NO. 91-8199

IN THE SUPREME COURT OF THE UNITED STATES

THOMAS LEE DEAL,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITIONER'S MOTION FOR LEAVE TO FILE OUT-OF-TIME PETITION FOR REHEARING

MARJORIE A. MEYERS
Federal Public Defender
Southern District of Texas
Attorney of Record

H. MICHAEL SOKOLOW
First Asst. Federal Public Defender
Attorneys for Petitioner
440 Louisiana, Suite 1350
Houston, Texas 77002-1056
Telephone: (713) 718-4600

Petitioner, Thomas Lee Deal, moves for leave to file the annexed petition for rehearing of the opinion and judgment of this Court affirming the judgment of conviction and sentence in his case on May 17, 1993. *See United States v. Deal*, 508 U.S. 129 (1993) (attached to the petition for rehearing). No timely petition for rehearing was filed in as much as no grounds for such a petition then existed. But, rehearing is sought at this time because, as is pointed out more fully in the annexed petition for rehearing, on December 21, 2018, Congress enacted a provision in the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194, § 403 ["First Step Act"], that has the heading "Clarification of Section 924(c) of Title 18, United States Code." *See id.* (some capitalization omitted). This provision of the First Step Act amends 18 U.S.C. § 924(c) by making clear that an enhancement for what was previously termed a "second or subsequent conviction" applies only to a § 924(c) conviction that occurs after another § 924(c) conviction has become final and that courts previously had interpreted this statute to the contrary allowing "inappropriately lengthy sentences." H.R. REP. 114-888, 20, 2016 WL 7471588, at *20; *see, e.g. Deal*, 508 U.S. at 131-32.

It would be manifestly unfair to petitioner to allow this Court's opinion to stand in the face of congressional action showing that the term "second or subsequent conviction" was indeed ambiguous and was in fact intended to mean a § 924(c) conviction that occurs after a prior conviction § 924(c) conviction has become final. *Compare Deal*, 508 U.S. at 131-32 (holding that "second or subsequent" conviction in § 924(c)(1) was not ambiguous and covered convictions for charges alleged in the same indictment).

Although this petition for rehearing is filed after the expiration of time prescribed in Rule 44.1, the grounds upon which it is based arose after such time. This Court clearly has the power, in its discretion and in the interests of justice, to entertain the petition in these circumstances. *See* Sup. Ct. R. 44.1.1 (stating that a petition for rehearing of a decision on the merits shall be filed within 25 days after entry of the decision, unless the Court or a Justice shortens or extends the time); *cf. United States. Ohio Power Co.*, 353 U.S. 98, 98-99 (1957) (vacating order denying rehearing a year and one-half after it was entered, granting rehearing and certiorari, and reversing the lower court's judgment); *Gondeck v. Pan Am. World Airways, Inc.*, 382 U.S. 25, 26-27 (1965) (granting rehearing and certiorari three years after the Court denied certiorari).

Date: February 25, 2019

Respectfully submitted,

MARJORIE A. MEYERS
Federal Public Defender
Southern District of Texas

By: H. Michael Sokolow
H. MICHAEL SOKOLOW
First Asst. Federal Public Defender
Attorneys for Petitioner
440 Louisiana, Suite 1350
Houston, TX 77002-1056
Telephone: (713) 718-4600