

APPENDIX

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

AUG 19 2021

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

No. 20-50171

Plaintiff-Appellee,

D.C. No.

8:05-cr-00293-CJC-1

v.

CHI MAK, AKA Dazhi Mai, AKA Daichi
Mak, AKA Jack Mak, AKA Taichi Mak,
AKA Seal A,

MEMORANDUM*

Defendant-Appellant.

Appeal from the United States District Court
for the Central District of California
Cormac J. Carney, District Judge, Presiding

Submitted August 3, 2021**
Pasadena, California

Before: PAEZ, CALLAHAN, and BENNETT, Circuit Judges.

Chi Mak appeals the district court's order denying his motion for
compassionate release under 18 U.S.C. § 3582(c)(1). We have jurisdiction under
28 U.S.C. § 1291. Reviewing for abuse of discretion, *United States v. Aruda*, 993

* This disposition is not appropriate for publication and is not precedent
except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision
without oral argument. *See* Fed. R. App. P. 34(a)(2).

F.3d 797, 799 (9th Cir. 2021), we affirm.

Mak contends, first, that the district court legally erred by denying his motion for compassionate release without addressing each of the enumerated factors in 18 U.S.C. § 3553(a), and second, that the district court abused its discretion in determining that the seriousness of his offense, his character, and the need for his sentence tipped the balance of the § 3553(a) factors against granting his motion for release. We disagree.

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).

AFFIRMED.

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

v.

CHI MAK,

Defendant.

Case No.: SACR 05-00293-CJC

**ORDER DENYING DEFENDANT'S
MOTION FOR COMPASSIONATE
RELEASE [Dkts. 856, 860]**

I. INTRODUCTION & BACKGROUND

Defendant Chi Mak led a conspiracy to pass sensitive naval technology to the People's Republic of China (the "PRC"). On May 10, 2007, after a six-week trial, a jury found Mr. Mak guilty of conspiracy to export defense articles, attempted export of defense articles, acting as an unregistered agent of a foreign government, and making a false statement. (Dkt. 605 [Jury Verdict].) On March 24, 2008, the Court sentenced Mr. Mak to a term of 293 months in prison. (*See* Dkt. 177.) Mr. Mak is currently serving

1 that sentence at Lompoc Federal Correctional Institute. Defendant filed this motion for
 2 compassionate release in light of the COVID-19 pandemic. (Dkt. 856 [Motion]; Dkt. 860
 3 [Amended Motion, hereinafter “Mot.”]) The government opposes Mr. Mak’s motion.
 4 (Dkt. 866 [hereinafter “Opp.”].) For the following reasons, Mr. Mak’s motion is
 5 **DENIED.**¹

6 7 **II. ANALYSIS**

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 9 Mr. Mak argues that he should be released under the compassionate release
 10 provisions of the First Step Act, which allow a sentencing court to reduce a sentence
 11 where “extraordinary and compelling reasons warrant such a reduction.” 18 U.S.C.
 12 § 3582(c)(1)(A)(i). He argues such reasons exist here because he “has been infected with
 13 COVID-19 and has a higher risk for death or developing serious medical complications
 14 from the virus, due to his age” of 79, and “additional time in custody is not required to
 15 satisfy the objectives of sentencing.” (Mot. at 1.)

16
 17 Even assuming Mr. Mak exhausted his administrative remedies², however, the
 18 seriousness of his crimes precludes his early release. Any decision to reduce a term of
 19 imprisonment under the First Step Act requires a court to “consider[] the factors set forth
 20 in section 3553(a).” 18 U.S.C. § 3582(c)(1)(A)(i). These factors include the nature and
 21 circumstances of the offense, the history and characteristics of the defendant, and the

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 23
 24 ¹ Having read and considered the papers presented by the parties, the Court finds this matter appropriate
 for disposition without a hearing. *See* Fed. R. Crim. P. 57(b). Accordingly, the hearing set for June 22,
 2020 at 1:30 p.m. is hereby vacated and off calendar.

25 ² The government argues Mr. Mak failed to exhaust administrative remedies because he submitted a
 26 Compassionate Release Request to the warden in October 2019, before the COVID-19 outbreak, and
 because his March 30, 2020 inquiry about his 2019 request for early did not release mention any
 27 COVID-19 concerns. (Opp. at 8; *see* Mot. Ex. H [Compassionate Release Request]; Dkt. 866-9 at 4
 [March 30, 2020 Inquiry].) However, the warden’s April 24, 2020 denial of Mr. Mak’s request states
 28 that Mr. Mak “requested a reduction in sentence (RIS) based on concerns about COVID-19.” (Dkt. 860-
 10.)

1 need for the sentence imposed. 18 U.S.C. § 3553(a). The nature of Mr. Mak's crimes
2 was extraordinarily serious. He organized and led a conspiracy to pass the "crown
3 jewels" of naval technology to the PRC. As the Court explained in its Statement of
4 Reasons for Mr. Mak's sentence,

5
6 Mr. Mak betrayed the United States. We entrusted him with our
7 national security and the safety of our courageous men and
8 women in the armed forces. He betrayed that sacred trust by
9 being an agent of the PRC and attempting to pass sensitive
10 naval technology to that country. To make matters worse, Mr.
11 Mak lied to avoid prosecution and conviction. We will never
12 know the full extent of the damage that Mr. Mak has done to
13 our national security.

14 (Dkt. 690 [hereinafter "SOR"] at 2.) Mr. Mak's crimes were "treasonous," made possible
15 by his position of public and private trust and his national security clearance. (*Id.* at 5.)
16 As "the organizer and leader of" the crimes, he was "the most culpable defendant" in the
17 conspiracy. (*Id.* at 3–4.) And he showed a "pattern of deceit," with lies at trial that were
18 "demonstrable, material, and willful." (*Id.* at 7–8.) Given all these factors, the Court
19 determined that a high-end advisory guideline sentence was necessary to "provide a
20 strong deterrent to the PRC not to send its agents here to steal American military secrets,"
21 and to "ensure that Mr. Mak will never attempt to pass any of our military secrets to the
22 PRC again." (*Id.* at 2, 9–10.) To grant Mr. Mak early release after serving only sixty
23 percent of the sentence the Court imposed would not advance the goals set forth in 18
24 U.S.C. § 3553(a). *See, e.g., United States v. Stone*, 2020 WL 2836794, at *3 (E.D. Cal.
25 June 1, 2020) (concluding that release of Lompoc inmate who tested positive for COVID-
26 19 was inappropriate under 18 U.S.C. § 3553(a), particularly because he remained a
27 danger to the community).

28 Mr. Mak contends that "his conduct in custody demonstrates that release is
appropriate in this case," citing his 14 and a half years in custody "without one

disciplinary incident,” and his work and tutoring history in prison. (Mot. at 6; Dkt. 867 [Reply] at 5.) But these are exactly the sorts of traits that the Court concluded did not warrant leniency at sentencing. Specifically, the Court found “that Mr. 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, Mr. Mak never could have committed his crimes against the United States.” (SOR at 11.) Moreover, there is evidence that Mr. Mak has no remorse for his actions, and that in 2014, while in prison, he told government agents that “he was entirely innocent of the charges he was earlier convicted of, that the government had unfairly targeted him from the outset, and was out to get him because he was ethnic Chinese and it fit the desired U.S. government narrative regarding espionage by China.” (Dkt. 866-1 [Declaration of James E. Gaylord] ¶¶ 3–4.) Even if Mr. Mak has behaved well in prison, this does not warrant his early release.

Finally, the Court is not persuaded that the severity of the outbreak at Lompoc or Mr. Mak’s positive test for COVID-19 constitute sufficiently extraordinary and compelling circumstances to warrant his release. *See, e.g., Stone*, 2020 WL 2836794, at *3; (denying Lompoc inmate’s motion for compassionate release after testing positive for COVID-19); *United States v. Vargas*, 2020 WL 3056794, at *4–5 (D. Or. June 9, 2020) (same); *United States v. Purry*, 2020 WL 2773477, at *2 (D. Nev. May 28, 2020) (same). This is so especially in light of the measures Lompoc has taken in response to the outbreak, including “the installation of a hospital care unit at the facility and universal testing.” *Purry*, 2020 WL 2773477, at *2; (Opp. at 14–15 [detailing the Bureau of Prisons’ response to the Lompoc outbreak]).

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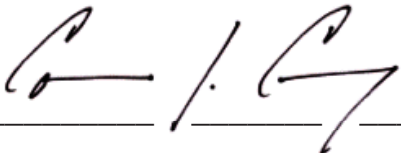
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1 **III. CONCLUSION**

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3 For the foregoing reasons, Mr. Mak's motion for compassionate release is
4 **DENIED.**

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6 DATED: June 11, 2020

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CORMAC J. CARNEY

9 CHIEF UNITED STATES DISTRICT JUDGE
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