

ORAL ARGUMENT REQUESTED

No. 11-6380

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

DEIDRE LYNN CLARK,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY

BRIEF OF PETITIONER-APPELLANT

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

This appeal raises a novel and important issue at the intersection of mental health and the law. As this Court recognized in its certificate of appealability, the law of the Sixth Circuit “is undeveloped with respect to how a petitioner, especially one proceeding pro se, might establish ‘compelling reasons’ for failing to raise new claims earlier.” (Case No. 11-6380, Order Granting Certificate of Appealability, Page ID #3.) Oral argument will assist the Court in answering that question as it applies here, where the district court twice denied leave to amend to a pro se habeas petitioner whose severe depression affected her ability to draft a comprehensive § 2255 motion in the first instance. At the Court’s express request, this appeal also addresses the applicability of Federal Rule of Civil Procedure 15(a)(2)’s directive that courts “should freely give leave [to amend] as justice so requires”—another important issue largely undeveloped in circumstances such as those presented here. Petitioner-Appellant requests that the Court grant oral argument so that these critical issues may receive a full hearing.

JURISDICTIONAL STATEMENT

The district court had jurisdiction over Ms. Clark's second motion to amend her motion to vacate, set aside, or correct her sentence pursuant to 28 U.S.C. § 2255(a). The district court denied her motion on October 4, 2011. Ms. Clark timely filed a notice of appeal of that denial on October 31, 2011. This Court subsequently granted a certificate of appealability on the question presented in this case. The Court has jurisdiction over this appeal of a final order of the district court on a proceeding under § 2255 pursuant to §§ 2253 and 2255(d).

STATEMENT OF THE ISSUE

Whether severe depression suffered by a pro se petitioner at the time she filed her § 2255 motion is a compelling reason to allow amendment to add new claims after the magistrate judge has issued a report & recommendation.

STATEMENT OF THE CASE

Nature of the Case. This case is an appeal of the district court's denial of the second motion to amend a § 2255 motion to vacate filed by Ms. Deidre Lynn Clark, a pro se petitioner who suffers from severe depression. Because her depression clouded her judgment at the time she drafted her original motion, she was unable to raise all of her claims in the first instance. She twice requested leave to add new claims. The district court denied both requests.

Course of Proceedings and Disposition Below. Ms. Clark filed a pro se § 2255 motion to vacate her sentence in 2010. (§ 2255 Motion, RE 331, Page ID

#2473-2528.) Her motion was referred to a magistrate judge, who recommended on July 19, 2011, that it be denied on the merits. (Recommended Disposition, RE 351, Page ID #2537-2559.) In response, Ms. Clark moved on August 22, 2011, to amend her § 2255 motion by adding additional claims, explaining that her severe depression had interfered with her attempt at filing a comprehensive petition in the first instance. (First Motion to Amend, RE 355, Page ID #2623-2632.)

On August 23, 2011—the next day—the district court issued a Memorandum Opinion and Order adopting the magistrate judge’s recommendation that the § 2255 motion be denied. (Mem. Op. and Order, RE 356, Page ID #2633-2646.) It declined to issue a certificate of appealability (COA). (*Id.*) Ms. Clark responded with a second—identical—motion to amend her original § 2255 motion, which she filed on October 3, 2011. (Second Motion to Amend, RE 358, Page ID #2649-2659.) The district court denied this motion on October 4. (Denial of Second Motion to Amend, RE 359, Page ID #2660.)

Ms. Clark filed a notice of appeal on October 31, 2011. (Notice of Appeal, RE 360, Page ID #2661-2665.) This Court construed her notice as a timely appeal of the October 4 Order but reserved the decision whether to grant a COA. (Order Dismissing Appeal, RE 363, Page ID #2672-2674.) It subsequently ordered the appeal held in abeyance and remanded to the district court for that court’s determination whether to grant a COA. (Order of Remand, RE 369, Page ID

#2839-2840.) The district court denied a COA on June 20, 2012. (Denial of COA, RE 377, Page ID #2882-2883.)

On February 8, 2013, this Court revisited whether to grant a COA on the district court's October 4 denial of Ms. Clark's second motion to amend, and it granted a COA "on the issue of whether depression may amount to a compelling justification for amending a § 2255 motion after the magistrate judge has issued a report and recommendation." (Case No. 11-6380, Order Granting COA, Page ID #3.) It also asked the parties to address "the applicability of Federal Rule of Civil Procedure 15(a)(2), which provides that a district court 'should freely give leave [to amend] when justice so requires,' to these circumstances." (*Id.*) The Court subsequently appointed undersigned counsel to represent Ms. Clark on appeal.

STATEMENT OF THE FACTS

Petitioner-Appellant Deidre Lynn Clark has been incarcerated since March 2007 (Order on Motion for Arrest Warrant, RE 90, Page ID #216), leaving her two daughters—who were 12 and 18 years old at the time of Ms. Clark's incarceration and whose father, Ms. Clark's first husband, is deceased—without any parental presence in their lives. (PSR ¶ 165.) Ms. Clark had married George Clark in 2003 (*id.* ¶ 166) but divorced him in 2012.

The story of why Ms. Clark is incarcerated begins with George Clark. In September 2006, law enforcement authorities investigating crimes they suspected

George Clark of committing interviewed Ms. Clark. (PSR ¶ 82.) The investigation continued, and several months later, on March 29, 2007, a Grand Jury returned a twenty-two count indictment charging George Clark and two other men with an assortment of crimes including Hobbs Act robbery, drug possession, and drug trafficking, and charging George Clark with additional crimes including possession of firearms as a convicted felon and possession of a forged certificate of discharge from military service. (Superseding Indictment, RE 59, Page ID #192-205.) The indictment included two counts against Ms. Clark. Count Seventeen charged that she acted as a straw purchaser for her husband by falsely stating in a Firearms Transaction Record that she was the true purchaser of the firearm, when in fact (according to the indictment) it was meant for George Clark. (*Id.* at Page ID #201-02; PSR ¶ 25.) *See* 18 U.S.C. § 924(a)(1)(A) (criminalizing making a false statement to a federally licensed firearm dealer). Count Twenty charged her with possession of an unregistered sawed-off shotgun, which the police recovered in the house she shared with George Clark. (Superseding Indictment, RE 59, Page ID #203; PSR ¶ 25.) *See* 26 U.S.C. § 5861(d).

On September 6, 2007, Ms. Clark entered a plea of nolo contendere to Count Seventeen and pled guilty to Count Twenty. (Plea Transcript, RE 294, Page ID #1257-58.) A few weeks later, on September 24, 2007, she filed a handwritten pro se motion to withdraw her plea to Count Seventeen, because she did not believe

that the evidence was sufficient to convict her on that count and had felt pressured by her attorney into entering a plea. (Motion to Withdraw, RE 173, Page ID #581-82.) She withdrew this motion on October 2, 2007. (Withdrawal of Motion to Withdraw, RE 184, Page ID #607.)

Several months later, on June 2, 2008, the district court sentenced Ms. Clark to 60 months' imprisonment on Count Seventeen and 108 months on Count Twenty, to run concurrently for a total sentence of nine years. (Judgment, RE 270, Page ID #1165-66.) On direct appeal, this Court affirmed the judgment of the district court in an Order issued July 28, 2009. (Case No. 08-5720, Order Affirming District Court Judgment, Page ID #1-6.) Ms. Clark's conviction and sentence became final ninety days later, on October 26, 2009.

Proceeding without the benefit of counsel and suffering from severe depression, Ms. Clark timely filed a § 2255 motion to vacate her sentence on July 20, 2010, arguing that she had received ineffective assistance of counsel at a number of points in the district court and on appeal, and that her plea was not knowing and voluntary. (§ 2255 Motion, RE 331, Page ID #2473-2511.) Her motion was referred to a magistrate judge, who recommended on July 19, 2011, that it be denied on the merits. (Recommended Disposition, RE 351, Page ID #2591-2615.)

At the time she filed her § 2255 motion, Ms. Clark was incarcerated at a prison facility in Waseca, Minnesota. (§ 2255 Motion, RE 331-3, Page ID #2528, sent from Waseca.) During the close to three years she spent in Waseca, Ms. Clark was unable to see her daughters, who prior to her incarceration had not been separated from their mother for more than a few days at a time. In July 2011—long after she filed her § 2255 motion, but only shortly before the magistrate judge ruled on it—Ms. Clark was transferred from the Waseca facility to Hazelton U.S. Penitentiary in Bruceton Mills, West Virginia. (First Motion to Amend, RE 355-1, Page ID #2631, sent from Hazelton.) Residing at Hazelton put Ms. Clark sufficiently close to her family in Kentucky that she was able to see her daughters in the summer of 2011 for the first time in several years.

On July 29, 2011, just a few weeks after her transfer, Ms. Clark wrote the district court asking for a 60-day extension of time to respond to the magistrate judge’s ruling (Motion for Extension, RE 353, Page ID #2618), but the court granted her only an additional fourteen days. She received that August 4 Order by mail. (Order on Extension, RE 354, Page ID #2621.) In a document dated August 18 and postmarked August 19, Ms. Clark filed a motion she titled “Defendants Motion for Amended 28 USC 2255 Petition.” (First Motion to Amend, RE 355, Page ID #2623.) In it, she explained that “due to her severe depression” she had been unable to file a comprehensive § 2255 motion in the first instance in July

2010, and she asked for leave to amend her motion to add additional claims—namely, challenges to two sentencing enhancements applied by the district court, as well as claims of selective prosecution and judicial misconduct. (*Id.* at 2623, 2626-30.)

The district court received and filed Ms. Clark’s motion on August 22. On the next day, August 23, the district court issued a Memorandum Opinion and Order adopting the magistrate judge’s recommendation that the § 2255 motion be denied. (Mem. Op. and Order, RE 356, Page ID #2633-46.) Although acknowledging that Ms. Clark’s motion to amend raised claims not addressed by the magistrate judge, the court denied amendment, construed the motion as objections to the magistrate judge’s ruling, denied those objections, and adopted the magistrate’s recommendation. (*Id.* at 2646.) The district court did not engage directly with Ms. Clark’s assertion that her depression was grounds for allowing her to amend. Instead, it invoked the general rule that a litigant may not raise new arguments after a magistrate judge has issued a ruling, but it failed to acknowledge that this Circuit recognizes an exception to that rule when a litigant has offered “compelling reasons” for her inability to raise the arguments sooner. (*Id.* at 2639.) Finally, the court also declined to issue a COA. (*Id.* at 2646)

In response to the district court’s ruling, Ms. Clark filed an identical motion to amend her original § 2255 motion, bearing the same title as her first motion to

amend. (Second Motion to Amend, RE 358, Page ID #2649-2656.) In addition to her reassertion that her severe depression was a basis for amendment, she emphasized in a cover letter that she “was not in [her] right state of mind” when she drafted her original § 2255 motion. (*Id.*, RE 358, 358-1, Page ID #2649-2659.) The district court received and filed this second motion to amend on October 3, 2011.

The district court denied Ms. Clark’s second attempt at amendment in a cursory Order the next day. The October 4 Order reads in full:

This matter is pending for consideration of Defendant/Movant Deidre Clark’s motion to amend her habeas petition which was denied on August 23, 2011. Once again, Clark asserts that relief should be granted because she was under a mental disability at times relevant to this action. The Court having previously addressed this issue and the remaining issues contained [in] her § 2255 motion which were properly presented, it is hereby ORDERED that the Defendant/Movant’s motion to amend is DENIED.

(Denial of Second Motion to Amend, RE 359, Page ID #2660.) On October 31, 2011, Ms. Clark filed a notice of appeal. (Notice of Appeal, RE 360, Page ID #2661.) Although her notice of appeal was late as to the district court’s August 23 Order, it was timely as to the October 4 Order. (Order Dismissing Appeal, RE 363, Page ID #2672-2673.)

By Order dated February 3, 2013, this Court determined that “reasonable jurists would find it debatable whether the district court was correct in its

procedural ruling” that Ms. Clark raised her new claims too late in the proceedings for them to be considered. (Case No. 11-6380, Order Granting COA, Page ID #2.) It granted a COA on the issue whether a petitioner’s severe depression may amount to a compelling justification for allowing amendment of a § 2255 motion even after a ruling by a magistrate judge. (*Id.* at 3.) The Court also instructed the parties to address the applicability of Federal Rule of Civil Procedure 15(a)(2), which allows that, after the initial period for amendment has closed, “a party may amend its pleading only with the opposing party’s written consent or the court’s leave” and instructs that “the court should freely give leave when justice so requires.” (*Id.*)

SUMMARY OF ARGUMENT

This Court should permit Ms. Clark to amend her § 2255 motion. She meets both of the applicable standards: She has presented a compelling reason for allowing her to raise new claims that she did not raise before the magistrate judge, and justice requires that she be permitted to amend her motion.

First, the depression that debilitated her at the time she drafted her original motion is a compelling reason to permit amendment after the magistrate judge’s ruling. The Sixth Circuit has recognized that “compelling reasons” justify allowing a litigant to raise new claims before the district court that she failed to raise before the magistrate judge, but until this point this Circuit has not given content to its promise. This unusual case, in which a pro se petitioner requests

leave to amend because her severe depression rendered her incapable of preparing a comprehensive petition in the first instance, presents an ideal opportunity for this Court to do just that.

Second, justice requires that a pro se petitioner suffering from mental illness be given an opportunity to amend so that all of her claims will be adjudicated on the merits. The district court recognized that its analysis of Ms. Clark's attempt to amend was governed by Rule 15(a)(2)'s directive that leave to amend should be freely given when justice requires. But the district court failed to apply this standard, instead focusing myopically on its (erroneous) conclusion that all of Ms. Clark's proposed amendments would be futile, without grappling with whether and how Ms. Clark's depression should affect its analysis.

Ms. Clark is all the more deserving of relief because she filed her § 2255 motion and her two subsequent motions to amend that motion without the assistance of counsel. This Court treats pro se filings like Ms. Clark's with leniency, and it should construe her filings liberally in order to avoid punishing her for her understandable lack of legal sophistication.

If this Court declines to grant Ms. Clark leave to amend, it should at a minimum remand with instructions that the district court hold an evidentiary hearing on the impact of her depression on her ability to file a comprehensive § 2255 motion in the first instance. Ms. Clark has sufficiently alleged facts that, if

true, would constitute a compelling reason for permitting her to amend her petition to add new claims.

Finally, this Court suggested in its COA that perhaps Ms. Clark's motion to amend should be treated as a second or successive § 2255 motion rather than as one seeking amendment of her original § 2255 motion. To the contrary, Ms. Clark's motion to amend is properly considered as such: She filed it before her original § 2255 petition was fully adjudicated, and recharacterizing her motion in a way adverse to her would be inconsistent with the rule that pleadings filed by pro se litigants are to be liberally construed.

STANDARD OF REVIEW

Generally, “[t]he standard for reviewing denials of motions to amend is abuse of discretion.” *Coe v. Bell*, 161 F.3d 320, 341 (6th Cir. 1998). “A district court by definition abuses its discretion when it makes an error of law.” *United States v. Coleman*, 188 F.3d 354, 357 (6th Cir. 1999) (en banc) (citing *Koon v. United States*, 518 U.S. 81, 100 (1996)). When the district court denies a motion to amend on grounds of futility, review is *de novo*. See *Bennett v. MIS Corp.*, 607 F.3d 1076, 1100 (6th Cir. 2010).

ARGUMENT

I. THE DISTRICT COURT SHOULD HAVE PERMITTED MS. CLARK TO AMEND HER § 2255 MOTION TO ADD NEW CLAIMS.

A. A Pro Se Petitioner's Severe Depression is a Compelling Reason to Allow the Petitioner to Raise New Claims After the Issuance of a Report & Recommendation.

Ms. Clark based her two motions to amend on the same specific reason: Her “severe depression” rendered her unable to file a comprehensive § 2255 petition in the first instance. By clearly identifying her depression as the reason her initial petition was incomplete, she provided a compelling reason that she should be allowed to raise new claims in a motion to amend after the magistrate judge’s ruling.

Depression “is a serious medical illness” that can be debilitating. *See* DEPRESSION SOURCEBOOK 24 (Sandra J. Judd ed., 2d ed. 2008). The experience of depression involves much more than “unpleasant feelings” or mere sadness. *See* FRANCIS MARK MONDIMORE, DEPRESSION, THE MOOD DISEASE 4 (Johns Hopkins Univ. Press 2006). To the contrary, clinical depression (also called “major depression”)—“unlike normal emotional experiences of sadness, loss, or passing mood states”—“is persistent and can significantly interfere with an individual’s thoughts, behavior, mood, activity, and physical health.” SOURCEBOOK at 24. Specific symptoms include “[d]ifficulty thinking, concentrating, and

remembering.” *Id.* at 25; *see also Depression*, National Institute of Mental Health, at 2, *available at* <http://www.nimh.nih.gov/health/publications/depression/depression-booklet.pdf> (in its most severe form, depression “is characterized by a combination of symptoms that interfere with a person’s ability to work, sleep, [and] study”).

Although there is no single cause of depression, and a myriad of factors can and do contribute to the emergence of depression in a particular sufferer’s life, depression often strikes “after a distressing event.” SOURCEBOOK at 5. Isolation from friends and family also contributes to the onset of depression. *See id.*

Women are twice as likely as men to suffer from depression. *See id.* at 19. In all, depression affects roughly 14.8 million American adults—about 6.7% of the adult population—in a given year. *Id.* at 15. In fact, major depression “is the leading cause of disability in the United States for ages fifteen to forty-four.” *Id.*

Ms. Clark is among the many American adults who suffer from depression. Unlike most depression sufferers, however, Ms. Clark—who has no legal training and never completed a college degree (PSR ¶ 176)—was faced with drafting a legal document on which her freedom hinged while she was grappling with her depression. Under the circumstances, it is unsurprising that Ms. Clark was unable to draft a comprehensive § 2255 petition or to meet the deadline for adding new

claims. Ms. Clark’s depression is a compelling reason to allow her to amend her petition to raise new claims.

1. For “compelling reasons,” which are present here, this Circuit permits a party to raise new claims after a magistrate judge rules.

This Court has long recognized that “compelling reasons” justify allowing a party to raise claims or arguments before the district court that it failed to present to the magistrate judge. Drawing from prior case law suggesting that when a sufficient explanation is provided, a litigant may in some circumstances overcome the usual rule barring consideration of issues not raised before the magistrate, *see United States v. Waters*, 158 F.3d 933, 936 (6th Cir. 1998) (noting an “apparent waiver” when litigant failed to raise claim prior to filing objections to the magistrate judge’s recommendation and, crucially, “offered no explanation” for his failure to raise the claim earlier), the Sixth Circuit made a clear statement in *Murr v. United States* that a postconviction petitioner may present new claims or arguments after a magistrate judge has issued its recommendation if there are “compelling reasons” for permitting the petitioner to do so. *See* 200 F.3d 895, 902 n.1 (6th Cir. 2000). But the *Murr* Court did not develop what kinds of reasons might be considered compelling—presumably because the petitioner there raised none—and this Court has not had occasion since *Murr* to explore what a compelling reason might look like.

This appeal squarely presents for this Court’s consideration the question of what constitutes “compelling reasons.” Ms. Clark told the district court twice that her severe depression hampered her ability to file a comprehensive § 2255 petition in the first instance. The district court nevertheless invoked the “well-established” rule “that a litigant may not raise new arguments in objection to a magistrate judge’s recommendation”—and cited *Murr* in support of its assertion without acknowledging that *Murr* itself recognized a “compelling reasons” exception to the general rule. (Mem. Op. and Order, RE 356, Page ID # 2639-40.) This Court should recognize a pro se petitioner’s severe depression as a compelling reason that permits the petitioner to raise new claims.

2. This Court’s treatment of mental illness as an “extraordinary circumstance” justifying equitable tolling supports accepting mental illness as a compelling reason for allowing the addition of new claims after a magistrate judge rules.

Support for accepting Ms. Clark’s severe depression as a compelling justification for her belated amendment is found in the similar context of equitable tolling of the one-year statute of limitations period for filing a petition prescribed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). *See* 28 U.S.C. §§ 2244(d), 2255(f). Equitable tolling—like permission to raise new claims belatedly—is a departure from normal rules of procedure that is to be granted “sparingly.” *See Solomon v. United States*, 467 F.3d 928, 933 (6th Cir. 2006). In

order to obtain relief, a petitioner must show that an “extraordinary circumstance” prevented timely filing of the motion. *See Robertson v. Simpson*, 624 F.3d 781, 784 (6th Cir. 2010) (citing *Holland v. Florida*, 130 S. Ct. 2549, 2562 (2010)). This Court squarely holds that mental illness is an extraordinary circumstance that can justify equitable tolling of AEDPA’s limitations period.

For example, in *McSwain v. Davis*, 287 F. App’x 450 (6th Cir. 2008), the Court considered petitioner McSwain’s argument that her dissociative identity disorder (“DID,” formerly known as multiple personality disorder) should entitle her to equitable tolling of the statute of limitations on her habeas petition. It concluded that, although mental incompetence is not a per se reason to toll a statute of limitations, a petitioner can establish that she is entitled to equitable tolling by making a “threshold showing of incompetence and . . . demonstrat[ing] that the alleged incompetence affected her ability to file a timely habeas petition.” *Id.* at 456. Petitioner McSwain did not meet that standard, because she presented no evidence supporting “a causal connection between her mental illness and her ability to file a timely federal habeas petition”; to the contrary, the record showed that McSwain actively litigated direct and collateral challenges to her conviction in state court during the period when she claimed to have been debilitated by DID. *Id.* at 457. Moreover, McSwain initially argued that her petition *was* timely—based on a misunderstanding of when the limitations period began. *See id.* The

Court concluded that McSwain did not meet her burden of establishing that her mental illness entitled her to equitable tolling. *Id.*

This Court adopted the *McSwain* rule as a binding precedential holding in *Ata v. Scutt*, 662 F.3d 736 (6th Cir. 2011), declaring unequivocally that “a petitioner’s mental incompetence, which prevents the timely filing of a habeas petition, is an extraordinary circumstance that may equitably toll AEDPA’s one-year statute of limitations.” *Id.* at 742. The *Ata* Court explained that a petitioner may obtain equitable tolling by demonstrating that he is mentally incompetent, and that his incompetence caused his failure to timely file. *Id.*

The Court should adopt this familiar rule here and hold that a petitioner may establish compelling reasons justifying the addition of new claims after a magistrate judge rules by making a threshold showing of (i) mental incompetence, and (ii) causation. Judged according to that rule, Ms. Clark has made the required showing. She repeatedly asserted that (i) she was suffering from severe depression when she drafted her original petition, and (ii) her “non-comprehensive inconclusive initial 2255 action” resulted from her mental health problems. (First Motion to Amend, RE 355, Page ID #2623-2630; Second Motion to Amend, RE 358, Page ID #2649-2656.) The facial plausibility of these claims is supported by record evidence that Ms. Clark has suffered from depression in the past. (PSR ¶ 170.)

If mental illness constitutes an “extraordinary circumstance” justifying equitable tolling of a statutory limitations period that would otherwise bar the filing of an initial petition, surely it amounts to a compelling reason for allowing a petitioner to raise new claims after a magistrate judge has issued a ruling on other claims. Ms. Clark has established a compelling reason for allowing her to raise new claims after the magistrate judge ruled on her § 2255 motion.

3. Decisions from other courts reinforce that depression is a compelling reason to permit amendment.

Decisions from other courts are also instructive in determining whether a petitioner’s health—and in particular, her mental health—constitutes a “compelling reason” justifying the petitioner’s failure to raise claims earlier. For example, in *Confere v. Astrue*, the Tenth Circuit held that a Social Security petitioner’s pro se status and “significant mental limitations”—including “[m]ajor depression”—were compelling reasons to excuse the petitioner’s failure to raise arguments at the appropriate juncture. *See* 235 F. App’x 701, 702 (10th Cir. 2007). Although the court did not elaborate on the factors it considered in determining that compelling reasons justified allowing *Confere* to raise an argument before the appellate court that she did not raise before the district court, it identified record evidence showing that *Confere*’s “ability to concentrate and persist seems to be *significantly impaired*.” *Id.* at 703 (emphasis in original). Like *Confere*, Ms. Clark suffered from a mental illness that can manifest in symptoms impacting the sufferer’s

ability to concentrate on a project or task. *See supra* at Part I.A. And amendment is even less intrusive here, where Ms. Clark did not wait until the appeals stage to raise her new claims: She raised them while her case was still pending at the district court.

Whitaker v. Astrue is similarly instructive. In *Whitaker*, a district court in this Circuit considered whether a plaintiff's stroke, which resulted in temporary difficulty speaking and writing, was a compelling reason to allow him to raise an argument not brought before the magistrate. *See* 1:12-CV-00009, 2012 WL 3231015, at *2-3 (M.D. Tenn. Aug. 6, 2012). Although the court did not expressly identify a particular test that it applied to the plaintiff's allegations, it treated the plaintiff's failure to raise his stroke earlier as dispositive. Because *Whitaker* had not mentioned his stroke in his complaint or in his lengthy response to the defendant's motion to dismiss before finally referencing it in his objections to the magistrate's recommendation, the court found that the stroke was not a compelling reason sufficient to justify belated consideration of *Whitaker's* new argument. *See id.*

Ms. Clark, unlike the *Whitaker* plaintiff, did not delay in identifying her depression as the reason for her failure to raise all of her claims in her initial § 2255 petition. In contrast to *Whitaker*, Ms. Clark made only primarily ministerial filings before referencing her depression in her first substantive filing

subsequent to her petition (namely, her first motion to amend), and referencing it again in her next filing after that (her second motion to amend). (First Motion to Amend, RE 355, Page ID #2623-2630, Second Motion to Amend, RE 358, Page ID #2649-2656.)

More importantly, unlike Whitaker—whose “lengthy and detailed arguments” presented in his response brief demonstrated to the court “his ability to litigate his case despite his stroke,” 2012 WL 3231015, at *2—Ms. Clark raised her new claims as soon as she was able. In July 2011, not long before she filed her first motion to amend, she was transferred to Hazelton U.S. Penitentiary in Bruceton Mills, West Virginia, and was able to see her daughters for the first time in almost three years. (*Compare* First Motion to Amend, RE 355-1, Page ID #2631, sent from Hazelton, *with* § 2255 Motion, RE 331-3, Page ID #2528, sent from Waseca.) Reconnecting with her daughters provided Ms. Clark with the spark necessary to mitigate the depression from which she had been suffering for some time. She was able to regain her focus and alert the Court to her additional claims shortly thereafter.

Ms. Clark’s case is not like *Whitaker*. Her circumstances are more akin to the *Confere* case: She is a pro se petitioner who suffered from mental illness at the time she filed her petition. As the Tenth Circuit held, this is a compelling reason

for allowing her to raise claims not originally presented. Ms. Clark should be permitted to amend her petition to include those claims.

B. Justice Requires That This Court Allow Ms. Clark to Amend Her Petition.

Ms. Clark has provided a compelling reason for permitting her to raise new claims after the magistrate judge issued his recommendation. Because she raised her new claims in the form of a motion to amend, she must also fulfill the requirements of Federal Rule of Civil Procedure 15, which provides the general standard for determining when amendment of pleadings is appropriate.¹ *See Nelson v. Adams USA, Inc.*, 529 U.S. 460, 465 (2000) (“Rule 15 sets out the requirements for amended and supplemental pleadings.”). Rule 15(a)(2) provides that after the expiration of the time during which a party may amend her pleadings as a matter of course (which time period all agree does not apply here), “[t]he court

¹ Rule 15—like all of the Federal Rules of Civil Procedure—applies to § 2255 motions to vacate, *see* 28 U.S.C. § 2242 (an application for a writ of habeas corpus “may be amended or supplemented as provided in the rules of procedure applicable to civil actions”); Rule 12, Rules Governing Section 2255 Proceedings for the United States District Courts (2010) (“The Federal Rules of Civil Procedure . . . may be applied to a [§ 2255] proceeding under these rules.”); *see Oleson v. United States*, 27 F. App’x 566, 568 (6th Cir. 2001) (“A district court’s denial of a motion to amend a habeas corpus motion is governed by Rule 15 of the Federal Rules of Civil Procedure.”).

should freely give leave [to amend] when justice so requires.” Ms. Clark has met that standard: Justice requires that she be permitted to amend and add new claims.²

The objective of doing justice should drive a court’s determination whether to allow amendment. In order to assist district courts considering whether to grant leave to amend, this Court has given the following guidance:

Several elements may be considered in determining whether to permit an amendment. Undue delay in filing, lack of notice to the opposing party, bad faith by the moving party, repeated failure to cure deficiencies by previous amendments, undue prejudice to the opposing party, and futility of amendment are all factors which *may* affect the decision.

² The COA in this case issued on the question “whether depression may amount to a compelling justification for amending a § 2255 motion after the magistrate judge has issued a report and recommendation.” (Case No. 11-6380, Order Granting COA, Page ID #3.) But elsewhere in the COA, the Court characterized the motion under review as “post-judgment.” (*Id.* at Page ID #2.) If this Court’s review is limited to the denial of Ms. Clark’s post-judgment—that is, her second—motion to amend, the “compelling reasons” test discussed *supra*, Part I.A, which applies when a litigant raises new claims after a magistrate judge rules, might not govern. But no matter which motion to amend is under review in this appeal, Rule 15(a)(2) applies and this Court must determine whether justice required the district court to give Ms. Clark leave to amend her motion. *See Oleson*, 27 F. App’x at 569-70 (noting that the Sixth Circuit has given leave to amend even after judgment has been entered and rejecting the district court’s apparent belief “that a Rule 15(a) motion cannot, as a matter of law, be brought after a § 2255 habeas motion is denied,” because “this Circuit has not recognized that principle as a rule of law”); *see also Saalfrank v. O’Daniel*, 533 F.2d 325, 330 (6th Cir. 1976) (“In certain circumstances Rule 15, Fed.R.Civ.P., may be availed of to permit an amendment after judgment”). Applying Rule 15, justice required the district court to permit Ms. Clark to amend her petition to add new claims whether her request is considered to be pre- or post-judgment.

Brooks v. Celeste, 39 F.3d 125, 130 (6th Cir. 1994) (internal quotation marks and citation omitted) (emphasis added); see *Foman v. Davis*, 371 U.S. 178, 182 (1962). The “critical factors” the district court should consider are “[n]otice and substantial prejudice to the opposing party.” *Brooks*, 39 F.3d at 130. But none of these judicially-created factors, whether taken individually or together, is intended to supplant the fundamental charge contained in the Rule’s text; instead, all of these factors are in service of the core instruction of the Rule that leave to amend should be freely given when justice so requires. Courts conducting a Rule 15 analysis should never lose sight of the Rule’s “liberal policy of permitting amendments in order to ensure determination of claims on their merits.” See *Ale v. Tennessee Valley Auth.*, 269 F.3d 680, 693 (6th Cir. 2001).

The district court’s cursory denial of Ms. Clark’s second attempt at amending her § 2255 motion violated Rule 15(a)(2)’s directive that leave to amend should be freely given when justice so requires. The Order denying Ms. Clark’s second motion to amend is quite short and contains no substantive analysis. It reads in full:

This matter is pending for consideration of Defendant/Movant Deidre Clark’s motion to amend her habeas petition which was denied on August 23, 2011. Once again, Clark asserts that relief should be granted because she was under a mental disability at times relevant to this action. The Court having previously addressed this issue and the remaining issues contained [in] her § 2255 motion which were properly presented, it

is hereby ORDERED that the Defendant/Movant's motion to amend is DENIED.

(Denial of Second Motion to Amend, RE 359, Page ID #2660.) This Order, which the Court issued only one day after receiving Ms. Clark's second motion to amend, was an improper response to Ms. Clark's explanation—repeated verbatim from her first motion to amend—that her “severe depression” had caused her non-comprehensive initial filing. (Second Motion to Amend, RE 358, Page ID #2649.) In addition to this clear statement of a justification for her request for amendment, she supplemented her second motion with a cover letter emphasizing that she “was not in [her] right state of mind to have properly submitted” her newly-raised arguments in her original motion. (*Id.*, RE 358-1, Page ID #2657.) But the district court failed to give Ms. Clark's newly-enhanced allegations of mental incapacity any consideration whatsoever. Instead, it ruled on her motion just a single day after receiving it, brushing off her repeated (and expanded) assertion of temporary incompetence with no further analysis. It failed to recognize that, under these circumstances, justice required it to permit amendment for consideration of the merits of Ms. Clark's new claims.

Even in its lengthier denial of Ms. Clark's first motion to amend—incorporated by reference into the second Order just discussed—the district court did not comply with Rule 15's admonition to act as justice requires. There, too, it decided the motion after a single day. And it brushed aside Ms. Clark's

explanation that her severe depression had prevented her from filing a complete § 2255 petition in the first instance. It quoted Ms. Clark’s allegations of depression but failed to engage with whether or how her depression should impact its analysis, instead responding to those allegations only that “the Court does not believe that it would be proper” to allow amendment. (Mem. Op. and Order, RE 356, Page ID #2639.) Having disposed of Ms. Clark’s allegations of depression without any effort, the court relied on rote application of the general rule that new claims typically may not be raised after issuance of a magistrate judge’s recommendation—without even acknowledging the exception to the rule when “compelling reasons” are present—to support its conclusion that justice did not require leave to amend. (*Id.* (citing *Murr* but omitting “compelling reasons” exception).)

The district court then turned to Rule 15. But in applying the Rule, it focused on one element of the judicially-created guideline, to the exclusion of any other considerations: Its hasty disposal of Ms. Clark’s motion under Rule 15 consisted entirely of its determination that amendment to allow Ms. Clark to add her new claims would be futile. It did not weigh any other factor commended by this Court or the Supreme Court for consideration, including the “critical factors” of notice and substantial prejudice. *See Brooks*, 39 F.3d at 130. (Mem. Op. and Order, RE 356, Page ID #2640-2641.)

Moreover, the district court committed several additional errors in its assessment that allowing Ms. Clark to add claims of selective prosecution and judicial misconduct would be futile. First, it committed a straw man fallacy by analyzing futility based on the timeliness of the claims. (*Id.*, Page ID #2641 (concluding that neither claim warranted amendment because they were raised outside of § 2255's one-year statute of limitations).)³ But timeliness was the wrong test by which to assess Ms. Clark's claims, because whether she should be permitted to raise those claims *regardless of their timeliness* was the question before the court. The district court erroneously treated the untimeliness of Ms. Clark's claims as dispositive of the Rule 15 analysis, instead of acknowledging that under some circumstances justice may require amendment despite the untimeliness of a request to amend.

Second and relatedly, in concluding that the statute of limitations barred Ms. Clark's new claims, the district court failed to consider whether her allegations of severe depression justified the equitable tolling of the limitations period, thereby exempting the new claims from the requirement that they relate back to the claims

³ The district court raised the statute of limitations issue *sua sponte*, without any prompting by the Government. In fact, because the district court issued its decision one day after Ms. Clark filed her first motion to amend, it did not allow time for either party to submit briefing on the limitations issue or other issues the district court discussed in its Opinion and Order. (*Compare* First Motion to Amend, RE 355, Page ID #2623-2632, filed Aug. 22, 2011, *with* Mem. Op. and Order, RE 356, Page ID #2633-2646, filed Aug. 23, 2011.)

raised in Ms. Clark’s original § 2255 motion in order to be timely.⁴ As discussed *supra*, see Part I.A.2, this Court holds that “[b]ecause AEDPA’s one-year statute of limitations is not jurisdictional, the one-year limitations period in § 2255 is subject to the doctrine of equitable tolling.” *McSwain*, 287 F. App’x at 455. And it is well-established that a petitioner’s mental incapacity can be a basis for equitable tolling. *See id.*; *Ata*, 662 F.3d at 742. But the district court failed to acknowledge that Ms. Clark had alleged facts in support of equitable tolling. It should have addressed whether Ms. Clark’s new claims were in fact timely, measured against a properly tolled statute of limitations.

Third, the district court failed to give due consideration to the merits of the new claims, in direct contravention of Rule 15’s goal of “ensur[ing] determination of claims on their merits.” *See Ale*, 269 F.3d at 693. It declared that both claims “could have been raised on direct appeal and are therefore improper in a § 2255 motion absent cause and prejudice,” and recognized—rightly—that Ms. Clark had asserted cause when she challenged the effectiveness of her appellate counsel in her initial § 2255 petition. (Mem. Op. and Order, RE 356, Page ID #2641 (citing

⁴ AEDPA claims are timely if they are filed within one year of the latest of four dates, the most commonly applicable of which is “the date on which the judgment of conviction becomes final,” *see* § 2255(f), or if they “relate back” to a claim filed within the limitations period with which they share “a common core of operative facts,” *see Mayle v. Felix*, 545 U.S. 644, 664 (2005); Rule 15(c). Equitable tolling of the limitations period extends the time in which claims may be timely filed even if they do not meet the relation-back requirement.

Ratliff v. United States, 999 F.2d 1023, 1025 (6th Cir. 1993) (applying cause-and-prejudice standard to claims asserted for the first time on collateral review)).) But the district court concluded abruptly that “she can establish no prejudice, as her claims are without merit.” (*Id.*) It did not offer any analysis of the merits of Ms. Clark’s claims to support its conclusion that they were unmeritorious. This cursory treatment of Ms. Clark’s claims was error.

Finally, the district court failed to consider Ms. Clark’s pro se status, which this Court treats as reason for leniency. *See, e.g., Gordon v. England*, 354 F. App’x 975, 981 (6th Cir. 2009) (remanding with leave to amend complaint where plaintiff was “proceeding pro se and was likely to have been unaware of the requirements of Rule 15”). The Sixth Circuit has remanded cases to allow pro se litigants leave to amend even where the litigants did not request an opportunity to amend in the district court. *See id.; Berndt v. Tennessee*, 796 F.2d 879, 882-83 (6th Cir. 1986). Amendment is all the more proper where, as here, a pro se litigant has twice requested leave to amend and where there is a sound basis for permitting her to do so.

In its rush to dispose of Ms. Clark’s newly-raised claims, the district court lost sight of the ultimate goal of Rule 15: to see that justice is done. It failed to give any weight to Ms. Clark’s repeated assertions that the severe depression from which she suffered at the time she filed her initial § 2255 petition—without the

benefit of counsel—inhibited her efforts at compiling a comprehensive petition. Under the unique circumstances of this case, justice required the district court to allow Ms. Clark to amend her § 2255 petition to add new claims.

C. This Court Should Construe Ms. Clark’s Pro Se Filings Liberally.

Because Ms. Clark was proceeding pro se at the time she filed her § 2255 motion and her subsequent requests to amend it, this Court should construe her filings liberally in determining whether to permit her to add new claims. Courts—including this one—generally treat pleadings drafted by pro se litigants with leniency. *See, e.g., Haines v. Kerner*, 404 U.S. 519, 520 (1972) (per curiam) (allegations of a complaint drafted by a pro se litigant are held to “less stringent standards than formal pleadings drafted by lawyers”); *Dassault Systemes, SA v. Childress*, 663 F.3d 832, 841 (6th Cir. 2011) (overruling district court’s determination that defendant’s lengthy filings and repeated failure to file an answer constituted “deliberately dilatory motions practice” because the defendant, “as a pro se litigant, was merely attempting to navigate the none-too-intuitive labyrinth of procedural rules”); *Modesty v. Shockley*, 434 F. App’x 469, 471 (6th Cir. 2011) (deciding, “in light of Plaintiff’s pro se status,” to proceed to the merits of the case, despite Plaintiff’s premature filing of appeal before the decision below was final (emphasis omitted)); *Brown v. Matauszak*, 415 F. App’x 608, 616-17 (6th Cir. 2011) (remanding to allow pro se plaintiff leave to amend § 1983 complaint

because “the rights of pro se litigants require careful protection” (internal quotation marks and citation omitted)). This leniency is particularly appropriate when a pro se litigant’s “lack of formal training” has put her at a distinct disadvantage in drafting a document or complying with a rule. *See Jourdan v. Jabe*, 951 F.2d 108, 109 (6th Cir. 1991). When a litigant proceeding pro se has attempted to “draft[] a formal pleading” or perform some other task that “presupposes some degree of legal training or, at least, familiarity with applicable legal principles,” the litigant “should not be precluded from resorting to the courts merely for want of sophistication.” *Id.* at 110.

Ms. Clark’s circumstances are just the sort under which this Court treats the efforts of pro se litigants with leniency. Her initial § 2255 motion dealt with sophisticated legal matters. When she twice attempted to amend that motion to add several more claims, she included a straightforward explanation for her failure to include those claims in the first instance; any defect in her explanation or in the technicalities of her motions to amend is attributable to her justifiable unfamiliarity with the rules governing amendment. *See Gordon*, 354 F. App’x at 981 (remanding with leave to amend where plaintiff was “proceeding pro se and was likely to have been unaware of the requirements of Rule 15”). Moreover, Ms. Clark exhibited no bad faith, did not engage in a pattern of delay, and did not ignore court-ordered deadlines. *See Jourdan*, 951 F.2d at 110 (declining to treat

litigant's pro se status as cause for leniency because he failed to "adhere to readily comprehended court deadlines of which he was well-aware" and failed to utilize extensions that the "district court was generous in granting"); *Holt v. Pitts*, 619 F.2d 558, 562 (6th Cir. 1980) ("dismissal should be used only in extreme situations where a [pro se] plaintiff has engaged in a clear pattern of delay.").

In keeping with its usual practice of treating the efforts of pro se litigants with leniency when the litigant has undertaken tasks made more difficult by a lack of formal training, and in the absence of any bad faith or failure to comply with easily-comprehensible instructions, this Court should construe Ms. Clark's filings liberally and permit her to amend her § 2255 motion to add new claims.

D. At a Minimum, Ms. Clark Should Receive an Evidentiary Hearing On the Impact of Her Depression On Her Ability to Litigate Her Claims.

In its certificate of appealability, this Court instructed the parties to address how a pro se petitioner might establish "compelling reasons" for failing to raise new claims earlier. (Case No. 11-6380, Order Granting Certificate of Appealability, Page ID #3.) It granted the COA on the issue "whether depression may amount to a compelling justification for amending a § 2255 motion after the magistrate judge has issued a report and recommendation." (*Id.*) For the reasons discussed *supra*, the answer to the question posed by the Court is Yes. Moreover, by clearly—and repeatedly—identifying her depression as the cause of her failure

to raise her claims earlier, Ms. Clark provided a sufficient basis for this Court to grant her leave to amend. But if the Court determines that the record is currently insufficient to serve as a basis for relief, at the very least, this Court should remand in order to allow Ms. Clark to present evidence demonstrating the extent to which her depression crippled her analytic capacities at the critical time at which she drafted her original § 2255 petition. Principles familiar from the comparable context of equitable tolling, discussed above, *see supra* Part I.A.2, offer useful guidance here.

In that context, “the initial burden of raising the statute of limitations defense is on the [government],” although a petitioner bears the burden of proof that she is entitled to equitable tolling. *See McSwain*, 287 F. App’x at 456. A petitioner whose allegations of mental incompetence do not immediately convince the court that she merits equitable tolling may still be entitled to an evidentiary hearing to present further evidence in support of her request. This Court uses a two-step standard to determine when “an evidentiary hearing is required” in order to allow a petitioner to develop further proof. *See Ata*, 662 F.3d at 742. First, the district court must determine whether a petitioner’s factual allegations are sufficient, if true, to support equitable tolling. If a petitioner’s allegations pass the first step, the court then reviews the record to ensure that it does not refute petitioner’s allegations or show them to be totally unmeritorious. *See id.* (adopting standard set

forth in *Schriro v. Landrigan*, 550 U.S. 465, 474 (2007)); *see also* *McSwain*, 287 F. App'x at 458 (“In deciding whether to grant an evidentiary hearing, a federal court must consider whether such a hearing could enable an applicant to prove the petition’s factual allegations, which, if true, would entitle the applicant to federal habeas relief.” (quoting *Schriro*)); *Carneal v. Crews*, 510 F. App'x 347, 347 (6th Cir. 2013) (per curiam) (district court held series of evidentiary hearings when petitioner “presented a colorable claim for equitable tolling on the basis of mental illness”). For example, in *Ata v. Scutt*, petitioner Ata made threshold showings of mental incapacity and causation sufficient to merit an evidentiary hearing at which his entitlement to equitable tolling could be further explored: In his motion for equitable tolling he identified not only a mental illness from which he suffered but also “specific ways . . . in which his mental illness prevented him from understanding and complying with AEDPA’s statute of limitations.” 662 F.3d at 743. Because the record did not refute Ata’s claims, *id.* at 744, his claims “justif[ied] further inquiry in an evidentiary hearing.” *Id.* at 745.

A petitioner’s allegations need not be “elaborate” in order to achieve the specificity required at the first step, *see Ata*, 662 F.3d at 743, and they need not be made at a particular point in the proceedings. *See, e.g., id.* at 739 (allegations made in motion for equitable tolling filed alongside tardy habeas petition); *McSwain*, 287 F. App'x at 456 (court looked to both habeas petition and response

to state's motion to dismiss in determining whether petitioner made the required threshold showing of mental incompetence); *Carneal*, 510 F. App'x at 347 (petitioner made allegations in support of request for equitable tolling in untimely habeas petition); *Price v. Jamrog*, 79 F. App'x 110, 111-12 (6th Cir. 2003) (considering petitioner's request for equitable tolling made in response to district court order that petitioner show cause why his habeas petition should not be dismissed as untimely). Here too, a court should take special care to construe allegations made by a pro se petitioner liberally. *See Ata*, 662 F.3d at 743.

Applying the equitable tolling standard here, if the Court for some reason does not view the allegations in Ms. Clark's motions as facially sufficient to warrant amendment outright, an evidentiary hearing is required on Ms. Clark's repeated assertion that her depression prevented her from including all of her claims in her § 2255 motion. In her two motions to amend, she made specific allegations of a particular mental illness and directly connected that illness with her failure to file a comprehensive petition in the first instance. If true, those allegations would constitute a compelling reason for allowing her to add claims after the magistrate judge's ruling and would demonstrate that justice requires that she be permitted to amend her motion.

Moreover, the record does not refute—in fact, it *supports*—Ms. Clark's allegations. The PSR reflects that she was treated in the past for depression

brought on by the loss of her father and grandmother. (PSR ¶ 170.) It stands to reason that another bout of depression could have been prompted by her incarceration and the resulting separation from her daughters. *See* SOURCEBOOK at 5 (depression often strikes “after a distressing event”). Moreover, the record reflects that in the summer of 2011 Ms. Clark was moved to Hazelton U.S. Penitentiary, whose relative proximity to her family allowed her to see her daughters for the first time in close to three years. *See supra*. This change in circumstances helped her come out of her depression, as evidenced by the fact that she filed her motion to amend by the end of that summer.

The district court never allowed Ms. Clark to present further evidence in support of her allegations that her mental state interfered with her ability to file a comprehensive petition. At a minimum, this Court should remand and give Ms. Clark the opportunity to do so now.

II. MS. CLARK’S MOTION IS PROPERLY CONSIDERED A MOTION TO AMEND.

This Court should treat Ms. Clark’s motion, which she titled “Defendants Motion for Amended 28 USC 2255 Petition,” as a motion to amend, and should apply the foregoing analysis.⁵ The Court did not grant a COA on the question whether Ms. Clark’s motion to amend is properly treated as such; rather, the COA

⁵ Ms. Clark gave her first motion the same title. (First Motion to Amend, RE 355, Page ID #2623-2630.)

assumes that it is. But the Court suggested in the final paragraph of its COA that her motion “at least arguably constituted a successive § 2255 motion.” (Case No. 11-6380, Order Granting Certificate of Appealability, Page ID #3.) For the sake of completeness, we address that issue here: Treating Ms. Clark’s motion as a second or successive § 2255 motion would be incorrect as a matter of law, and it would be a particularly inappropriate treatment of a filing made by a pro se litigant.

Although AEDPA describes what a habeas petitioner must do in order for her claims presented in a “second or successive” habeas petition to be adjudicated, *see* 28 U.S.C. §§ 2244(b), 2255(h), the statute does not define what constitutes a “second or successive” petition. “Nonetheless, it is clear that for a petition to be ‘second or successive’ within the meaning of the statute, it must at a minimum be filed *subsequent to the conclusion* of a proceeding that ‘counts’ as the first.” *Ching v. United States*, 298 F.3d 174, 177 (2d Cir. 2002) (Sotomayor, J.) (internal quotation marks and citation omitted) (emphasis added); *see Johnson v. United States*, 196 F.3d 802, 805 (7th Cir. 1999) (“a motion is caught by § 2244(b) or § 2255[h] only if it is second or successive to a proceeding that ‘counts’ as the first”). If a petitioner’s initial § 2255 motion has not been resolved on appeal, that first proceeding is not yet finished such that any request to raise new claims should be considered a second or successive motion—even if the district court has already denied the petitioner’s original § 2255 motion and an appeal of that denial is

pending. *See Ching*, 298 F.3d at 177-78. Under AEDPA, every prisoner should “receive[] one complete round of litigation,” which includes the “entitlement to add or drop issues while the litigation proceeds.” *Johnson*, 196 F.3d at 805. Ms. Clark did not file a notice of appeal until October 31, 2011 (Notice of Appeal, RE 360, Page ID #2661), after she filed both of her motions to amend, and that appeal—the proceeding before the Court—remains pending. The litigation of her original petition was very much still proceeding when she requested amendment to add new issues.

“The [foregoing] logic applies with special force in the context of pro se litigants.” *Woods v. Carey*, 525 F.3d 886, 889 (9th Cir. 2008) (holding that pro se habeas petitioner’s filing dismissed by the district court as second or successive should be construed as a motion to amend). Following the Supreme Court’s directive that “[a] document filed pro se is to be liberally construed,” *see Erickson v. Pardus*, 551 U.S. 89, 94 (2007), the Ninth Circuit held in *Woods* that when a pro se habeas petitioner files a new petition before his prior petition has been fully adjudicated, the district court should construe the new petition as a motion to amend rather than as a second or successive application. *See* 525 F.3d at 888, 890. The court determined that if Woods had been represented by counsel at the time he filed his second petition, that counsel certainly would have styled the second filing as an amendment to Woods’ first petition. *Id.* at 890. Woods’ pro se filing, which

he presented as a new petition, should therefore have been treated as a motion to amend.

This Circuit, too, liberally construes pleadings filed by pro se litigants. *See, e.g., Boswell v. Mayer*, 169 F.3d 384, 387 (6th Cir. 1999); *see supra*, at Part I.C. But Ms. Clark does not need the benefit of a *Woods*-style charitable recharacterization of her filings. Although proceeding without the benefit of counsel, she rightly presented both of her motions as motions to *amend*. In them, she made no attempt at meeting the particular requirements for second or successive petitions; instead she expressly asked leave to amend, provided a basis for her request, and presented new claims in addition to the claims she raised in her original motion. (First Motion to Amend, RE 355, Page ID #2623-2632; Second Motion to Amend, RE 358, Page ID #2649-2659.) Construing her motion to amend as a second or successive § 2255 petition, thus exposing her to AEDPA’s stringent gatekeeping provisions rather than the liberality of Rule 15’s generous standard for amendment, would be grossly unjust. It would also be inaccurate, as explained above. This Court should treat Ms. Clark’s motion to amend as a motion to amend. *Cf. Johnson*, 196 F.3d at 804 (“[W]e do not see how a proposed amendment to one’s first motion can be deemed a ‘second or successive’ motion.”).

* * *

Proceeding without counsel and struggling against a debilitating mental illness, Ms. Clark initially filed a § 2255 motion that did not include all of the claims that she, after she emerged from under the cloud of depression, wished to bring before the district court. This Court should remand with instructions that the district court grant Ms. Clark leave to amend and add new claims. At a minimum, this Court should remand for an evidentiary hearing and invite Ms. Clark to present evidence of her mental illness and its impact on her original petition.

CONCLUSION

This Court should reverse the judgment of the district court denying Ms. Clark's motion to amend her § 2255 motion to vacate her sentence and remand for consideration of her new claims on the merits, with an evidentiary hearing as appropriate.

July 22, 2013

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 9,769 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), as counted using the word-count function on Microsoft Word 2007 software.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point Times New Roman font.

July 22, 2013

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CERTIFICATE OF SERVICE

I hereby certify that, on the 22nd day of July, 2013, I electronically filed the original of the foregoing brief (including the accompanying addendum) with the clerk of this Court by using the CM/ECF system, which served counsel for the United States at his designated electronic mail address.

July 22, 2013

/s/ Jennifer Bradley Lichter
JENNIFER BRADLEY LICHTER

Counsel for Petitioner-Appellant

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Documents

RECORD ENTRY NUMBER	DESCRIPTION OF ENTRY	DATE DOCUMENT ENTERED	Page ID # Range
N/A	Docket Sheet		
N/A	Presentence Report (confidential)		
59	Superseding Indictment	3/29/2007	192-205
173	Defendant's Motion to Withdraw Plea	9/24/2007	581-82
184	Defendant's Withdrawal of Motion to Withdraw Plea	10/2/2007	606-08
270	Judgment	6/5/2008	1165-70
331	Defendant's § 2255 Motion	7/20/2010	2473-2528
351	Recommended Disposition	7/19/2011	2591-2615
355	Defendant's First Motion to Amend § 2255 Motion	8/22/2011	2623-32
356	Memorandum Opinion and Order	8/23/2011	2633-46
357	Judgment on § 2255 Motion	8/23/2011	2647-48
358	Defendant's Second Motion to Amend § 2255 Motion	10/3/2011	2649-59

359	Order Denying Second Motion to Amend	10/4/2011	2660
360	Defendant's Notice of Appeal	10/31/2011	2661-65
363	Order Dismissing Appeal of 8/23/11 Decision and Construing as Timely Appeal of 10/4/11 Decision	3/13/2012	2672-74