contributed to his ability to commit and conceal the offense. So those factors did not carry a lot of weight in terms of mitigation and further supported a sentence at the high end of the guideline range.

The prosecutor argued that the idea that Mak would have no useful information after ten years was not right. Both Lipo and Lee testified that

they would never send the work that they were doing for Power Paragon to the Chinese.

The court imposed an enhancement for obstruction of justice based upon Mak's trial testimony, and sentenced Mak to a high-end sentence of 293 months.

## **6. March 24, 2008 Statement of Reasons**

The court held that a high-end guidelines sentence was warranted because Mak betrayed the United States and lied to avoid prosecution and conviction. A high-end sentence would provide a strong deterrent to China not to send its agents here to steal American military secrets, and it would ensure that Mak would never attempt to pass any military secrets to China again.

Although Mak was not convicted for passing military secrets to the PRS, the court said that Mak admitted during his post-arrest interview that he passed naval technology to China over the years. Mak willfully lied to gain access to sensitive naval technology, to conceal his conduct after the fact, and to try to mitigate his role in the offense in front of the jury.

A high-end guideline sentence was justified based in part on the serious nature of the offense and the need to protect the public from further crimes by Mak. Mak organized and led a conspiracy to pass sensitive naval technology to China. He attempted to pass nuclear submarine power and propulsion quieting technologies, as well as information about the Navy's

current fleet and its future plans. By passing sensitive naval technology to China, Mak would have enhanced China's military power at the expense of that of the United States.

The court cited trial testimony that United States submarine stealth technology is one of the nation's "crown jewels," because nuclear submarines form the last line of defense in the event of a nuclear war. A high-end sentence was necessary to protect the public from future crimes by Mak. Mak was a brilliant man who had extensive knowledge of this country's naval technology, and a high-end sentence of this length would prevent him from sharing that knowledge with China. Should Mak outlive his prison term, any information that he had retained would be outdated and obsolete.

A high-end sentence would also provide deterrence to others who would engage in Mak's crimes.

The court stated that in terms of mitigating factors, Mak argued that he was entitled to a downward departure or variance from the advisory guideline range based on several personal characteristics, such as his lack of criminal history, his age, and the fact that he had already lost the two things he valued most-his career and his wife, who would be deported to China. Mak also argued that he deserved a downward departure or variance because he lived a productive life developing technology for the United States and because he was well-regarded by his colleagues and neighbors. Based on

these purportedly mitigating factors, Mak argued that a sentence of ten years was appropriate.

Rather than finding that these factors merited a downward departure, the Court found that Mak's lack of criminal history, good reputation in the community and professional accomplishments contributed to his ability to carry out and conceal his crimes over an extended period of time. But for his good reputation and covert behavior, Mak never could have committed his crimes against the United States.

#### **D. Motion for Compassionate Release**

##### **1. May 29, 2020 Motion for Compassionate Release**

The defense told the court that Mak was 79 years old and was incarcerated at Lompoc, which had 905 cases of Coronavirus Disease 2019 (“COVID”). 96% of the prisoners at Lompoc had been infected with COVID. Mak had also been infected.

The instant case was Mak's only criminal case. He had already served over 14-1/2 years in custody, approximately 60% of his sentence. He had been a model prisoner. He had a viable release plan.

COVID was spreading at an alarming rate, and public health experts had warned that incarcerated individuals were at special risk of infection and less able to protect themselves. Conditions in BOP facilities provided a uniquely hospitable environment for COVID to spread. For that reason, members of

Congress asked the BOP to allow for the immediate release of elderly nonviolent inmates. Dozens of leading public health experts made a similar request, noting that elderly inmates are at the highest risk of dying from the disease and posed the smallest risks to public safety.

The BOP's precautionary measures at Lompoc had fallen woefully short. 96% of the population contracted COVID. The BOP had failed to take meaningful action to release even nonviolent first-time elderly offenders like Mak.

Mak had been in custody for 14-1/2 years, since October of 2005, and he had no disciplinary violations. He worked as a tutor in the education department since 2008, where he taught other prisoners so that they could pass the GED test. From 2015 to 2016, Mak worked in a UNICOR factory and made indoor and outdoor signs for the government. He also taught other prisoners industrial knowledge and skills to assist them in integrating back into society. Mak is a Buddhist and he attends weekly chapel services. He has taken numerous classes while in custody.

While incarcerated at FCI Lompoc, Mak tested positive for COVID. Although he was asymptomatic, he faced an increased risk for death and more severe complications from COVID because he is 79 years old. According to the CDC, individuals who are 65 years of age or older are at a significantly higher risk for severe illness from the pandemic. Also,

individuals who suffer from underlying medical conditions are at a higher risk for complications.

Mak has high blood pressure and high cholesterol; he suffers from hyperlipidemia, which means that he has high levels of lipids in his blood. On December 22, 2019, Mak vomited and passed out when he was in food service area. He also suffers from chondromalacia patellae (deterioration of cartilage on the underside of the kneecap) and has been assigned a lower bunk. Mak's physical health is deteriorating rapidly. He suffers from osteopenia - the weakening of the bone and bone loss - and has degenerative joint disease in his spine. He has pain in both of his legs, his hip, and his ankle. He also feels pain when he walks, and must rely on handrails when he goes up stairs. He moves slowly and takes medication for his cholesterol, for his high blood pressure, and to protect his heart.

His mental health is also deteriorating. He suffers from memory loss and must take detailed notes when he tutors GED students, because he forgets their names and where he left off on a lesson. This deterioration has become more profound recently.

The defense contended that Mak satisfied all the requirements for compassionate release. The COVID outbreak was an extraordinary and compelling reason supporting release. Mak was infected with COVID while

incarcerated at FCI Lompoc. Mak may face serious long-term health effects weeks or months into the future.

Because COVID is a new disease, there are insufficient studies about its long-term effects. While some patients may fully recover, clinicians are seeing evidence that virus also may be causing heart inflammation, acute kidney disease, neurological malfunction, blood clots, intestinal damage and liver problems. Some of the long-term effects that have already emerged included lung scarring; stroke, embolism and blood clotting; and heart damage.

Finally, given Mak's age and deteriorating health, he is at increased risk for serious complications. Thus, Mak may experience serious long-term effects from the virus in the future. He will require ongoing monitoring and treatment. These circumstances supported compassionate release so Mak could obtain the medical care that he needs.

The BOP and FCI Lompoc could not be trusted to provide adequate follow-up treatment or care. The staggering infection rates at FCI Lompoc reflected the unsafe and inhumane conditions there.

Having already failed to prevent the spread of coronavirus, FCI Lompoc cannot be trusted to provide adequate monitoring and treatment for Mak. After initially committing to construct a 50-bed field hospital at the Lompoc complex, which houses over 2,700 inmates in total, officials instead built a care unit consisting of 10 double occupancy rooms that has no ventilators, is

not ICU certified, and is not staffed with doctors and nurses. Elected officials have expressed frustration with the lack of transparency from FCI Lompoc and the BOP about its response to the outbreak.

Mak does not pose a danger to the community, and pursuant to the §3553(a) factors compassionate release was warranted.

Mak was 79 years old and had served 14-1/2 years of his sentence. He is suffering from deterioration in his physical and mental health due to the process of aging. Mak's medical conditions, including his age, high blood pressure, and high cholesterol, are especially serious in light of the COVID pandemic. Adults over 65 are at a particularly high risk for death and severe illness. Each of these conditions could independently cause a serious complications from COVID, which would threaten Mak's life. Thus, Mak qualified for compassionate release.

## **2. June 4, 2020 Government's Opposition to Mak's Motion for Compassionate Release**

The government contended that Mak betrayed the country and was not entitled to a sentence reduction. When imposing the sentence in this case, the court cited the serious offenses committed by defendant, deeming them "treasonous." The court found that defendant posed an ongoing threat to national security given his expertise gained from decades of access to restricted and classified naval technology – knowledge he could still share

with Chinese intelligence agents.

The government cited the court's Statement of Reasons. The government stated that the court found that defendant posed an ongoing threat to national security given his knowledge of naval defense programs. In the court's Statement of Reasons, the court stated that a sentence of the length chosen by the court would prevent Mak from sharing information with China.

The government contended that, contrary to the defense claims that the BOP did little to nothing to prevent the spread of the virus at Lompoc, the BOP had taken steps to combat the virus, including the construction of a Hospital Care Unit at Lompoc.

### **3. June 8, 2020 Mak's Reply to Government's Opposition to Mak's Motion for Compassionate Release**

Mak argued that he should be granted compassionate release based on several factors, including that he was 79 years old, had a viable release plan, has no prior criminal record, has been rehabilitated, has deteriorating physical and mental health, and has been infected with COVID, along with 96% of the prisoner population at FCI Lompoc.

Knowing the specifics of nuclear submarine power systems in 2005, is not relevant information in 2020. The offenses occurred 15 years ago, and any intelligence that Mak possessed at that time is outdated and obsolete.

#### **4. June 11, 2020 Written Order Denying Motion for Compassionate Release**

The court stated that the seriousness of Mak's crimes precluded early release. According to the court, Mak "organized and led a conspiracy to pass the 'crown jewels' of naval technology to the PRC."

The court held that Mak's crimes were treasonous; as the organizer and leader, he was the most culpable defendant; and he showed a pattern of deceit, with lies at trial. Given these factors, the court had determined that a high-end advisory Guidelines sentence was necessary to provide a strong deterrent to China not to send its agents to steal American military secrets, and to ensure that Mak would never attempt to pass any military secrets to the PSR again. To grant Mak early release after serving only 60% of the sentence would not advance the goals set forth in §3553(a).

Mak contended that his conduct in custody demonstrated that release was appropriate, citing his 14-1/2 years in custody without one disciplinary incident, and his work and tutoring history in prison. The court responded that those were exactly the sorts of traits that the court concluded did not warrant leniency at sentencing. At sentencing, the court found that Mak's lack of criminal history, good reputation in the community, and professional accomplishments contributed to Mak's ability to carry out and conceal his crimes over an extended period of time. But for his good reputation and

covert behavior, Mak never could have committed his crimes.

The court also stated that there was no evidence that Mak had remorse for his actions. In 2014, Mak told government agents that he was innocent of the charges and had been unfairly targeted by the government.

The court stated that it was not persuaded that the severity of the outbreak at Lompoc or Mak's positive test for COVID constituted sufficiently extraordinary and compelling circumstances to warrant his release. This was especially so in light of the measures Lompoc had taken in response to the outbreak, including the installation of a hospital care unit at the facility and universal testing. For those reasons the court denied Mak's motion for compassionate release.

#### **E. Ninth Circuit Memorandum**

On August 19, 2021, the Ninth Circuit issued a Memorandum Disposition stating in pertinent part as follows:

“First, the legal standard for compassionate release does not require the district court to recite each of the provisions of § 3553(a). 18 U.S.C. § 3582(c)(1)(A) (stating that district courts must consider ‘the factors set forth in section 3553(a) to the extent that they are applicable’ (emphasis added)); cf. *United States v. Carty*, 520 F.3d 984, 992 (9th Cir. 2008) (“The district court need not tick off each of the § 3553(a) factors to show that it has considered them.”).

Second, while Mak may disagree with how the district court balanced the § 3553(a) factors, there is no basis for us to conclude the district court abused its discretion. The district court fully explained its reasons for reaching its conclusion, which is supported by the record. See *United States v. Robertson*, 895 F.3d 1206, 1213 (9th Cir. 2018) (explaining that

a district court abuses its discretion only if its decision is illogical, implausible, or without support in the record). Further, we find no error in the district court’s determination that the balance of the § 3553(a) factors weigh against Mak’s release. This determination is a sufficient basis to affirm the district court’s denial of Mak’s motion for compassionate release. In light of this determination, we need not address Mak’s contention that the district court erred in finding he had not shown ‘extraordinary and compelling’ circumstances warranting his release. *United States v. Keller*, 2 F.4th 1278, 1284 (9th Cir. 2021).”

## **REASONS FOR GRANTING THE WRIT**

The district court erred in denying Mak’s motion for compassionate release. Section 3582(c)(1)(A) provides that the court may grant compassionate release “after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that.... extraordinary and compelling reasons warrant such a reduction.” Accordingly, the statute requires the district court to consider all applicable §3553(a) factors.

### **A. Extraordinary and Compelling Circumstances Warrant Compassionate Release**

Mak’s age and medical conditions are extraordinary and compelling circumstances warranting compassionate release.

The district court did not address Mak’s medical conditions, simply stating that the COVID outbreak and Mak’s COVID infection were not sufficiently extraordinary and compelling. However, the fact that Mak continued to suffer from hyperlipidemia and hypertension notwithstanding BOP

treatment, means that Mak is not being properly treated by the BOP for those conditions. And as Mak demonstrated, these are conditions that the CDC has said can make one more likely to get severely ill from COVID.

<https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html>

And according to the CDC, the primary risk factor for severe COVID is age. <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/index.html>. The CDC has determined that older adults are at increased risk for severe illness from COVID. 80% of COVID deaths are in adults aged 65 and older. <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/older-adults.html>. Mak is 80%.

The district court relied upon the construction of a ten-room hospital at Lompoc. However, a ten-room hospital for over 2,000 inmates is inadequate. Additionally, the ACLU class action demonstrated that the hospital unit is unused because of a lack of dedicated staff and unclear clinical need.

The district court abused its discretion by failing to consider Mak's nonfrivolous claim of hypertension and hyperlipidemia, in addition to his mental and physical deterioration, and by failing to give sufficient weight to these important factors. Accordingly, Mak established that extraordinary and compelling circumstances warrant compassionate release.

## **B. The §3553(a) Factors Warrant Compassionate Release**

### **1. The Nature and Circumstances of the Offense**

The district court based its denial on its belief that “the seriousness of [Mak’s] crimes precludes his early release.” The district court claimed that Mak “organized and led a conspiracy to pass the ‘crown jewels’ of naval technology to the PRC.”

#### **(1) Seriousness of Mak’s Crimes**

Mak challenged the court’s reliance on the seriousness of the offense by demonstrating that the Documents that Mak was convicted of attempting to export -- the QED and Solid State Documents -- were publicly available.

Mak challenged the district court’s denial of compassionate release based upon the finding that the offense was extremely serious. Mak’s challenge was based upon the undisputed facts that Mak’s supervisor Dr. Yuri Khersonsky and Mak presented the QED and 5MW Documents at conferences attended by United States and foreign nationals, including Chinese nationals. The government was contemporaneously aware of Mak’s presentations because such presentations occurred while the government was surveilling Mak, and the government did not stop the dissemination of the Documents. Thus the Documents could not have endangered United States security. The government’s indifference to the dissemination of the Documents establishes that Mak’s offense was not serious.

## **(2) Crown Jewels of Naval Technology**

Mak established that the claim that Mak passed “crown jewels” to China is without support in the record. At sentencing, the district court observed only that submarine stealth technology is one of the nation’s crown jewels. There was no evidence that charged Documents were crown jewels. The PSR stated that the information in the Documents was neither top secret nor marked as classified.

And the government could not reasonably claim that the two charged Documents were “crown jewels.” The government knew that both Documents had been distributed at conferences and had been available at conferences and online during the period of surveillance. During all that time the government had done nothing to restrict access to those disseminated Documents. Accordingly, the government and court cannot reasonably claim that the documents were “crown jewels.” If the Documents’ dissemination had even remotely endangered the United States, the government would have acted to terminate the dissemination.

## **C. The History and Characteristics of the Defendant**

At his initial sentencing, the defense introduced extensive evidence regarding Mak’s helpful and caring nature. The district court unreasonably turned this mitigating evidence into aggravating evidence by finding that Mak’s impeccable behavior simply “contributed to his ability to carry out and

conceal his crimes.”

Similarly, when faced with Mak’s exemplary behavior in custody, including his selfless dedication to helping others, the district court responded that “these are exactly the sorts of traits that the Court concluded did not warrant leniency at sentencing.” The court’s reasoning is illogical and implausible. Even accepting arguendo the court’s reasoning that Mak’s impeccable behavior for 27 years prior to his arrest (helping his coworkers and neighbors, dedicating himself to his work, living frugally) was for the sole purpose of advancing his alleged spying, that same rationale could not apply to Mak’s behavior in custody. Mak’s exemplary behavior for 15-1/2 years in custody could not have been driven solely by the belief that he could thereby carry out and conceal crimes. Instead, the fact that Mak has been so selfless and helpful in custody is because that is his character. His behavior in custody establishes who he is -- a caring and giving person devoted to helping others. This invalidates the court’s reasoning in its denial of Mak’s motion for compassionate release. The district court failed to adequately weigh the §3553(a) factors when it turned Mak’s mitigating characteristics into aggravation.

The court further failed to address important aspects of Mak’s arguments regarding why his heightened COVID risks warrant his compassionate release and why his release is appropriate in light of the §3553(a) factors.

Citing CDC guidance, Mak argued that that his incarceration placed him at heightened risk of contracting the disease and suffering death or severe complications should he do so. His hypertension and hyperlipidemia increase these risks. He argued that his deteriorating mental and physical conditions rendered him unable to protect himself at Lompoc. The district court failed to discuss this heightened risk.

Mak's age of 80 alone would put him at high risk under CDC guidelines. The district court did not consider Mak's age with respect to his risk of contracting severe COVID. The district court also failed to consider Mak's arguments regarding the increased likelihood of contracting COVID while incarcerated. The CDC has advised that the challenges in practicing physical distancing and other prevention strategies within correctional and detention facilities place persons in these settings, many of whom have chronic diseases, at high risk for COVID exposure, and that a lack of testing exacerbates this problem.

Nor did the district court address Mak's mental and physical deterioration. Accordingly, with respect to Mak's history and characteristics, the district court abused its discretion by relying on findings of material fact that were illogical and implausible. The district court's decision was also substantively unreasonable, given that it assigned excessive weight to Mak's purported "dangerousness" without giving

consideration to other §3553(a) factors.

**D. The Need for the Sentence Imposed to Reflect the Seriousness of Offense, Respect for the Law, Just Punishment**

As discussed above, the court stated that Mak’s crimes were extraordinarily serious and that he led a conspiracy to pass the “crown jewels” of naval technology to the PSR. But the two Documents that Mak was convicted of attempting to pass to China had both been distributed at conferences. And the government, who was surveilling Mak, knew the papers were available and did nothing to stop their dissemination. Since the government permitted dissemination of the Documents, it is an abuse of discretion to characterize Mak’s offense as extraordinarily serious and the Documents as “crown jewels.” Despite its suffocating surveillance, the government failed to prove that Mak passed any other material to China. And the district court acknowledged that it could not view Mak’s case as an espionage case. Again, the court’s denial of Mak’s motion constituted an abuse of discretion.

**E. The Need for the Sentence Imposed to Afford Adequate Deterrence to Criminal Conduct, Public Protection**

The district court’s statement that Mak’s high-end sentence was necessary to deter China from sending its agents here was illogical, implausible and without support in the record. China will not stop spying on the United

States merely because the district court denied compassion to an elderly and infirm United States citizen.

The district court said that denying release would ensure that Mak would never pass secrets to China again. But at this point Mak has no secrets to pass to China even if he wanted to do so. Mak has had no access to military intelligence since 2005 -- over 15 years ago. Any information he retains was obsolete long ago in this fast-paced technological world. The district court found that any information still retained by Mak from 2005 would be dangerous in 2020, but harmless in 2026. The district court cited no basis for this belief that 2026 was the magical date for obsolescence. Instead, given the fast pace of technological developments, any information that Mak may retain long ago became obsolete. Thus the district court's reasoning was illogical, implausible and unsupported by the record.

And notably, the fear that Mak retains valuable information that he would disclose to China if he were released, is irreconcilable with the finding that Mak's offense is extraordinarily serious because Mak already disclosed all his information to China. The government argued that Mak personally went to China every other year and gave China everything he knew. If Mak had given all his information to China, then China already has everything that Mak knows. Therefore further incarceration is not necessary to deter future criminal conduct.

And as his motion demonstrated, Mak's memory, like his health, is failing. Thus Mak would be unable to recall any technology from decades earlier. The district court abused its discretion in making findings that are illogical, implausible and unsupported by the record, and by failing to address Mak's nonfrivolous arguments.

#### **F. The Need for the Sentence Imposed to Provide the Defendant with Needed Medical Care**

Mak established that Lompoc failed to provide adequate care not only for COVID, but also for general medical conditions. As a result of Lompoc's failures, nearly every Lompoc FCI inmate was infected with COVID and inmates died.

Mak established that he had been suffering advanced health deterioration for four years. He suffered leg pain and could not walk stairs without holding handrails. His right leg pain extended to his hips and ankle, a sign of sciatica. His mental deterioration was reflected in his lost memory. Often he didn't remember students' names that he had learned two days earlier. He needed to take detailed notes where he stopped in the lesson. This deterioration had become more profoundly recently He needed medication to control his high cholesterol, high blood pressure and to protect his heart. In his motion, he stated that he suffered from osteopenia, generative joint disease in his spine, chondromalacia patellae.

The ACLU class action filed against the BOP establishes that the BOP is not providing adequate medical care in general. This is especially concerning as more evidence is discovered that even asymptomatic COVID can have serious long-term mental and physical health consequences.

<https://www.cnn.com/2021/04/06/health/covid-neurological-psychological-lancet-wellness/index.html>

As Mak established, Mak faces potential serious consequences from his last COVID infection, as well as more severe consequences from any future COVID infection. Mak suffers from hypertension and hyperlipidemia. Both conditions have been determined to be potential risk factors for serious COVID outcomes and have been held to warrant compassionate release. And Mak has additional other debilitating medical conditions for which he cannot receive adequate treatment in the BOP. The district court erred by failing to consider Mak's nonfrivolous arguments that release is warranted to provide Mak with adequate medical care.

#### **G. The Need to Avoid Unwarranted Sentence Disparities**

Section 3553(a) requires the court to consider, among other things, the need to avoid unwarranted sentence disparities. As the defense established at sentencing, the sentencing ranges for Mak's offense ranged from 24 months to 181 months, averaging 84.5 months. Additionally, the disparities between the sentences imposed upon Mak and his codefendants

were staggering. Tai was released in 2014; Chiu was released in 2011; Billy was sentenced to 11 months; and Li was sentenced to probation. Thus unwarranted sentence disparities supported compassionate release.

The district court abused its discretion by relying on findings that were illogical, implausible and unsupported by the record, and by assigning excessive weight to the allegedly seriousness of Mak's offense without giving adequate consideration to other §3553(a) factors.

## CONCLUSION

For all the foregoing reasons, Petitioner Chi Mak submits that the petition for writ of certiorari should be granted.

Respectfully submitted,

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DATED: November 16, 2021

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