
The Sixth Amendment of the United States Constitution guarantees the fundamental right that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.” Nevertheless, indigent defendants may relinquish their court-appointed counsel by three methods: voluntary waiver, waiver by conduct, and forfeiture. In *Commonwealth v. Means*, the Massachusetts Supreme Judicial Court (SJC) considered whether the trial court’s application of the doctrine of forfeiture, a novel matter in Massachusetts, was constitutional and appropriate in comparison to well-founded guidelines set forth by other federal and state jurisdictions. The SJC, taking into account its own precedent, further examined the impact of a defendant’s mental incapacity on the applicability of the forfeiture doctrine. In determining that employment of forfeiture was incorrect, the SJC held that the trial court unconstitutionally infringed upon a defendant’s Sixth Amendment rights by denying the defendant a proper hearing prior to the exercise of the forfeiture doctrine.

On March 15, 2002, a grand jury indicted Mark Means on a series of charges, including assault and battery on a correction officer and being a

1. U.S. CONST. amend. VI (guaranteeing criminal defendants right to counsel); see also infra note 19 and accompanying text (characterizing foundation of Bill of Rights and Sixth Amendment).

2. See Gideon v. Wainwright, 372 U.S. 335, 344 (1963) (recognizing appointment of counsel to indigent defendant as necessary for fair trial); see also infra note 19 and accompanying text (listing authorities prescribing provision of counsel to defendant without financial means at public’s expense). Although the right to counsel is fundamental, it is not absolute. See United States v. Goldberg, 67 F.3d 1092, 1099-1101 (3d Cir. 1995) (identifying limitations on right to counsel). A defendant may be permitted to voluntarily go forward without an attorney or be directed by the court to involuntarily proceed pro se. See id.


4. See id. at 651 (stating basis for Means’s appeal to SJC).

5. Id. at 661 (acknowledging SJC’s additional caveat to guidelines for application of forfeiture to mentally incompetent defendants). “No trial can be fair that leaves the defense to a man who is insane, unaided by counsel, and who by reason of his mental condition stands helpless and alone before the court.” Massey v. Moore, 348 U.S. 105, 108 (1954) (recognizing mental capacity as essential element to proceeding pro se in legal matters).

6. 907 N.E.2d at 662-63 (concluding exercise of forfeiture doctrine without hearing improper); see also King v. Superior Court, 132 Cal. Rptr. 2d 585, 598-601 (Cal. Ct. App. 2003) (observing severity of sanction of forfeiture requires procedural due process protections including judicial hearing). Due to the constitutional guarantee at issue, specifically access to an attorney to assist in one’s defense, the trial court should have warned the defendant of the potential sanction of forfeiture and conducted a hearing allowing the defendant to contest such sanction. See David E. Frank, *Massachusetts Supreme Judicial Court Says Defendant Who Made Threats Could Forfeit Right to Counsel*, MASS. LAW. WkLY., June 22, 2009 (setting forth SJC’s proposed procedure for application of forfeiture for future Massachusetts courts to follow).
habitual criminal.7 Due to his indigent status, the court appointed an attorney to assist Means with his defense.8 In April 2004, Means filed the first in a series of motions petitioning the court to remove his appointed counsel and assign a different attorney, citing dissatisfaction with his attorney’s job performance and communication efforts.9 The court allowed trial counsel’s subsequent motion to withdraw, appointing the attorney as standby counsel, but then ordered his reinstatement as trial counsel despite Means’s submission of multiple pro se motions urging removal of counsel due to Means’s anger management disorder.10

In March 2005, Means submitted an affidavit to the court stating that he had forwarded a blood-smeared letter to his court-appointed counsel threatening violence to counsel if he did not remove himself from Means’s case.11 At the August 2005 hearing on Means’s March 2005 motion, the judge granted Means’s motion and removed counsel, but declared Means had forfeited his right to proceed with any appointed attorney as a result of “egregious misconduct.”12 Means subsequently filed a motion for reconsideration, discussing his mental health issues and reiterating that he was incapable of representing himself at trial, which a single appeals court judge denied without a hearing.13

7. 907 N.E.2d at 652 (outlining charges and subsequent indictments against Means). The grand jury also indicted Means for assault and battery with a deadly weapon and vandalism with a noxious or filthy substance. Id.
8. See id. (inferring Means’s financial situation as indigent due to appointment of court-assigned counsel).
9. Id. at 652-53 (articulating Means’s basis for refusal of his court-appointed attorney). Specifically, Means claimed that the assigned counsel did not file particular motions, failed to speak with Means via telephone and only met with Means twice over the course of their twenty-five-month relationship as attorney and client. Id. at 653.
10. Id. (delineating judge’s failure to acknowledge Means’s continual opposition to court-appointed attorney).
11. 907 N.E.2d at 653 (addressing circumstances of Means’s misconduct). In his affidavit, Means cited his history of mental instability and anger issues. Id. Means further averred he would physically attack appointed counsel at his first opportunity and threatened harm to counsel’s family unless the court removed counsel from Means’s case. Id.
12. Id. at 654 (detailing judge’s finding of forfeiture of counsel at hearing). At the hearing, Means claimed that although he wrote the blood-smeared letter, he had no intention to carry out his threats against the appointed attorney. Id. Nevertheless, the trial judge maintained that threatening appointed counsel and counsel’s family with bodily violence was grounds for forfeiture of counsel, and therefore Means surrendered his right to any court-appointed attorney. Id.
13. Id. (setting forth substance of Means’s motion for reconsideration of forfeiture ruling). Means, in support of his contention that his mental state was unstable, only offered an affidavit citing his “Intermittent Explosive Anger Disorder” and “Bipolar[†]” condition, and represented that he had been diagnosed with the illnesses by prison mental health clinicians. Id. The Committee for Public Counsel Services (CPCS) wrote to the trial judge and offered to provide an attorney to act on Means’s behalf at both a competency hearing—as the court had not evaluated his capacity to stand trial—and at his motion for reconsideration. Id. at 655. The trial judge did not act on this correspondence, but in responding to a subsequent telephone call from CPCS to the court, she further reiterated her finding of forfeiture. Id. The trial judge, however, ordered a forensic psychologist to examine Means. Id. at 655 n.11. The psychologist testified that Means likely had a personality disorder, but possessed no “major mental illness” and was competent to stand trial. Id.
Means represented himself at the trial for his assault and battery charges, and the jury found him guilty.  

Means immediately stood trial before the same jury on the habitual criminal charge, where he protested representing himself and once more requested that the court appoint him counsel. Again, the judge denied his motion and the jury found him guilty. Means appealed to the Massachusetts Appeals Court, which rejected his petition, and then to the SJC, questioning the application of forfeiture in light of his behavior and challenging the forfeiture doctrine itself as unconstitutionally depriving him of his Sixth Amendment right to counsel. The SJC granted Means’s appeal and overturned his convictions, holding that a hearing is required for the defendant to offer an explanation of his behavior prior to removing counsel under the forfeiture doctrine.

The Sixth Amendment provides all citizens the fundamental right to criminal defense counsel, regardless of their financial status, to help preserve the intrinsic human values of life and freedom. Nevertheless, the right to counsel is not absolute, as defendants can surrender it by voluntary waiver, waiver by conduct, and forfeiture. Forfeiture occurs when a defendant engages in

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14. Id. at 655 (eliciting results of Means’s first trial). A jury found Means guilty of assault and battery on a correction officer and assault and battery with a dangerous weapon. Id. The same jury decided Means was not guilty as to the charge of vandalism with a noxious or filthy substance. Id.

15. 907 N.E.2d at 655 (indicating Means’s unwillingness to proceed without assistance of counsel).

16. Id. (noting outcome of Means’s second trial). At the second trial, Means, serving as his own counsel, failed to make opening statements or call any witnesses. Id. The court sentenced Means to two concurrent ten-year prison terms. Id.

17. Id. at 652, 655 (outlining Means’s contentions on appeal). In his argument to the Massachusetts Appeals Court, Means asserted that the trial judge should have investigated the jury for bias and prejudice before going forward with his second trial. Id. at 652 n.3. That argument was not at issue before the SJC. Id. Means argued to the SJC that his behavior did not rise to a level of exceptional reprehensibility that would trigger a finding of forfeiture. Id. at 655.

18. Id. at 652 (characterizing judicial hearing as necessary mechanism prior to finding forfeiture). The SJC reversed the judgments against Means and remanded his case to the Superior Court for a new trial on the charges for assault and battery on a correction officer and assault and battery with a dangerous weapon. Id.

19. See U.S. CONST. amend. VI (declaring criminal defendants’ entitlement to counsel); MASS. R. CRIM. P. 8(a) (2009) (encapsulating spirit of Sixth Amendment in Massachusetts procedural rule); Gideon v. Wainwright, 372 U.S. 335, 344 (1963) (acknowledging indigent defendants’ right to government-provided counsel); Powell v. Alabama, 287 U.S. 45, 72-73 (1932) (asserting assignment of counsel to indigents necessary to comport with due process of law). The Framers intended the Bill of Rights not to set forth any original governmental dogma, but to delineate specific individual rights and immunities to constrain the powers of the federal government. See Johnson v. Zerbst, 304 U.S. 458, 462 (1938) (articulating lack of access to counsel equates to lack of justice for defendant); see also Theodore F. T. Plucknett, A CONCISE HISTORY OF THE COMMON LAW 434-35 (6th ed. 2007) (providing historical perspective on access to counsel for purported criminals).

20. See United States v. Goldberg, 67 F.3d 1092, 1099-1101 (3d Cir. 1995) (identifying limitations on right to counsel). Voluntary waiver of counsel results when a defendant willingly and knowingly chooses to proceed pro se. See id. at 1099 (describing voluntary, knowing request to proceed pro se as “typical” waiver); Commonwealth v. Torres, 813 N.E.2d 1261, 1276 (Mass. 2004) (stating valid waiver requires “informed and intentional relinquishment of a known right”). Prolonged misbehavior by the defendant after judicial warning may constitute waiver by conduct. See, e.g., United States v. Leggett, 162 F.3d 237, 250 (3d Cir. 1998) (treating forfeiture as extraordinary sanction requiring intolerable courtroom decorum); United States v.
deplorable misconduct such as excessive dilatory tactics, repeated dismissal of appointed counsel, or threatening or harming his or her attorney. A judge will invoke forfeiture to safeguard the integrity of the judicial proceedings and ensure a fair resolution of the matter.

The case of *King v. Superior Court* presents a formulaic approach for applying forfeiture, which ensures adequate due process prior to removal of counsel. Pursuant to *King*, in order to ensure the application of forfeiture is

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Goldberg, 67 F.3d 1092, 1100 (3d Cir. 1995) (characterizing defendant’s repeated misconduct as implied request to continue pro se); Commonwealth v. Lee, 475 N.E.2d 363, 368 (Mass. 1985) (characterizing defendant’s refusal of competent assigned counsel as voluntary waiver of right to counsel). Defendants may forfeit their right to an attorney without prior warning and, despite desiring continued representation, if they commit such atrocious acts that the judge deems it necessary to remove counsel. See *State v. Carruthers*, 35 S.W.3d 516, 550 (Tenn. 2000) (recognizing violent threats against successive appointed counsel as grounds for forfeiture). See generally Timothy P. O’Neill, *Waiver, Forfeiture and Right to Counsel*, CHL DAILY L. BULL., Sept. 27, 2000, at 5 (distinguishing waiver from forfeiture).


22. See *Illinois v. Allen*, 397 U.S. 337, 343-44 (1970) (recognizing province of court in selecting methods of handling obstreperous defendants). Judges cannot tolerate blatant disregard for the standards of acceptable behavior in a courtroom and properly administrate criminal justice. See *id.* at 343. Trial judges must have ample discretion to sustain the character of a dignified courtroom, including the ability to exclude a defendant who persists with disruptive and disorderly behavior. See *id.* at 343-44 (holding defendant may lose right to attend trial if courtroom misconduct continues after warning); see also *Faretta v. California*, 422 U.S. 806, 834-35 n.46 (1975) (articulating court entrusted with power, including invoking forfeiture, to ensure sanctity of proceedings); *Commonwealth v. O’Neill*, 641 N.E.2d 702, 704 (Mass. 1994) (affirming authority of court to control its proceedings, including conduct of defendants). Nevertheless, “[t]he court cannot constitutionally eliminate important elements of a trial.” *27-644 James Wm. Moore et al.*, *Moore’s Federal Practice—Criminal Procedure § 644.37(2)(d) (2009)* (recognizing forfeiture does not trump defendant’s constitutional right to present arguments and call witnesses).


24. *See King v. Superior Court*, 132 Cal. Rptr. 2d 585, 598-601 (Cal. Ct. App. 2003) (emphasizing importance of maintaining constitutional integrity amid application of forfeiture). Three factors are integral to a court’s consideration of the “specific dictates” of due process upon the execution of a government action: the impact on private interest, the likelihood of wrongful deprivation of a right, and the government’s interest, including administrative and financial concerns. See *id.* at 598. As application of forfeiture involves defendant’s loss of his or her fundamental constitutional right to counsel as a result of governmental action, due process protections are necessary to ensure the loss of that right is proper. See *id.* at 600. A court may not exert jurisdiction over individuals unless a practical system exists to afford them their due process rights, including notice of the charge and a reasonable chance to defend against it. See *id.* at 598-600. In the case of forfeiture, the due process procedures to prevent an unjust deprivation of counsel include a court-conducted hearing where defendant is “entitled to be present, to have the assistance of counsel, to present evidence, and to...
proper, a defendant must be notified of the pending forfeiture sanctions and be offered a hearing wherein he or she is represented by counsel and given the opportunity to call witnesses and present evidence regarding his or her purported misconduct and its bearing on the case. 25 The King court held that in evaluating a defendant’s actions in tandem with his or her defense presented at the hearing, a judge should determine if the defendant’s conduct was egregious in view of the entirety of the situation, and therefore whether a sanction of forfeiture is warranted and in the interest of justice. 26 A court should also take the mental health and capacity of the defendant into account when evaluating whether forfeiture is proper, as its application results in the defendant proceeding pro se in the matter. 27

In Commonwealth v. Means, the SJC evaluated whether an indigent criminal defendant’s misbehavior warranted forfeiture of his court-appointed trial counsel without any successor. 28 In considering this issue of first impression, the SJC looked to other state and federal jurisdictions for guidance on differentiating forfeiture from other waivers of counsel and establishing the requisite process for its application. 29 The SJC held that while forfeiture is a recognized and constitutional method of courtroom management, courts should only apply it as a last resort when the defendant has engaged in egregious cross-examine witnesses.” Id. at 600. See generally RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 25 (1971) (listing recognized elements of procedural due process as notice and opportunity to be heard).

25. See King v. Superior Court, 132 Cal. Rptr. 2d 585, 598-600 (Cal. Ct. App. 2003) (outlining defendant’s due process entitlements in confronting sanction of forfeiture). In United States v. Welty, the Third Circuit employed a similar method in assessing the validity of a voluntary waiver of counsel wherein the court affirmed that it requires a “searching inquiry” by the trial judge in examining the validity of a defendant waiving his or her right to an attorney. See United States v. Welty, 674 F.2d 185, 188-89 (3d Cir. 1982) (describing Third Circuit’s methodology in allowing waiver of counsel).

26. See King v. Superior Court, 132 Cal. Rptr. 2d 585, 598-601 (Cal. Ct. App. 2003) (stating court must consider various circumstances in determining suitability of application of waiver). The court noted that prior to the application of forfeiture, the court must scrutinize an array of interests beyond defendant’s conduct, including defendant’s constitutional rights, judicial efficiency, the protection of attorneys, and the fair administration of the trial. See id. at 588; see also Johnson v. Zerbst, 304 U.S. 458, 464 (1938) (noting application of waiver depends upon facts and circumstances of each case). Although a defendant’s actions on their face may appear manipulative to the judicial process and merit employment of forfeiture, the record as a whole must establish that the defendant comprehended the implications of his or her actions, such as the removal of his or her attorney, and that the court clearly warned the defendant of the same. See United States v. Welty, 674 F.2d 185, 188-89 (3d Cir. 1982).

27. See Commonwealth v. Blackstone, 472 N.E.2d 1370, 1373 (Mass. App. Ct. 1985) (emphasizing judges must protect incompetent defendants from proceeding pro se). Application of forfeiture places the defendant in a precarious position—serving as one’s own attorney—and thus courts should not employ it without significant inquiry, especially as to the defendant’s mental capacity. See id. The court cannot find that a defendant has the mental capacity to stand trial while concurrently declaring him or her as incompetent to waive his or her right to counsel. See id.; see also Indiana v. Edwards, 128 S. Ct. 2379, 2386 (2008) (mandating comprehensive examination of pro se defendant’s capacity due to varying effects of mental illness).

28. See 907 N.E.2d at 651 (considering premise for application of forfeiture doctrine).

29. See id. at 656-58 (interpreting case law to define procedures for invoking forfeiture). The SJC determined three different types of waiver exist for purposes of the Massachusetts courts: voluntary waiver, waiver by conduct, and forfeiture. See id.; see also supra note 20 and accompanying text (delineating types of waiver and providing case examples of each).
conduct.\textsuperscript{30} The SJC further emphasized that the court should never apply forfeiture absent a hearing where the defendant has a chance to provide an explanation of his or her actions, which the court should consider alongside the totality of the circumstances in deciding whether to apply forfeiture.\textsuperscript{31} Although Means’s actions may have been egregious enough to warrant the sanction of forfeiture, the SJC concluded that because the trial court did not provide Means a hearing to defend his behavior pursuant to his due process rights in connection with his Sixth Amendment right to counsel, the application of the forfeiture doctrine was inappropriate.\textsuperscript{32}

The SJC also acknowledged that forfeiture is unsuitable, even when it might otherwise be appropriate, if the court finds the defendant mentally incompetent.\textsuperscript{33} The SJC recognized that in addition to the elements previously established by other jurisdictions, a judge should evaluate a defendant’s mental health to determine if the defendant can voluntarily or involuntarily appear pro se.\textsuperscript{34} In articulating that the defendant’s behavior determines the scope of any inquiry into the defendant’s mental status, the SJC also noted that a court should continually visit the issue of a defendant’s mental stability throughout the course of the matter, as mental functioning can change over time.\textsuperscript{35} Although the SJC established a scheme for Massachusetts courts to use in determining whether the exercise of forfeiture is appropriate, which includes an evaluation of the defendant’s mental status, the SJC did not delve further into

\textsuperscript{30} See 907 N.E.2d at 658-59 (discussing premise and trigger for forfeiture). The SJC has acknowledged that the judiciary possesses broad and necessary power to control its proceedings, which in some circumstances requires the removal of the defendant’s counsel. \textit{See id.; see also supra} note 22 and accompanying text (providing examples of appropriate judicial invocation of forfeiture).

\textsuperscript{31} See 907 N.E.2d at 662 (mandating judicial procedure prior to application of forfeiture doctrine). Considering the involuntary removal of counsel is such a harsh sanction, the SJC found that a judge must give the defendant the opportunity to justify his or her actions at a hearing. \textit{See id. At the hearing, the defendant should be represented by counsel, provide evidence and witnesses in defense of his or her purported misconduct, and present evidence of other factors, such as his or her mental condition, that will inform a judge’s determination as to whether forfeiture is appropriate. \textit{See King v. Superior Court, 132 Cal. Rptr. 2d 585, 598-99 (Cal. Ct. App. 2003) (expounding defendants’ rights at forfeiture hearing). The judge should rule whether the defendant’s behavior was so horrendous as to warrant forfeiture, and whether forfeiture is in the interest of justice. \textit{See id. at 598 (providing overriding issues judges should consider prior to applying forfeiture).}

\textsuperscript{32} See 907 N.E.2d at 662 (declaring SJC’s holding).

\textsuperscript{33} See \textit{id. at 661 (examining Massachusetts precedent as it applies to forfeiture). Similar to voluntarily waiver, where the court has an obligation to inquire whether a mentally ill defendant’s “election to proceed without counsel is grounded in an incapacity,” the court should examine and resolve any issues as to the defendant’s competency prior to issuing a ruling of forfeiture. \textit{See id.; Commonwealth v. Blackstone, 472 N.E.2d 1370, 1373 (Mass. App. Ct. 1985) (proffering mental illness inhibits defendants from appearing pro se, thus preventing finding of forfeiture).}

\textsuperscript{34} See 907 N.E.2d at 661 (characterizing mental illness as factor of interest in determining application of forfeiture). Courts should not force a mentally ill defendant, unaided by counsel, to be alone and defenseless in his or her judicial proceedings. \textit{See id. (noting dangers of applying forfeiture doctrine to mentally ill); see also Massey v. Moore, 348 U.S. 105, 108 (1954) (asserting any defense “hopelessly beyond reach” for insane defendants).}

\textsuperscript{35} See 907 N.E.2d at 661 (discussing interplay of mental health and forfeiture at various junctures).
the proffered procedure as it immediately found that forfeiture was inappropriate because the trial judge deprived Means of a hearing prior to its application and thus denied him due process in connection with his Sixth Amendment entitlements. 36

In adopting the procedure established by the King court, the SJC wisely broached new ground in Massachusetts by establishing a mechanism judges must adopt when applying the forfeiture doctrine. 37 Although informal requirements permit the court some flexibility when invoking legal principles pursuant to what is fair in the specific circumstances, the lack of prescribed guidelines, which results in little to no direction for judges to utilize, has a propensity to produce subjective and inconsistent applications of legal doctrines, as demonstrated in Commonwealth v. Means. 38 The creation of a bright-line rule for employing forfeiture was particularly important to ensure that a judge’s removal of an indigent criminal defendant’s appointed counsel comport with and did not compromise the Sixth Amendment of the Constitution. 39

The SJC succeeded in balancing the integrity of the courtroom with the sanctity of defendants’ due process guarantees in connection with their Sixth Amendment rights by adopting a constitutionally appropriate method for the application of forfeiture. 40 Alternatively, the SJC could have considered the legitimacy of the forfeiture doctrine because forfeiture strips a defendant’s fundamental right to counsel without warning, and could have denied its

36. See id. at 662 (contending hearing essential to ensure constitutional application of forfeiture). The SJC reasoned that the purported hearing pertaining to Means’s March 2005 motion did not constitute a proper forfeiture hearing because the judge did not inform Means that she was considering applying the sanction of forfeiture, and therefore he could not propound a defense on his behalf. See id. at 662-63; see also supra note 19 and accompanying text (discussing Sixth Amendment guarantee of certain fundamental rights).

37. See 907 N.E.2d at 662 (providing reasoning for adoption of procedure to apply forfeiture). The SJC, aware of the acute consequences surrounding the application of forfeiture and the fact that the doctrine is contrary to the rights provided by the Sixth Amendment, implemented a mechanism to ensure the protection of a defendant’s constitutional rights. See King v. Superior Court, 132 Cal. Rptr. 2d 585, 597-601 (Cal. Ct. App. 2003) (requiring hearing and evaluation by judge based on circumstances prior to exercise of forfeiture).

38. See 907 N.E.2d at 663 (recognizing incorrect application of forfeiture due to denial of hearing). See generally August K. Anderson, Note, People v. Longwith: The Requirements of Court Advisement in Assuring a Knowing and Intelligent Waiver of Right to Counsel, 5 CRIM. JUST. J. 379 (1982) (comparing formal versus non-formal standards in doctrinal applications); C. Allen Parker, Jr., Note, Proposed Requirements for Waiver of the Sixth Amendment Right to Counsel, 82 COLUM. L. REV. 363 (1982) (acknowledging lack of standards for exercise of forfeiture often results in confusion as to its validity).

39. See 907 N.E.2d at 662 (suggesting crux of labeling forfeiture as unconstitutional hinges upon absence of due process); see also United States v. McLeod, 53 F.3d 322, 325 (11th Cir. 1995) (providing examples of proper application of forfeiture under Sixth Amendment); King v. Superior Court, 132 Cal. Rptr. 2d 585, 598-99 (Cal. Ct. App. 2003) (elucidating mandatory invocation of due process protections prior to constitutional application of forfeiture).

40. See 907 N.E.2d at 662 (stating forfeiture hearing applicable tool of judicial management); see also Johnson v. Zerbst, 304 U.S. 458, 464 (1938) (emphasizing courts should prudently presume against waiver of basic constitutional privileges); King v. Superior Court, 132 Cal. Rptr. 2d 585, 598-99 (Cal. Ct. App. 2003) (setting forth process to ensure constitutionality of forfeiture).
application altogether to ensure preservation of the Sixth Amendment.\textsuperscript{41} The Third Circuit has espoused this approach because it essentially bars forfeiture by requiring judges to fully warn the defendant of the consequences of appearing pro se prior to waiver by misconduct; therefore, every waiver of counsel is construed as an affirmative relinquishment of Sixth Amendment rights.\textsuperscript{42} Nevertheless, in not adopting the procedure propounded by the Third Circuit, the SJC allowed the lower courts of Massachusetts to infer that forfeiture is constitutional so long as it is carried out in accordance with the guidelines the SJC set forth.\textsuperscript{43}

As a second alternative, the SJC may have been better served by addressing the issue of Means’s capacity for standing trial, rather than concentrating on his ostensible forfeiture of counsel, because Means presented his mental health issues well before he purportedly forfeited his right to an attorney.\textsuperscript{44} When a judge has substantial reason to doubt a defendant’s capacity, the court must immediately mandate a competency hearing.\textsuperscript{45} In \textit{Means}, for example, the trial judge must have been well versed in Means’s psychological issues as he repeatedly acknowledged them, and therefore the court should have initiated and conducted a hearing to evaluate Means’s competency.\textsuperscript{46} If the trial court

\textsuperscript{41} See supra note 19 and accompanying text (discussing defendant’s fundamental rights under Sixth Amendment). See generally Frank, supra note 6 (describing severity of sanction of forfeiture).

\textsuperscript{42} See United States v. Goldberg, 67 F.3d 1092, 1099 (3d Cir. 1995) (exemplifying Third Circuit’s prerequisite of judicial warning prior to sanction of waiver). To exercise a constitutional waiver of counsel due to repeated bad behavior on the part of defendant, the Third Circuit requires that the defendant be thoroughly informed of the risks of self-representation. See \textit{id. at} 1102. See generally Suzanne Diaz, \textit{Comment, State v. Hampton: Addressing Forfeiture of the Right to Counsel by Egregious Conduct}, 47 \textit{ARIZ. L. REV.} 837 (2005) (suggesting forfeiture automatically fails when court fails to warn defendant prior to waiver).

\textsuperscript{43} See 907 N.E.2d at 664 (recognizing its holding permits forfeiture within boundaries of applicable constitutional protections). Consequently, the Third Circuit’s requirement of a hearing prior to waiver differs from the approach to a hearing set forth in \textit{King} in that under the Third Circuit’s approach, a judge must warn of the dangers of self-representation, which would not be appropriate in application of forfeiture because forfeiture intrinsically lacks a warning prior to the loss of counsel. See Jennifer Elizabeth Parker, \textit{United States v. Goldberg: The Third Circuit’s Nontraditional Approach to Waiver of the Sixth Amendment Right to Counsel}, 41 \textit{VILL. L. REV.} 1173, 1203-07 (1996) (comparing jurisdictional differences regarding court-mandated loss of counsel).

\textsuperscript{44} See 907 N.E.2d at 663-64 (pointing to reasons judge should have inquired into Means’s purported mental condition); see also United States v. Purnett, 910 F.2d 51, 56 (2d Cir. 1990) (mandating resolution as to competency prior to waiver of counsel); Commonwealth v. Blackstone, 472 N.E.2d 1370, 1373 (Mass. App. Ct. 1985) (articulating trial judges must protect mentally ill from proceeding without counsel).

\textsuperscript{45} See 907 N.E.2d at 661 (describing court’s duty to ensure defendant’s competency throughout proceeding). “Where there is some indication of mental disorder or impairment sufficient to create a ‘bona fide doubt’ as to the defendant’s ability . . . a competency hearing . . . is required.” \textit{Id.}; see also Indiana v. Edwards, 128 S. Ct. 2379, 2386 (2008) (noting inherent instability of mental illness necessitates ongoing inquiry regarding defendant’s mental state); United States v. Purnett, 910 F.2d 51, 55 (2d Cir. 1990) (rejecting defendant’s ability to waive counsel while concurrently adjudged incompetent to stand trial).

\textsuperscript{46} See 907 N.E.2d at 662-63 (observing Means exposed his purported illness multiple times over course of proceedings). On the first day of trial, the trial judge acknowledged that she was familiar with the fact that Means had undergone treatment for mental illness. See \textit{id. at} 663. Furthermore, the fact that the trial judge employed a forensic psychologist to examine Means prior to trial indicates that the judge had reason to doubt Means’s competence and should have instituted a competency hearing to evaluate the status of his capacity to
considered Means’s capacity to stand trial when it became aware of the possibility that he was mentally ill, the proceedings may not have reached a crisis point; the court might have declared Means incompetent, and thus Means would not have been in a position to forfeit counsel as a result of drafting the threatening letter.47 The SJC could have transcended any application of forfeiture by recognizing that the trial court should have analyzed Means’s capacity to stand trial at the outset, upon initial suspicion of his mental illness.48

In Commonwealth v. Means, the SJC considered the procedure a court must employ to assess whether the application of the forfeiture doctrine, which results in the removal of a court-appointed counsel from an indigent criminal defendant, is appropriate. In its reasoning, the SJC elucidated that a trial judge should evaluate the totality of the circumstances that provide grounds for the forfeiture sanction, including ensuring that the defendant possesses adequate and ongoing mental capabilities before the court directs him to proceed pro se. Moreover, the SJC dictated that a court must provide the defendant with a hearing regarding the court’s potential utilization of the forfeiture doctrine, wherein the defendant has an opportunity to assert evidence and defend himself, which comports with the defendant’s due process rights in connection with the right to counsel the Sixth Amendment guarantees.

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47. See United States v. Purnett, 910 F.2d 51, 55 (2d Cir. 1990) (mandating inquiry into issues surrounding competency, if any, prior to waiver of counsel). If a trial court cannot find a defendant incompetent to stand trial but competent to waive counsel and proceed pro se, by the same reasoning a court cannot find a defendant incompetent to stand trial but competent enough to trigger forfeiture, thereby losing his or her right to counsel. See id. at 53-58 (illustrating similarities between effect of competency upon waiver by conduct and forfeiture).

48. See id. (reiterating importance of evaluating competency upon first doubt as to capacity). “It has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him . . . may consult with counsel.” Indiana v. Edwards, 128 S. Ct. 2379, 2386 (2008) (citing Drope v. Missouri, 420 U.S. 162, 171 (1975)) (demonstrating lack of capacity precludes application of forfeiture).