COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

SJC-13652

COMMONWEALTH OF MASSACHUSETTS,
Appellant

v.

BRIAN DICK, JAMES BI, BRENDAN GARAFALO,
VIET NGUYEN, ERIC VANRIPER
Appellee

COMMONWEALTH'S BRIEF ON APPEAL FROM A JUDGMENT OF THE PLYMOUTH SUPERIOR COURT

PLYMOUTH COUNTY

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ISSUE PRESENTED

Does probable cause exist to support the indictments of attempted human trafficking under G.L. c. 265, § 50(a) where a grand jury heard evidence that, after the defendants responded to advertisements looking to buy sexual services, they appeared at a location to purchase commercial sexual services?

STATEMENT OF THE CASE

This case is before the Court on the Commonwealth's appeal from the allowance of the defendants' motions to dismiss in the Superior Court.

On October 15, 2021, a Plymouth County grand jury returned indictments charging the five defendants, Brendan Garafalo, Brian Dick[1], Eric VanRiper, James Bi, and Viet Nguyen, each with trafficking of persons for sexual servitude, in violation of G.L. c. 265, § 50(a); and engaging in

[1] On January 22, 2024, Mr. Dick's attorney filed a motion to dismiss the appeal in the Appeals Court with respect to Mr. Dick based upon the suggestion of death. On May 7, 2024, the Appeals Court, ruled "[t]he issue should be taken up in the Superior Court."

sexual conduct for a fee, in violation of G.L. c. 272, § 53A (CA. 4, 10, 15, 20, 24).[2]

On July 7, 2022, the defendants filed motions to dismiss pursuant to *Commonwealth v. McCarthy*, 385 Mass. 160 (1982), alleging that the facts presented to the grand jury did not establish probable cause to support the charges (CA. 12, 16, 22, 27).[3] On August 3, 2022, the Commonwealth opposed the motion (CA. 7, 12, 16, 22, 27). On August 24, 2022, Garafalo filed a supplemental memorandum of law, which some of the defendants joined in support (CA. 22, 27).

On October 4, 2022, Judge Maynard Kirpalani allowed the defendants' motions (CA. 7, 12-13, 17-18, 22-23, 27-28, 113-121). On November 10, 2022, the Commonwealth filed a notice of appeal (CA. 7, 13, 18, 23, 28).

On March 8, 2023, this case entered in the Appeals Court on five separate dockets, each docket representing the

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[2] "(CA. _) herein refers to the Commonwealth's record appendix.

[3] The Commonwealth is appealing the allowance of those motions as to each defendant.

case against each defendant.[4] The cases were subsequently consolidated to a single docket, docket 23-P-268, because each co-defendant filed an identical brief on appeal and the order on appeal was an "omnibus" order of the Superior Court that pertained to all five defendants. The Commonwealth filed its brief on April 14, 2024. The defendants filed their briefs on May 11, 2023. On November 9, 2023 oral argument was held at the Appeals Court. On November 22, 2024, the Court issued an order that:

> No later than December 15, 2023, the parties may file with the court supplemental memoranda, specifically addressing the issue of whether the facts presented to the grand jury established probable cause, as to each defendant, that satisfied the statutory language that they "attempt[ed] to recruit, entice, harbor, transport or obtain by any means . . . ." We view this issue as distinct from the issue addressed by the Superior Court, regarding the need for an actual victim.
>
> The defendants may file a consolidated memorandum not to exceed 12 pages.
>
> The Commonwealth's memorandum also may not exceed 12 pages. The court would appreciate an

[4] The following docket numbers reflect original entry: 23-P-268; 23-P-269; 23-P-270; 23-P-271; 23-P-272.

> analysis of whether there are any material differences in the evidence as to each defendant.

Both parties filed responses.

On May 7, 2024, the Appeals Court issued a full opinion affirming the allowance of the defendants' motions to dismiss, though for reasons different than those the motion judge relied upon (Add. 60-66). Whereas the trial court allowed the defendants' motions to dismiss on grounds of factual impossibility (Add. 51-59), the Appeals Court affirmed the allowances on grounds that the Commonwealth failed to present sufficient evidence to a grand jury that the defendants engaged in an attempted "entic[ing]," "recruit[ing]," or "obtain[ing]" of "another person to engage in commercial sexual activity" as a matter of law (Add. 60-66).

The Commonwealth promptly filed a petition for further appellate review, which was allowed on September 5, 2024. This case entered in this Court on September 6, 2024.

STATEMENT OF FACTS

A. The Crime.

The five defendants all responded to online advertisements on August 5, 2022, looking to buy sexual services (ICA. 34-39; Tr. 6-7).[5] The advertisements contained photographs of an adult female, a description of the sexual services offered, and a phone number at which the interested party could contact the female (ICA. 34-39). The advertisements were posted by Massachusetts State Troopers as well as local police officers who were investigating unknown individuals interested in purchasing a female for commercial sex (Tr. 6-7).

Each of the five defendants responded to the advertisements by texting the number posted (ICA 40-47). Via text message or phone call unknowingly communicating with an undercover officer, each of the defendants agreed to pay a fee for specific sexual acts and were told a location and

[5] The Commonwealth has filed the grand jury minutes and exhibits in an impounded record appendix pursuant to G.L. c. 268, § 13D and refers to these materials as "(ICA. __)."

time when the contracted-for acts would take place (ICA 40-47). Each of the defendants showed up at the location and when they did so, they were texted by the undercover officer, confirming that the cellphones in their possession had been used to coordinate the meetings (ICA. 40-47). As to each specific defendant, the evidence presented was as follows:

i. Defendant Nguyen

Defendant Nguyen placed a phone call to the number listed in the advertisement on August 5, 2021 at 5:58 and 6:01 p.m. (ICA 40). During the calls, Nguyen indicated he wanted a "quick visit," which was explained to the grand jury to mean a fifteen-minute time interval where there would be "full sex" (ICA 11-12). Nguyen agreed to pay $100 for the service and it would occur at 7:00 p.m. (ICA 12). Nguyen went to the prearranged location, texted the number in the advertisement, and an undercover officer responded via text with a room number (ICA 40). Nguyen responded to the room and was met by State Police (ICA 13, 40).

ii. Defendant Bi

Defendant Bi texted the number from the advertisement on August 5, 2021, at 8:32 p.m. (ICA 41). In his initial text, Bi indicated that he was looking for a "hhr incall gfe," (ICA 41), which was explained to the grand jury meant a half hour session, where he would go to the sex worker and engage in something called the girlfriend experience (ICA 14-15). The undercover officer then asked what else the defendant liked and over text message Bi indicated that he liked "French kissing and bbj" (ICA 41). It was explained to the grand jury that a "bbj" was a bare blow job meaning a blow job performed without protection (ICA 14-15). The undercover officer texted that it would be $120 and via text the two agreed to meet around 9:30 p.m. (ICA 41). Bi went to the prearranged location, texted when he arrived at 9:32 p.m., and was texted a room number by the undercover officer (ICA 40). Bi went to the room and was met by the State Police (ICA 16).

iii. Defendant Dick

Defendant Dick texted the phone number from the advertisement on August 5, 2021 at 8:06 p.m. by asking "Hi are you available and are the pics you?" (ICA 42). The undercover officer responded: "hi hun yes r u lookin for company" (ICA 42). Dick indicated he was, and the undercover officer provided rates for a quick visit, a half an hour, and an hour (ICA 42). The undercover officer responded it had a spot (ICA 42). Dick asked, "hotel?" and when the undercover responded in the affirmative, Dick said "ok" and eventually that he was looking for a half hour (ICA 42).

When the undercover asked what Dick had in mind, Dick indicated he was not into "Dom or prostate" (ICA 42). When asked again: "what r u into I can make it happen" Dick responded, "Everything else" (ICA. 42). When asked again by the undercover officer, Dick asked "Are u affiliated with law" to which the undercover responded "no" (ICA. 42).

The undercover asked, "r u shy?" and Dick responded "Little" and "I'll call and tell you." (ICA 43).

Dick then placed a 1:18 minute call to the number in the advertisement (ICA 43), during which he indicated he was looking for oral sex and the girlfriend experience (ICA 17). Dick later went to the prearranged location, texted when he arrived at 8:50 p.m., and was texted a room number by the undercover officer before he proceeded to that room where he met the State Police (ICA 18).

iv. Defendant Garafalo

Defendant Garafalo texted the phone number in the advertisement on August 5, 2021 at 9:00 p.m. and said "hey" ICA 44). The undercover officer texted back "hi love u lookin 4 company? To which Garafalo responded "Ya" (ICA 44).

The undercover officer asked what he liked and Garafalo responded "Incall?" and "Where r u located" (ICA 44). The undercover officer indicated they were in Rockland and had a room tonight, to which Garafalo said, "Hh/qv" (ICA 44). After a back and forth, Garafalo indicated he

wanted a "qv," which was explained to the grand jury to mean a "quick visit" (ICA 21, 44). The undercover officer gave a price of $80 and asked, "what can I do to make sure ur 100% satisfied" to which Garafalo responded, "I can think of a couple things lol" (ICA 44). When pressed, Garafalo said, "I'll show you once I get there" before eventually calling the advertisement number (ICA 44). Garafalo indicated that he wanted a blowjob (ICA 23). The undercover officer gave a location, Garafalo texted when he arrived at 10:42, and the undercover texted a room number to Garafalo (ICA 45). Garafalo went to the room number he was texted and met the State Police on arrival (ICA 9).

v. Defendant Vanriper

Defendant Vanriper texted the phone number from the advertisement on August 5, 2021, at 8:52 p.m. by texting "Hi love, are you hosting?" (ICA 46). The undercover officer texted Vanriper that she was and Vanriper asked, "Where at hun? And what are your donations?" (ICA 46). The undercover officer responded with rates for a quick visit, half

hour, and an hour (ICA 46). Vanriper texted that he was down for a "hh" (ICA 46). The undercover officer then asked what he liked, to which Vanriper responded, "eating pussy, sloppy bjs, doggystyle, foot jobs and if you're into it I like getting pegged" (ICA 46). The undercover officer responded, "if ur into it I will make it happen," then set a price at $150 (ICA 46). The undercover officer texted the general location; Van riper texted when he arrived at 10:00 p.m., and the undercover texted him a room number (ICA 47). Vanriper went to that room where he met the State Police on arrival (ICA 9).

B. The Motion Judge's Ruling

The motion judge allowed the defendant's motion, explaining:

> The defendants argue that they are entitled to dismissal of the indictments charging trafficking of persons for sexual servitude because violation of the Sex Trafficking Statute requires proof of an actual victim and, in their cases, there was no victim, since the female identified in the advertisements was fictitious and no money and/or sexual services were ever exchanged. The Court is persuaded, based on the SJC's discussion of the Sex Trafficking Statute in the Fan case,

> 490 Mass. at 445-452, that the defendants are correct.

(CA. 115).

The judge pointed to the discussion of the applicable statute in *Commonwealth v. Fan*, 490 Mass. 433 (2022) (CA. 117-119). Specifically, the judge found:

> [T]he SJC spent considerable time expounding upon the Legislature's use of the phrases "another person" and "a person." [Fan, 490 Mass.] at 447-448. The Court concluded that the term "another" refers to one "other than oneself or the one specified." Id. at 447, citing Webster's New Universal Unabridged Dictionary 85 (1996). And, that the term "person" means "a human being." Id. citing Webster's New Universal Unabridged Dictionary, at 1445. According to the Court, in combination, the use of these phrases indicates "that (1) the trafficking must be of a human being . . . and (2) one cannot be convicted of trafficking him- or herself[.]"
>
> In Fan the SJC clearly stated that to establish a violation of the Sex Trafficking Statute, the Commonwealth must prove that a defendant "(1) knowingly (2) 'enabled or caused,' by one of the statutorily enumerated means, (3) *another person* (4) to engage in commercial sexual activity." Id. at 448 (emphasis added), citing Commonwealth v. McGhee, 472 Mass. 405, 418 (2015) (stating Sex Trafficking Statute prohibits "individuals or entities from knowingly undertaking specific activities that will enable or cause another person to engage in commercial sexual activity"); see also Commonwealth v. Dabney, 478 Mass. 839, 857,

> cert. denied, ---U.S. ---, 139 S. Ct. 127 (2018). In reaching this conclusion, the SJC was careful to point out that, although proof of a victim's identity is not required, a violation of the Sex Trafficking Statute requires the Commonwealth to prove beyond a reasonable doubt that there was a victim, i.e., someone whom the defendant enabled or caused to engage in commercial sexual activity [.]" 490 Mass. at 448.
>
> With respect to the current matter, the grand jury heard insufficient evidence to establish probable cause to arrest the Defendants for violating the Sex Trafficking Statute. The grand jury heard no evidence that there were any actual victims in the cases involving any of the Defendants, as the woman in the advertisements was a fictitious individual created by law enforcement, and there was no money and/or sexual services exchanged. Consequently, there was no evidence that any of the Defendants knowingly enabled or caused, or attempted to enable to cause, *another person* to engage in commercial sexual activity. This conclusion comports with the purpose behind the Legislature's enactment of the Sex Trafficking Statute, which was "to 'change the focus of police and prosecutors from targeting prostitutes to going after . . . the pimps who profit from the transactions by ensuring that traffickers, and not only the individuals solely engaged in commercial sexual activity, are prosecuted." Id. at 447, citing Dabney, 478 Mass. at 853 quoting Gov. Patrick Signs Bill Against Human Trafficking, Associated Press, Nov. 21, 2011.

(CA. 118-119, internal footnotes omitted).

C. The Appeals Court's Decision.

The Appeals Court issued a full opinion affirming the allowance of the defendant's motion to dismiss, albeit on grounds different than the motion judge (Add. 60-66). Rejecting the motion judge's reasoning, the Appeals Court reaffirmed its holding in *Commonwealth v. Bell,* 67 Mass. App. Ct. 266 (2006), that "factual impossibility is not a defense to a crime." (Add. 62, quoting *Bell*, at 271). The Appeals Court went on to conclude:

> The facts before the grand jury established probable cause that each of the defendants intended to pay another person for sexual acts. The defendants did not know that the person described in the advertisement was factitious; indeed, each defendant actually communicated with a person, and then arrived at the identified place and entered it. As stated in Bell, each defendant's "conduct, intent, culpability and dangerousness" were as if the other "person". . . actually existed."

(Add. 62). As the Appeals Court correctly reasoned, the case relied upon by the motion judge and defendants, *Commonwealth v. Fan*, 490 Mass at 445-452, did not stand for the proposition that an actual victim need be sold to support

a conviction for human trafficking, but rather that one could not traffick one's self. (Add. 62).

Despite acknowledging that "[t]he facts before the grand jury established probable cause that each of the defendants intended to pay another person for sexual acts. . .", the Appeals Court went on to conclude that the evidence presented at grand jury was insufficient to establish probable cause for a violation of G.L. c. 265, § 50(a).

In short, the Appeals Court concluded that the grand jury did not hear sufficient evidence to establish probable cause that the defendants attempted to "recruit, entice . . . or obtain by any means, another person to engage in commercial sexual activity" as a matter of law (Add. 60-66). In so concluding, the Appeals Court went out of its way to deny inserting an element of control and/or coercion that plainly does not exist in the statute (Add. 65 at n.10)("We are here construing only the word 'obtain.' The words 'entice' or 'recruit' do not require that the defendant control the victim, and in construing 'obtain' we are not reimporting a general

element of coercion into the statute. Nor does the level of control for 'obtain[ing]' necessarily have to rise to the level of coercion.").

Nevertheless, instead of applying the usual rules of statutory analysis, which requires that appellate courts "not 'read into [a] statute a provision which the Legislature did not see fit to put there,'" the Appeals Court concluded "the use of 'obtain' in the statute is in the context of 'trafficking,' which implies some level of controlling or changing the victim's will or intent." (Add. 65). *Chin v. Merrior,* 470 Mass. 527, 537 (2015) (quoting *Commissioner of Correction v. Superior Court Dep't of the Trial Court for the County of Worcester*, 446 Mass. 123, 126 (2006)).

ARGUMENT

THE EVIDENCE PRESENTED AT GRAND JURY ESTABLISHED EACH DEFENDANT ATTEMPTED TO ENTICE, RECRUIT, OR OBTAIN ANOTHER PERSON FOR COMMERCIAL SEX.

As a general rule, "a court will not inquire into the competency or sufficiency of the evidence before the grand jury." *Commonwealth v. Rex,* 469 Mass. 36, 39 (2014). A

limited exception exists, as recognized in *Commonwealth v. McCarthy*, 385 Mass. at 161-163, requiring that a grand jury hear evidence that establishes probable cause to believe the defendant committed a crime. *Id.* "Probable cause to sustain an indictment is a decidedly low standard," *Commonwealth v. Hanright*, 466 Mass. 303, 311 (2013), and the evidence must be viewed "in the light most favorable to the Commonwealth." *Commonwealth v. Rakes*, 478 Mass. 22, 29 (2017). Under this standard, the evidence presented to the grand jury need only "'establish the identity of the accused, . . . and probable cause to arrest him.'" *Commonwealth v. Barbosa,* 477 Mass. 658, 675 (2017) (quoting *McCarthy*, 385 Mass. at 163). "As the issue of probable cause presents a question of law, [this Court] review[s] the motion judge's determination de novo." *Commonwealth v. Ilya I.,* 47 Mass. 625, 627 (2015).

Here, the grand jury heard sufficient evidence establishing probable cause to believe each defendant had violated G.L. c. 265, § 50 (herein referred to as "the human trafficking statute"). "Probable cause is a 'considerably less

exacting' standard than that required to support a conviction at trial," *Commonwealth v. Stirlacci,* 483 Mass. 775, 780 (2020) (quoting *Commonwealth v. O'Dell,* 392 Mass. 445, 451 (1984)), requiring "'sufficient facts to warrant a person of reasonable caution in believing that an offense has been committed,' not proof beyond a reasonable doubt" *Id.* (quoting *Commonwealth v. Levesque,* 436 Mass. 443, 447 (2002)). Accordingly, the motion judge erred in allowing the defendants' motions to dismiss.

A. The Human Trafficking Statute

As this Court succinctly articulated in *Commonwealth v. Fan*, 490 Mass. at 446, "'to ascertain the elements of a crime [appellate courts] ordinarily look to the statutory language.'" (quoting *Commonwealth v. Burke*, 390 Mass. 480, 483 (1983). This Court will interpret the statutory language

> according to the intent of the Legislature ascertained from all its words construed by the ordinary and approved usage of the language, considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished, to the end that the purpose of its framers may be effectuated.

Commonwealth v. Figueroa, 464 Mass. 365, 368 (2013), quoting *Harvard Crimson, Inc., v. President & Fellows of Harvard College*, 445 Mass. 745, 749 (2006).

Importantly, this Court will "not look to extrinsic sources to vary the plain meaning of a clear, unambiguous statute unless a literal construction would yield an absurd or unworkable result[,]" *Commonwealth v. Millican*, 449 Mass. 298, 300-301 (2007), nor will it 'read into [a] statute a provision which the Legislature did not see fit to put there.'" *Chin v. Merriot,* 470 Mass. 527, 537 (2015) (quoting *Commissioner of Correction v. Superior Court Dep't of the Trial Court for the County of Worcester,* 446 Mass. 123, 126 (2006)). "Any reformulation of the statutory crime. . . is a matter for the Legislature." *Commonwealth v. Bell*, 455 Mass. 408, 414 (2009), abrogated on other grounds by *Commonwealth v. Labrie*, 473 Mass. 754 (2016).

The human trafficking statute provides, in relevant part,

> Whoever knowingly: subjects, or attempts to subject, or recruits, entices, harbors, transports,

> provides or obtains by any means, or *attempts to* recruit, entice, harbor, transport, provide or obtain by any means, another person to engage in commercial sexual activity. . . shall be guilty of the crime of trafficking of persons for sexual servitude.

G. L. c. 265, § 50(a) (emphasis added). The phrase "commercial sexual activity" is further defined as "any sexual act on account of which anything of value is given, promised to or received by any person." G. L. c. 265, § 49; *Commonwealth v. McGhee*, 472 Mass. at 407.

The human trafficking statute is plain, clear, and unambiguous. *See McGhee* at 410. ("In this case, the defendants' actions fell squarely within the conduct *unambiguously proscribed by G.L. c. 265, § 50 (a)*") (emphasis added); *Dabney* at 855 ("*the plain and ordinary meaning of the actus reus in the human trafficking statut*e does not, as the defendant contends, necessarily 'connote[] some level of inducement, manipulation, or coercion'") (emphasis added). As this Court has explained, one violates the human trafficking statute when "[a]n individual engages in statutorily enumerated acts knowing that those acts will

result in another person's anticipated engagement in commercial sexual activity." *Id.* at 417. "[N]othing in the language of the human trafficking statute suggests that it excludes conduct aimed at victims who have engaged in prostitution in the past." *Dabney,* at 856. Consistent with the plain language of the statute, it is a crime in the Commonwealth of Massachusetts to attempt to recruit, to attempt to entice, or to attempt to obtain by any means, another person to engage in commercial sexual activity.

This Court has repeatedly rejected suggestions that the human trafficking statute contains an element of force, fraud, or coercion. *See McGhee* at 417*; Dabney*, at 853. The Court first concluded in 2015 that "the Legislature has determined that whether a person being trafficked for sexual servitude has been forced or coerced into engaging in such activities is immaterial for purposes of ascertaining whether a criminal act has been committed[,]" *McGhee* at 415, and reaffirmed that principle in 2018, *see Dabney* at 853. Since those decisions, the human trafficking statute has not been

modified, suggesting this Court interpreted the statute consistent with the Legislature's intent. *See Regis College v. Town of Weston*, 462 Mass. 280, 288 & n.10 (2012) ("Indeed, the Legislature's failure to act could also represent a determination that its concerns have been adequately addressed 'by . . . judicial development of decisional law'") (internal quotations and citations omitted).

Though the human trafficking statute prohibits a wide array of conduct related to commercial sex, the Massachusetts Legislature is not unique in its adoption of its statutory language. Several other states have also chosen to omit the requirement of force, fraud or coercion. *See* Tenn. Code Ann. §39-13-309; Cal. Pen. Code §266i (a); Minn. Stat. § 609.322 (1a); Me. Rev. Stat. Ann. Tit. 17, § 853.[6] *See also State v.*

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[6] Tenn. Code Ann. §39-13-309 provides: "a) A person commits the offense of trafficking a person for a commercial sex act who:. . . Recruits, entices, harbors, transports, provides, purchases, or obtains by any other means, another person for the purpose of providing a commercial sex act;"

Cal. Pen. Code §266i "(a) provides, in part: "[e]xcept as provided in subdivision (b), any person who does any of the

Williams, 46 Kan. App. 2d 36 (2011). The adoption of such language reflects the Massachusetts Legislature's desire to align the laws of our Commonwealth with a neo-abolitionist view of commercial sex wherein the Legislature sought to create a "criminal legal response to perpetrators of sex trafficking and buyers of sex, while decriminalizing victims or 'prostituted persons.'" *See* Julie Dahlstrom, "The Elastic Meaning(s) of Human Trafficking," 108 Calif. L. Rev. 379, 387-388, n. 38 (2020) (explaining a neo-abolitionist view of human trafficking).

Further evidence of the Legislature's intentional decision to omit fraud, force, or coercion as an element of the

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following is guilty of pandering, a felony, and shall be punishable by imprisonment in the state prison for three, four, or six years: (1) Procures another person for the purpose of prostitution. . . (6) Receives or gives, or agrees to receive or give, any money or thing of value for procuring, or attempting to procure, another person for the purpose of prostitution, or to come into this state or leave this state for the purpose of prostitution."

Minn. Stat. § 609.322 (1a) and Me. Rev. Stat. Ann. Tit. 17, c. 35,§ 853 both omit force, fraud, or coercion as an element as well.

offense can be found by review of the analogous federal statute. *See* 18 U.S.C. § 1591. The federal statute, since its inception, has always required proof of fraud, force, or coercion with respect to the trafficking of adult persons for commercial sex. *Id.* The federal statute does not require proof of fraud, force, or coercion with respect to the trafficking of children for commercial sex. *Id.*

The Massachusetts Legislature's decision to not mirror the federal statute as it pertains to adults, and instead mirror the language that pertains to minor sex trafficking victims, clearly demonstrates an intent to omit force, fraud, or coercion as an element with respect to the trafficking of all humans for commercial sex. Indeed, as this Court noted *McGhee*, "the omission of language from G.L. c. 265, § 50 (a), that is included in the previously enacted analogous Federal statute 'reflect[s] a conscious decision by the Legislature to deviate from the standard embodies in the federal statute.' *Globe Newspaper Co. v. Boston Retirement Bd.,* 388 Mass. 427, 433 (1983)." 472 Mass. at 412 n. 8.

The plain and unambiguous language that the Massachusetts Legislature adopted in the human trafficking statute clearly reflects a desire to attack the "demand" side of supply-and-demand in the context of the business of commercial sex, as does the fact that the Legislature simultaneously sought to increase the maximum punishment for purchasers of commercial sex, but did not increase penalties for "whoever engages, agrees to engage or offers to engage in sexual conduct with another person in return for a fee." *See* 2011 Mass. H.B. 3808, §25.[7] The Legislature acted

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[7] G.L. c. 272, §53A previously punished both adult purchasers and sellers of commercial sex with a maximum penalty of one year in a house of correction or by a fine of not more than $500. *See* 2005 Mass. H.B. 859.

In 2011, in addition to creating the human trafficking statute, the Legislature amended G.L. c. 272, §53A to separate out different punishments for adult buyers of commercial sex and adults who accept fees to engage in commercial sex, again targeting buyers of commercial sex with harsher penalties:

> (a) Whoever engages, agrees to engage or offers to engage in sexual conduct with another person in return for a fee, shall be punished by imprisonment in the house of correction for not

well within its authority in establishing more severe penalties for purchasers of commercial sex, especially in light of how the demand side of human trafficking has historically been under-prosecuted. *See* Mary Graw Leary, "Dear John, You are a Human Trafficker," 68 S.C. L. Rev. 415, 425 (2017) ("Notwithstanding [a] comprehensive approach to domestic and international human trafficking, from its inception, one segment of offenders has often been ignored in the fight against sex traffickers: purchasers. Although purchasers of people for sex drive the sex trafficking market…purchasers

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> more than 1 year or by a fine of not more than $500, or by both such imprisonment and fine, whether such sexual conduct occurs or not.
>
> (b) Whoever pays, agrees to pay or offers to pay another person to engage in sexual conduct, or to agree to engage in sexual conduct with another person, shall be punished by imprisonment in the house of correction for not more than 2 and one-half years or by a fine of not less than $ 1,000 and not more than $5,000, or by both such imprisonment and fine, whether such sexual conduct occurs or not.

2011 Mass. H.B. 3808, §25.

have only recently become a target of the anti-trafficking movement").

Moreover, the fact that two separate statutes punish similar conduct with different penalties, providing the executive branch with discretion to prosecute those who purchase another human for commercial sex under either, does not detract from the idea that the Legislature intended to punish purchasers of humans for commercial sex under the human trafficking statute. *See Commonwealth v. Ehiabhi*, 478 Mass. 154, 159 (2017) (reaffirming rejection of argument that G.L. c. 94C is unconstitutionally void for vagueness because there is no ambiguity in the legislative intent expressed by enacting by § 32A (a) and § 32A (c), which punish the same conduct with different penalties); *Cedeno v. Commonwealth*, 404 Mass. 190, 194 (1989) ("[w]e simply see no significant ambiguity in the legislative intent expressed in § 32A (a) and §32A (c)"). Where this Court has held that the trafficking of narcotics can be prosecuted under different statutes that prohibit the same conduct, this Court should

also hold that the trafficking of humans can be prosecuted under different statutes that prohibit the same conduct.

B. The Grand Jury Evidence

The grand jury heard evidence in this case that law enforcement posted advertisements online purporting to be two different women advertising sexual services for a fee (ICA 34-39). Each advertisement contained a telephone number and instructed interested purchasers of commercial sex to text the phone number (ICA 35, 38). Each of the defendants contacted the telephone number from the advertisement on August 5, 2021 (ICA 10-11; 14, 16, 21-23, 40-47).

i. Each defendant attempted to entice another person for commercial sexual activity.

In *Dabney*, this Court already held that in the context of the human trafficking statute, the plain meaning of "entice is to 'incite,' 'instigate,' 'draw on by arousing hope or desire,' 'allure,' 'attract,' . . . ." *Dabney* at 856 (quoting Webster's Third New International Dictionary 757 (1993)). This Court further explained, "one may entice, for example, simply by making an attractive offer." *Id.* Here, the defendants each

individually instigated commercial sexual activity by responding to an online advertisement of general sexual services, indicating the specific sexual services they wished to obtain from the female, planned a meeting with the female, agreed to pay the female for the specific sexual services, and showed up at the prearranged location to follow through with the planned transaction.

ii. Each defendant attempted to recruit another person for commercial sexual activity.

This Court has also previously defined "recruit" as to 'hire or otherwise obtain to perform services,' to 'secure the services of' another, to 'muster,' 'raise,' or 'enlist.' *Dabney* at 856 quoting Webster's Third New International Dictionary, *supra* at 1899. In the instant case, the defendants attempted to hire and secure the services of another person for commercial sexual activity.

Shockingly, the Appeals Court ignored this Court's prior definitions of "entice" and "recruit," as well as this Court's conclusion that force, fraud, or coercion is not an element of the offense. Add. 64. ("In our view, both 'entice' and recruit,'

as used in the statute, contain an element of causing another person to engage in an act or practice in which the person was not otherwise intending to engage"). Such an interpretation is flawed for many reasons, not the least of which is that it requires the Commonwealth to prove the intent of a purportedly trafficked person at trial, when the mens rea that the Commonwealth is always required to prove at any criminal trial is that of the defendant—not that of a person purchased for commercial sex.

Indeed, if the Appeals Court's interpretation were allowed to stand, one could imagine a criminal defendant charged with trafficking a human for commercial sex asserting a defense that the person purchased for sex intended to sell himself or herself all along. Such a position would require the Commonwealth to prove the human being sold was not voluntarily being sold, but was forced, coerced, or otherwise compelled to engage in commercial sex, contrary to this Court's precedent and the plain language of the statute.

Despite the existence of our rape shield statute, a defendant could seek to admit a trafficked person's sexual history in support of such a defense. Alternatively, a person who was previously sold for commercial sex against his or her will and previously convicted of sex for a fee could have his or her prior conviction used against them at a future defendant's trial where a defendant sought to establish that the person sold would have otherwise intended to engage in commercial sex as evidenced by their history of engaging in commercial sex. The result would be a trial-within-a-trial on the issue of whether the person being sold previously was or was not sold willingly.

Again, the focus at a trial for a violation of the human trafficking statute should be a defendant's mens rea—not the mens rea of a person who was bought and sold for commercial sex. The Legislature's enactment of the human trafficking statute reflects its recognition of this premise.

iii. Each defendant attempted to obtain by any means another person to engage in commercial sexual activity.

Though this Court has not yet had the opportunity to define "obtains" in the context of the human trafficking statute, the common dictionary definition of the word "obtain" means "to gain or attain usually by planned action or effort." Merriam-Webster Online Edition, available at: https://www.merriam-webster.com/dictionary/obtain (last visited October 31, 2024). Applying this common definition to the case at bar, each of the defendants purposely contacted the telephone number from the advertisement with the intent that another person—the female depicted in the advertisement—engage in commercial sexual activity in exchange for money. Quite plainly, each defendant executed a planned effort to attempt to attain another human for the purpose of commercial sexual activity.

Other dictionaries and courts have defined "obtains" similar to the definition supplied by Merriam Webster. For example, the Cambridge English Dictionary defines "obtain"

as "to get something, especially by asking for it, *buying it*, working for it, or producing it from something else." Cambridge English Dictionary Online, available at: https://dictionary.cambridge.org/us/dictionary/english/obtain (last accessed November 5, 2024) (emphasis added). The Oxford English Dictionary defines "obtain" to mean "[t]o come into the possession of; to procure; to get, acquire, or secure." Oxford English Dictionary Online, available at: https://www.oed.com/dictionary/obtain_v?tab=meaning_and_use#33684348 (last accessed November 5, 2024).

The Eighth Circuit previously summarized various definitions of "obtains." *See United States v. Jungers*, 702 F.3d 1066, 1070 (8th Cir. 2013). In doing so, that court cited Black's Law Dictionary to define "obtains" as "[t]o get hold of by effort; to get possession of; to procure; to acquire, in any way." Black's Law Dictionary, 1078 (6th ed. 1990). That court also cited to the Tenth Circuit, which had defined "obtains" to include "attaining or acquiring a thing of value in any way. . .

." *Id.*; *see United States v. Ramos-Arenas*, 596 F.3d 783, 787 (10th Cir. 2010) (internal citations omitted).

The Appeals Court, while acknowledging the plain definition of obtain is "to gain or attain . . . usu[ally] by some planned action or method[,]", *see* Webster's Third New International Dictionary 1559 (2002), erroneously "decline[d] to read 'obtain' so broadly." (Add. 60-68). Citing no source or authority, the Appeals Court held "the word itself has a narrower but commonly used meaning, which is not simply to get or attain, but to possess or control." The Commonwealth disagrees and maintains that the proper definition of "obtain," as used by the Legislature, is "to gain or attain," which is consistent with dictionary definitions and ignored by the Appeals Court.

The Appeals Court further erred when, instead of adopting and applying the plain English definition of "obtain" to the statute at issue, it relied on the Latin etymology of "obtain" (Add. 60-68). Noting that "obtain" derives from the Latin "tenere"—to hold—the Appeals Court suggested that

when one "obtains" property, one "hold[s]" or "posses[es] it." [8] The Appeals Court then concluded:

> Context matters, and the use of 'obtain' in the statute is in the context of 'trafficking,' which implies some level of controlling or changing the victim's will or intent.

(Add. 67). In so concluding, the Appeals Court ignored the plain language of the statute and ignored its obligation to not 'read into [a] statute a provision which the Legislature did not see fit to put there.'" *Chin v. Merriot*, 470 Mass. at 537, quoting *Commissioner of Correction v. Superior Court Dep't of the Trial Court for the County of Worcester*, 446 Mass. at 126. "Any reformulation of the statutory crime. . . is a matter for the Legislature." *Commonwealth v. Bell*, 455 Mass. at 414. Accordingly, this Court should conclude the grand jury indeed did hear sufficient evidence to establish that these defendants

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[8] Of course, when one "obtains" property, one also "gain[s] or attain[s] [it]. . . usu[ally] by some planned action or method." This example offered by the Appeals Court therefore does nothing to support the Appeals Court's erroneous definition. Moreover, the Appeals Court's focus on the Latin etymology of "obtain" completely ignores the Anglo-Norman/French root of the word. The French root, "obtenir," meant "to gain, to achieve." Oxford English Dictionary Online, *supra*; *see* Merriam Webster Online, *supra.*

attempted to obtain by any means another person for commercial sex.

C. Factual Impossibility Does Not Defeat Probable Cause

The motion judge erred in allowing the defendants' motions to dismiss in this case because, relying on *Commonwealth v. Fan*, 490 Mass. 433 (2022), the judge concluded that the evidence failed to establish probable cause that the defendants violated the human trafficking statute because there was no actual person being sold for commercial sex given that it was law enforcement who posted the advertisements for commercial sex. (CA. 84-85). As the Appeals Court correctly concluded below, Add. 63, the motion judge's reliance on *Fan* was misplaced. "[I]t is of no consequence that [the person sold] was not a real person, because 'factual impossibility is not a defense to a crime.'" *Commonwealth v. Disler*, 451 Mass. 216, 223 (2008) (quoting *Commonwealth v. Bell*, 67 Mass. App. Ct. 266, 271 (2006)).

The facts and holding of *Fan* are distinguishable from these cases because the facts of these cases are distinctly

different from the facts of *Fan*. In *Fan*, Fan and a co-defendant operated five brothels throughout the Commonwealth. *Id.* at 435. Police conducted months-long surveillance and spoke with men who left the brothels. These men explained they had responded to advertisements on Backpage.com and gone to the brothels to pay for commercial sex. *Id.* The Commonwealth argued Fan was engaged in an ongoing scheme of human trafficking with multiple victims and this Court held a defendant may be found guilty so long as the Commonwealth proves "beyond a reasonable doubt that there was a victim, i.e., someone whom the defendant enabled or caused to engage in commercial sexual activity, [but] it need not prove the identity of that person as an element of the offense." *Id.* at 448.

In *Fan*, the persons sold for commercial sex were actual humans, which was established by the purchasers of those humans who admitted to law enforcement that they had just purchased sexual services with another person. *Id.* at 435. The theory in *Fan* was that Fan engaged in ongoing human

trafficking. By contrast, the Commonwealth's theory in the instant cases is that the defendants here *attempted* to engage in human trafficking. Such prosecutions are explicitly permitted by the plain terms of G.L. c. 265, § 50(a). The distinction is critical because where the crime charged is an attempt crime, there need not be an actual victim. *See Commonwealth v. Bell*, 67 Mass. App. Ct. 266, 267 (2006). This is true even where the underlying statute, like the human trafficking statute, uses language contemplating that another human is the victim of a crime. *See id.* at 270.

The decision in *Bell* illustrates this point well. In *Bell*, the Appeals Court held that Bell's indictments for attempted rape of a child and solicitation of sexual conduct for a fee should stand where there was no actual victim because the police were engaged in an undercover investigation—the same as in the instant cases. *See id.* at 267. *Bell* made an almost identical argument to that of the defendants here in their motions to dismiss: "that the statutory language of both of these crimes requires the presence of a victim as an

element, and since the child in this case did not really exist, the evidence before the grand jury was insufficient." *Id.* at 269-270. The Appeals Court soundly rejected that argument, explaining that the fact that there was no actual victim made the crimes factually impossible *to commit*, but factual impossibility is not a defense to any crime. *Id.* at 271-272.

As the Appeals Court correctly explained in *Bell*:

> [t]hat factual impossibility is not a defense reflects a judgment that a defendant should not be exonerated simply because of facts unknown to him which made it impossible for him to succeed.

Id. at 271. More particularly,

> In an undercover sting operation culminating in a defendant's conviction, "[w]hether the targeted victim . . . [actually exists], the defendant's conduct, intent, culpability, and dangerousness are all exactly the same."

Id. (quoting *In re Doe*, 855 A.2d 1100, 1106 (D.C. 2004)). In this situation,

> The defendant "is deserving of conviction, and just as much in need of restraint and corrective treatment as the defendant who did not meet with the unanticipated events which barred successful completion of the crime.

Id. (quoting LaFave, Substantive Criminal Law §11.5(a), at 234).

Just as in *Bell*, here the defendants, in writing, contracted to buy another person for commercial sex (ICA 40-47). Each defendant showed up at the prearranged location at the prearranged time for the commercial sexual services (ICA 40-47), inferably to engage in the contracted-for sexual services with another human. "Because the defendant[s] intended to commit the acts, took actions to carry out that intent, and [were] only precluded because the illegal acts could not physically be accomplished there was a factual impossibility." *Id.* at 272. The nonexistence of the human the defendants intended to purchase "is no less an impediment to the application of the criminal sanction than was the absence" of a child for the charged of attempted child rape, *id.* at 272; the absence of a wallet for a pickpocket, *Commonwealth v. McDonald*, 5 Cush. [365,] 367-368 [1850)]; the absence of a fetus in an illegal abortion, *Commonwealth v. Taylor,* 132 Mass. 261 (1882); or the failure of an attempted murderer to put enough poison in a victim's beverage, *Commonwealth v. Kennedy,* [170 Mass. 18,] 21-22 [(1879)]. Accordingly, the

motion judge erred in ruling that there was insufficient evidence before the grand jury to establish probable cause and his decision should be reversed.

CONCLUSION

For the foregoing reasons, the Commonwealth respectfully requests that this Honorable Court vacate the Superior Court's allowance of the defendants' motions to dismiss.

Respectfully submitted,
TIMOTHY J. CRUZ
District Attorney

BY: /s/ Julianne Campbell
Julianne Campbell
Assistant District Attorney
Plymouth County District Attorney's Office
166 Main Street
Brockton, Massachusetts 02301

Dated: November 7, 2024

COMMONWEALTH'S ADDENDUM

Rec'd 10-14-22

12

COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH, ss.	**SUPERIOR COURT CRIMINAL ACTION**
COMMONWEALTH vs. BRIAN DICK	**2183CR00347**
COMMONWEALTH vs. JAMES BI	**2183CR00348**
COMMONWEALTH vs. BRENDAN J. GARAFALO	**2183CR00349**
COMMONWEALTH vs. VIET H. NGUYEN	**2183CR00350**
COMMONWEALTH vs. ERIC VAN RIPER	**2183CR00351**

OMNIBUS MEMORANDUM OF DECISION AND ORDER ON DEFENDANTS' MOTIONS TO DISMISS

INTRODUCTION

On October 15, 2021, a Plymouth County Grand Jury issued indictments, charging the defendants, Brian Dick, James Bi, Brendan Garafalo, Viet Nguyen, and Eric Van Riper (collectively, the "Defendants"), with trafficking of persons for sexual servitude, in violation of G. L. c. 265, § 50(a) (the "Sex Trafficking Statute"), and engaging in sexual conduct for a fee, in violation of G. L. c. 272, § 53A. The Defendants now collectively move for dismissal of the trafficking charge, pursuant to Commonwealth v. McCarthy, 385 Mass. 160, 163 (1982), arguing the grand jury did not hear sufficient evidence to establish probable cause to support the charge.[1] As discussed below, after hearing, review of the parties' papers and the applicable case law, including the Supreme Judicial Court's recent holding in Commonwealth v. Fan, 490 Mass. 433 (2022), the court concludes the Defendants' motions to dismiss must be **ALLOWED**.

[1] Brian Dick filed Defendant's Motion to Dismiss Complaint as to Count I (Paper No. 18) in 2183CR00347; James Bi filed Defendant's Motion to Dismiss (Paper No. 17) in 2183CR00348; Brendan Garafalo filed Defendant's Motion to Dismiss (Paper No. 8) in 2183CR00349; and Eric Van Riper filed Defendant's Motion to Dismiss for Lack of Probable Cause to Issue the Complaint (Paper No. 8) in 2183CR00351. Viet Nguyen did not file an individual request for dismissal; however, on August 3, 2022, he filed Defendant's Motion for Permission to Join Co-Defendants' Motions to Dismiss (Paper No. 7) in 2183CR0050, which the court (Kirpalani, J.) allowed.

cc: AF PW 10-17-22 in hand

RELEVANT FACTS

The evidence pertaining to each of the Defendants is largely the same. Viewed in the light most favorable to the Commonwealth, that evidence established the following.[2] See Commonwealth v. Buono, 484 Mass. 351, 362 (2020) (in evaluating motion to dismiss, court views "the evidence before the grand jury in the light most favorable to the Commonwealth").

In August 2021, members of the Massachusetts State Police, the Rockland Police Department, the Boston Police Department's Human Trafficking Task Force, and the Plymouth County Sheriff's Department were investigating human trafficking in Plymouth County. In furtherance of this investigation, on August 5, 2021, they created and posted at least two fictional advertisements online, wherein they (i.e., law enforcement) posed as a fictitious female offering sexual services in exchange for money.

The first advertisement is entitled "In Call Specials Now—Columbian Princess—Local and Discreet." The advertisement contains four photographs of an adult female with a description of her race, weight, height, breast size, and genital grooming. The advertisement states that the female is 22-years-old and located in the Boston area. The advertisement lists services offered by the female, including, but not limited to, vaginal intercourse, anal intercourse, and oral intercourse. The advertisement states that the female accepts various payment methods, including Cash, CashApp, and Venmo. The advertisement states that the female sees both couples and men. Finally, the advertisement provides a telephone number via which interested parties may contact the female.

[2] During the proceedings before the grand jury, the Commonwealth presented one witness, Trooper Derek Cormier. In addition, the Commonwealth submitted various exhibits, including two advertisements that law enforcement had posted online featuring a female allegedly offering sexual services for a fee; and text messages the Defendants exchanged with the telephone number listed on the advertisements.

The second advertisement is nearly identical. It is entitled, "Sexy Columbian In-Call Available Now Cum Have Ur Needs Met." The advertisement contains three photographs of an adult female with a description of her race, weight, height, breast size, and genital grooming. The advertisement states that the female is 22-years-old and located in the Brockton/Rockland area. The advertisement lists services offered by the female, including, but not limited to, vaginal intercourse, anal intercourse, and oral intercourse. The advertisement states that the female accepts various payment methods including Cash, CashApp, and Venmo. The advertisement states that the female sees both couples and men. Lastly, the advertisement provides a telephone number via which interested parties may contact the female.

Each of the Defendants responded to one of the above advertisements by contacting the telephone number listed on the advertisement and exchanging text messages with the undercover police officer who was posing as the female. In these text messages, each of the Defendants offered to pay a fee in exchange for certain sexual services. Further, each of the Defendants agreed to meet the fictitious female at a local hotel; however, upon arriving for their planned assignations, each of the Defendants was arrested by law enforcement officers who were waiting to apprehend them. No money was ever exchanged, and no sexual services were ever performed. The indictments charging the Defendants with trafficking of persons for sexual servitude, in violation of the Sex Trafficking Statute, each list "society" as the victim.

DISCUSSION

The Defendants argue that they are entitled to dismissal of the indictments charging trafficking of persons for sexual servitude because violation of the Sex Trafficking Statute requires proof of an actual victim and, in their cases, there was no victim, since the female identified in the advertisements was fictitious and no money and/or sexual services were ever

exchanged. The court is persuaded, based on the SJC's discussion of the Sex Trafficking Statute in the Fan case, 490 Mass. at 445-452, that the defendants are correct.

I. Standard of Review

"'Although, in general, a "court will not inquire into the competency or sufficiency of the evidence before the grand jury," . . . "[a]t the very least, the grand jury must hear enough evidence to establish the identity of the accused and to support a finding of probable cause to arrest the accused for the offense charged."'" Commonwealth v. Reyes, 98 Mass. App. Ct. 797, 801 (2020), review den. sub nom. Commonwealth v. Alejandro, 486 Mass. 1111 (2021), quoting Buono, 484 Mass. at 365, quoting Commonwealth v. Rex, 469 Mass. 36, 39-40 (2014). This "'is a "considerably less exacting" standard than that required to support a conviction at trial.'" Id., quoting Commonwealth v. Stirlacci, 483 Mass. 775, 780 (2020), quoting Commonwealth v. O'Dell, 392 Mass. 445, 451 (1984). "'It requires "sufficient facts to warrant a person of reasonable caution in believing that an offense has been committed," not proof beyond a reasonable doubt.'" Id., quoting Stirlacci, 483 Mass. at 780, quoting Commonwealth v. Levesque, 436 Mass. 443, 447 (2002). In this case, the Commonwealth has not met its burden to demonstrate that the grand jury heard sufficient evidence to establish probable cause to believe the Defendants violated the Sex Trafficking Statute.

II. Analysis – The Sex Trafficking Statute

The Sex Trafficking Statute states, in relevant part, as follows:

> Whoever knowingly . . . subjects, or attempts to subject, or recruits, entices, harbors, transports, provides or obtains by any means, or attempts to recruit, entice, harbor, transport, provide or obtain by any means, another person to engage in commercial sexual activity . . . or causes a person to engage in commercial sexual activity . . . shall be guilty of the crime of trafficking of persons for sexual servitude] . . . .

G. L. c. 265, § 50(a). Recently, in Fan, the SJC discussed this provision; in particular, the Legislature's use of the phrases "another person" and "a person." 490 Mass. at 445-452. That discussion informs this court's decision regarding the Defendants' pending motions to dismiss.

In Fan, following an investigation involving various law enforcement agencies, investigators began to suspect that the defendant, Pingxia Fan, was working with her two codefendants to operate five brothels at apartments located in and around Boston. Id. at 435. Over several months, police conducted surveillance at these locations, observing the defendant carrying trash or groceries and, occasionally, driving women to and from these locations. Id. In addition, during their surveillance, police frequently observed men waiting outside these apartments and being admitted by young "Asian women" who came to the door wearing only bathrobes. Id. Police interviewed several of these men after they left the suspected brothels and they conceded that, while inside the apartments, they had exchanged money for sexual services. Id.

Police secured and simultaneously executed search warrants at each of the apartments under investigation. Id. at 436. When the search warrant was executed at the apartment in Boston, police found the defendant, her son, and two women. Id. Police learned that the defendant leased two of the apartments and held another lease jointly with one of her codefendants. Id. In addition, police obtained several advertisements offering massage services from the website Backpage.com appearing to reference the apartments by location, one of which included the defendant's cellphone number, and two of which were posted using an email address registered in the defendant's name. Id. In addition, the defendant's telephone records showed that she had been in communication with two of the men who admitted to having paid for and received sexual services at the apartments. Id.

Following execution of the search warrants, the defendant was arrested and charged with, among other things, five counts of human trafficking in violation of the Sex Trafficking Statute, one count for each of the five alleged brothels. Id. at 437. Later, she was indicted by the grand jury on these charges. Id. At trial, the prosecutor introduced testimony from a number of law enforcement officers, as well as several men who testified that they had received sexual services in exchange for cash payments at the identified locations. Id. Although the Commonwealth introduced photographs of each of the women who had been found in the apartments when the search warrants were executed and provided names for each, the prosecutor was unable to locate the majority of the suspected trafficking victims and only two victims testified. Id.

At trial, the defendant asked the judge to instruct the jury that, for each count of human trafficking, "they must 'be unanimous as to at least one human person' that the defendant had trafficked at the specific location set forth on the verdict slip." Id. at 445. Instead, the judge "instructed the jury, *sua sponte*, that '[t]he Commonwealth need not prove the identity of the person or persons engaged in prostitution, so long as it proves that one or more persons was engaged in commercial sexual activity at the location identified by the verdict slip.'" Id. On appeal, the defendant argued, among other things, that the identity of the particular trafficking victim is an essential element for violation of the Sex Trafficking Statute and thus, to convict, the jury needed to unanimously agree on the identity of the person who was trafficked for each count. Id. at 446.

The SJC rejected the defendant's argument in Fan, concluding that the Commonwealth need not prove a victim's identity to establish a violation of the Sex Trafficking Statute. Id. at 448. In doing so, the SJC spent considerable time expounding upon the Legislature's use of the phrases "another person" and "a person." Id. at 447-448. The Court concluded that the term

"another" refers to one "other than oneself or the one specified." Id. at 447, citing Webster's New Universal Unabridged Dictionary 85 (1996). And, that the term "person" means "a human being." Id., citing Webster's New Universal Unabridged Dictionary, at 1445. According to the Court, in combination, the use of these phrases indicates "that (1) the trafficking must be of a human being . . . and (2) one cannot be convicted of trafficking him- or herself[.]"

In Fan, the SJC clearly stated that to establish a violation of the Sex Trafficking Statute, the Commonwealth must prove that a defendant "(1) knowingly (2) 'enabled or caused,' by one of the statutorily enumerated means, (3) *another person* (4) to engage in commercial sexual activity." Id. at 448 (emphasis added), citing Commonwealth v. McGhee, 472 Mass. 405, 418 (2015) (stating Sex Trafficking Statute prohibits "individuals or entities from knowingly undertaking specified activities that will enable or cause another person to engage in commercial sexual activity"); see also Commonwealth v. Dabney, 478 Mass. 839, 857, cert. denied, --- U.S. ---, 139 S. Ct. 127 (2018). In reaching this conclusion, the SJC was careful to point out that, although proof of a victim's identity is not required, a violation of the Sex Trafficking Statute requires the Commonwealth to "prove beyond a reasonable doubt that there was a victim, i.e., someone whom the defendant enabled or caused to engage in commercial sexual activity[.]" 490 Mass. at 448.

With respect to the current matter, the grand jury heard insufficient evidence to establish probable cause to arrest the Defendants for violating the Sex Trafficking Statute. The grand jury heard no evidence that there were any actual victims in the cases involving any of the Defendants, as the woman in the advertisements was a fictitious individual created by law

enforcement, and there was no money and/or sexual services exchanged.[3] Consequently, there was no evidence that any of the Defendants knowingly enabled or caused, or attempted to enable or cause, *another person* to engage in commercial sexual activity. This conclusion comports with the purpose behind the Legislature's enactment of the Sex Trafficking Statute, which was "to 'change the focus of police and prosecutors from targeting prostitutes to going after . . . the pimps who profit from the transactions' by ensuring that traffickers, and not only the individuals solely engaged in commercial sexual activity, are prosecuted." Id. at 447, citing Dabney, 478 Mass. at 853, quoting Gov. Patrick Signs Bill Against Human Trafficking, Associated Press, Nov. 21, 2011.

CONCLUSION AND ORDER

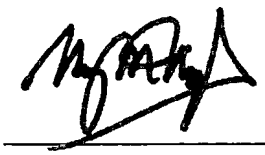
For the reasons explained above, insofar as they pertain to the indictments charging trafficking of persons for sexual servitude, in violation of G. L. c. 265, § 50(a), it is hereby **ORDERED** that:

1. Defendant's Motion to Dismiss Complaint as to Count I (Paper No. 18) in 2183CR00347 is **ALLOWED** and Indictment No. 001 in 2183CR00347 is **DISMISSED**;
2. Defendant's Motion to Dismiss (Paper No. 17) in 2183CR00348 is **ALLOWED** and Indictment No. 001 in 2183CR00348 is **DISMISSED**;
3. Defendant's Motion to Dismiss (Paper No. 8) in 2183CR00349 is **ALLOWED** and Indictment No. 001 in 2183CR00349 is **DISMISSED**;

[3] The indictments charging the Defendants with human trafficking in violation of the Sex Trafficking Statute identify "society," as the victim. In the court's view, this seems to be an acknowledge on the part of the Commonwealth that there was no identifiable victim in relation to these charges.

4. Defendant's Motion to Dismiss for Lack of Probable Cause to Issue the Complaint (Paper No. 8) in 2183CR00351 is **ALLOWED** and Indictment No. 001 in 2183CR00351 is **DISMISSED**; and
5. Viet Nguyen's request for dismissal in 2183CR00350 is **ALLOWED** and Indictment No. 001 in 2183CR00350 is **DISMISSED**.

SO ORDERED.



Maynard Kirpalani
Justice of the Superior Court

DATE: October 14, 2022

Commonwealth v. Garafalo

Appeals Court of Massachusetts

November 9, 2023, Argued; May 7, 2024, Decided

Nos. 23-P-268, 23-P-269, 23-P-270, 23-P-271, & 23-P-272.

Reporter
104 Mass. App. Ct. 161 *; 234 N.E.3d 987 **; 2024 Mass. App. LEXIS 66 ***; 2024 WL 2002716

COMMONWEALTH *vs*. **BRENDAN** J. **GARAFALO** (and nine companion cases[1]).

Notice: Further appellate review granted, 494 Mass. 1106 (2024).

Subsequent History: Appeal granted by *Commonwealth v. Garafalo, 2024 Mass. LEXIS 388 (Mass., Sept. 5, 2024)*

Prior History: **[***1]** Plymouth. INDICTMENTS found and returned in the Superior Court Department on October 15, 2021.

Motions to dismiss were heard by *Maynard M. Kirpalani*, J.

Counsel: *Cailin M. Campbell*, Assistant District Attorney, for the Commonwealth.

[*162] *Patrick J. Noonan* for the defendants (*Richard J. Sweeney*, for James Bi, *& Joshua D. Werner*, for Viet H. Nguyen, also present).

Judges: Present: DITKOFF, ENGLANDER, & WALSH, JJ.

Opinion by: ENGLANDER

Opinion

[989]** **ENGLANDER**, J. Massachusetts *G. L. c. 265, § 50*, the so-called "human trafficking" statute, enacted in 2011, makes it a crime for a person to (among other things) "attempt[ ] to recruit, entice … or obtain by any means, another person to engage in commercial sexual activity." In this case, five separate defendants have been charged with violating the statute, after they responded to advertisements posted by the State police and were arrested as part of a "sting" operation. A Superior Court judge dismissed the ensuing indictments, ruling that because the advertisements were fake and there was no actual "victim" in these instances, the "another person" requirement of the statute could not be met.

The case requires us to address the criminal law relative to **[***2]** attempt crimes, and whether so-called "factual impossibility" is a defense to the charge at issue (because there was no actual person who would have provided any sexual services). More generally, the case also requires us to consider whether and under what circumstances

[1] One against Brendan J. Garafalo and two each against Brian D. Dick, Eric P. VanRiper, James Bi, and Viet H. Nguyen. During the course of this appeal, we received a suggestion of death of the defendant Brian D. Dick and a request that the charges against him be dismissed. That issue should be taken up in the Superior Court.

the human trafficking statute can apply to persons sometimes referred to as "Johns" — that is, persons who seek the services of prostitutes but who do not otherwise cause or profit financially from the prostitution.

As to the former issue, we conclude that the Commonwealth may meet the "another person" element of the crime in the context of a law enforcement sting operation, and that the dismissal on that ground was incorrect. We nevertheless affirm the dismissal of the indictments, because the evidence before the grand jury did not establish **[**990]** probable cause that any of the defendants met the statutory requirement that they "recruit, entice … or obtain by any means" another person, so as to be guilty of "trafficking" that person. While the statute's language is indeed broad, we do not construe it to extend to conduct that merely responds to an offer from another person, but that does not otherwise cause or control **[***3]** the offering of commercial sex. As presented to the grand jury, each of the defendants responded to an advertisement offering sexual services, but not more, and thus the statutory language is not met.

Background. In August of 2021, a division of the State police posted two advertisements on the Internet. Each advertisement contained photographs and a description of a woman who purportedly was offering sexual services for a fee, and included a telephone number and the words "text me." On August 5, each of **[*163]** the five defendants separately contacted the telephone number in the advertisements. The communications thereafter differ somewhat from defendant to defendant, but eventually each defendant was provided the address of a hotel, where that defendant could come to meet the purported offeror of services. Upon arrival at the designated hotel room, each defendant was arrested by State troopers.

A grand jury indicted each defendant on two charges — G. L. c. 265, § 50, "human trafficking," and G. L. c. 272, § 53A, "engaging in sexual conduct for a fee." General Laws c. 265, § 50 (a), provides, in pertinent part:

> "Whoever knowingly: (i) … *attempts to recruit, entice*, harbor, transport, provide *or obtain by any means, another person* to engage in commercial **[***4]** sexual activity … shall be guilty of the crime of trafficking of persons for sexual servitude" (emphasis added).

As to penalty, the statute provides for a five-year mandatory minimum sentence. See G. L. c. 265, § 50 (a).

General Laws c. 272, § 53A (b), provides, in pertinent part:

> "*Whoever* pays, agrees to pay or *offers to pay another person to engage in sexual conduct … shall be punished* by imprisonment in the house of correction for not more than 2 and one-half years … *whether such sexual conduct occurs or not*" (emphasis added).

Notably, § 53A does not carry a mandatory minimum sentence.

The defendants each filed a motion to dismiss the charges as to G. L. c. 265, § 50, the human trafficking statute. They argued (among other things) that the facts presented to the grand jury were inadequate to establish probable cause because (1) there was no victim in these cases, and the statute requires that there be a victim for the crime to be completed (relying principally on language from Commonwealth v. Pingxia Fan, 490 Mass. 433, 191 N.E.3d 1027 [2022] [*Fan*]), and (2) the facts as to each defendant were otherwise insufficient to satisfy the statute, because the statutory language was not intended to encompass persons who merely responded to an advertisement and at most, offered to pay for sex. As to this latter argument, some **[***5]** defendants pointed out that the conduct alleged would violate the preexisting statute, G. L. c. 272, § 53A, and the fact that the acts were already criminal provided another reason not to read the recently enacted G. L. c. 265, § 50, as broadly as the Commonwealth contends.

[*164] After a hearing, the judge dismissed the human trafficking charges, accepting the argument that where there was no actual victim of the alleged crime, the "another person" requirement was not met. As a result, the

judge did not address **[**991]** whether the defendants' conduct met the "recruit, entice … or obtain by any means" language. The Commonwealth appeals.[2]

Discussion. 1. *The "another person" requirement*. We first address whether, under the circumstances, the Commonwealth could meet the statutory element that each defendant attempted to obtain "another person" for commercial sexual activity. The motion judge concluded that the Commonwealth could not, because "[t]he grand jury heard no evidence that there were any actual victims" in the defendants' cases. If that conclusion were correct, the human trafficking statute (and perhaps any other statute using such "another person" language) could not be invoked to prosecute attempt crimes against persons arrested **[***6]** as a result of a sting operation such as the one at issue.

The law of criminal attempt, however, is not so limited. Rather, it is well established that an attempt crime occurs when the defendant forms the intent to commit the criminal act and then overtly acts upon that intent, *Commonwealth v. Ortiz, 408 Mass. 463, 470, 560 N.E.2d 698 (1990)*, even if the crime could not be completed for reasons unknown to the defendant.[3] This court explained the principle in *Commonwealth v. Bell, 67 Mass. App. Ct. 266, 853 N.E.2d 563 (2006)*, a case involving a different statute but analogous facts. In *Bell* the defendant responded to a police sting operation, seeking to commit sexual acts against a young child. After his arrest, the defendant argued that he could not have committed attempted rape of a child, because the crime "requires the presence of a victim as an element, and … the child in this case did not really exist." *Id. at 269-270*.

This court rejected the defendant's argument in *Bell*, noting that "factual impossibility is not a defense to a crime." *67 Mass. App. Ct. at 271*. We explained that "factual impossibility arises when the crime cannot physically be effectuated, such as trying to pick a pocket that proves to be empty." *Id. at 270*. We expounded on the rationale as follows:

> **[*165]** "That factual impossibility is not a defense reflects a judgment that a defendant **[***7]** should not be exonerated simply because of 'facts unknown to him which made it impossible for him to succeed.' Thus, in an undercover sting operation culminating in a defendant's conviction, '[w]hether the targeted victim … [actually exists], the defendant's conduct, intent, culpability, and dangerousness are all exactly the same.' In such circumstance, the defendant is 'deserving of conviction and is just as much in need of restraint and corrective treatment as the defendant who did not meet with the unanticipated events which barred successful completion of the crime.'" (Citations omitted.)[4]

Id. at 271.

The reasoning of our opinion in **[**992]** *Bell* controls here.[5] The facts before the grand jury established probable cause that each of the defendants intended to pay another person for sexual acts. The defendants did not know

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[2] See ***Mass. R. Crim. P. 15 (a)***, as amended, 476 Mass. 1501 (2017) (Commonwealth's right to interlocutory appeal of decision granting motion to dismiss complaint or indictment). The separate appeals were consolidated in this court.

[3] In addition, the overt act must be sufficiently proximate to the carrying out of the crime. See *Commonwealth v. Bell, 455 Mass. 408, 414, 917 N.E.2d 740 (2009)*.

[4] The authorities often distinguish "factual impossibility" from "legal impossibility," but we need not dissect the distinction in this case. Factual impossibility is where the defendant intended to perform all the elements of a crime, but could not due to facts unknown. Legal impossibility is where the acts the defendant intends simply do not constitute a crime. See *Bell, 67 Mass. App. Ct. at 270*. See also 2 W.R. LaFave, Substantive Criminal Law § 11.5(a) (2023). Here, the evidence before the grand jury was that the defendant intended to commit an act with "another person."

[5] Our decision in *Bell* addressed questions reported by the trial judge. Thereafter the defendant in *Bell* was tried and convicted in the Superior Court, and on appeal from the convictions the Supreme Judicial Court again addressed an issue regarding the scope of attempt crimes. See *Commonwealth v. Bell, 455 Mass. at 412-417*. The issue presented to the Supreme Judicial Court

that the person described in the advertisement was fictitious; indeed, each defendant actually communicated with a person, and then arrived at the identified place and entered it. As stated in *Bell*, each defendant's "conduct, intent, culpability and dangerousness" were as if the other "person" — a victim — actually existed (citation omitted). *67 Mass. App. Ct. at 271*.

The defendants **[***8]** argue, however, that criminal liability is foreclosed by the Supreme Judicial Court's construction of the human trafficking statute in *Fan, 490 Mass. at 445-452*. We do not agree. The facts in *Fan* involved a defendant who ran multiple brothels. **[*166]** The evidence presented came from several customers of the brothels, as well as two of the women who provided services, but the evidence did not link particular customers to particular victims. The defendant argued that to prove a violation of the statute, the Commonwealth needed to charge and prove (and the jury needed to find) a "specific victim" that the defendant had trafficked "at the specific location" charged. *Id. at 445*. The court rejected that argument, holding that under the statute the Commonwealth did not need to prove the victim's identity. It concluded its analysis by stating:

> "Although the Commonwealth must prove beyond a reasonable doubt that there was a victim, i.e., someone whom the defendant enabled or caused to engage in commercial sexual activity, it need not prove the identity of that person as an element of the offense."

Id. at 448.

The defendants seize on the language that "the Commonwealth must prove that there was a victim," but in doing so they remove the **[***9]** statement from its context. The *Fan* court was not addressing an attempt crime, or issues raised by a law enforcement sting operation. Rather, the court was merely saying that the human trafficking crime must involve trafficking of someone other than the defendant who is charged — i.e., "another person." Put differently, a person could not be guilty of "trafficking" herself. *Fan, 490 Mass. at 447*. As noted above, that element is met here, because the defendants *attempted* to engage in commercial sexual activity with another person — the purported prostitute (actually, a police officer) with whom the defendants communicated. Nothing in *Fan* holds that an attempt crime cannot be proved in the circumstances here.[6]

[993]** 2. "*Recruit, entice … or obtain by any means*." That brings us to the defendants' separate argument for dismissal — in essence, that the human trafficking statute does not apply where a defendant responded to an advertisement offering sex for a fee, but did not initiate or impel the offer of sex or stand to profit from it.[7] They argue "that the law was intended to punish 'pimps' or those **[*167]** persons who traffic human beings for financial gain. … The [L]egislature did not intend to punish 'Johns' who offer **[***10]** another person a fee in exchange for sexual conduct." And, the defendants point out, *G. L. c. 272, § 53A*, which predates *G. L. c. 265, § 50*, *does* explicitly criminalize the simple offer of payment to engage in sexual conduct, "whether such sexual conduct occurs or not." The defendants contend that the existence of *G. L. c. 272, § 53A*, is evidence that *G. L. c. 265, § 50*, was not intended to encompass the conduct at issue. Moreover, they argue, the human trafficking statute's five-year mandatory minimum sentence further suggests that the human trafficking crime was intended to be different in kind than the conduct prohibited by *G. L. c. 272, § 53A*.

Some of the defendants' arguments have considerable force and, as discussed herein, we ultimately agree that the facts presented to the grand jury were not sufficient to establish a human trafficking charge. But the question before us is one of statutory interpretation, and as always when confronting such a question, we must start with the language of the statute. See *Worcester v. College Hill Props., LLC, 465 Mass. 134, 138-139, 987 N.E.2d 1236*

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was different from that before us in *Bell, 67 Mass. App. Ct at 270-271*, and nothing in the Supreme Judicial Court's *Bell* opinion detracts from the reasoning in our earlier decision.

[6] We note that if the defendants were correct, then their reasoning would also appear to foreclose the criminal charges in this case under *G. L. c. 272, § 53A*, as that statute also requires an offer to pay "another person."

[7] We consider this argument because, if correct, it would result in affirmance of the order below. See *Lopes v. Commonwealth, 442 Mass. 170, 181, 811 N.E.2d 501 (2004)*.

(2013) ("In interpreting the meaning of a statute, we look first to the plain statutory language"). That language is broader than the defendants contend. Notably, the Supreme Judicial Court has rejected previous efforts by defendants to limit the scope of the human trafficking **[***11]** statute (in ways other than the defendants argue here), relying primarily upon the breadth of the language the Legislature employed. See Commonwealth v. Dabney, 478 Mass. 839, 852-856, 90 N.E.3d 750, cert. denied, *139 S. Ct. 127, 202 L. Ed. 2d 78 (2018)*; Commonwealth v. McGhee, 472 Mass. 405, 418-420, 35 N.E.3d 329 (2015). Here, the Commonwealth once again relies on the statute's plain language — in particular, it argues that the defendants' alleged conduct falls within the words "entice," "recruit," or "obtain."

The Supreme Judicial Court has previously addressed the meaning of the words "entice" and "recruit," as used in the human trafficking statute, in Dabney, 478 Mass. at 852-856. In Dabney, a defendant convicted of human trafficking challenged the sufficiency of the evidence against him, arguing that he had merely encouraged the victim, a former prostitute, to begin prostituting again, but had not coerced her nor derived a financial benefit. See id. at 852. The Dabney court rejected those arguments. The court held that coercion or force, which is a required element of the Federal human trafficking crime, 18 U.S.C. § 1591, is not found in **[*168]** the language of G. L. c. 265, § 50, and is not an element of the Massachusetts crime. Id. at 855-856. Nor does the Massachusetts statute require that the defendant receive a financial benefit, as with a pimp: "an individual who knowingly enables or causes another person to engage in commercial sexual **[***12]** activity need not benefit, either financially or by receiving something **[**994]** of value" (citation omitted). Id. at 855.

The facts of Dabney, however, were materially different than the facts here. Although those facts did not necessarily include coercion, they did involve, unlike here, substantial efforts by the defendant to convince the victim to engage in prostitution. In Dabney, "[t]he jury could have found that the defendant 'enticed' and 'recruited' the victim to engage in prostitution because he told her that she was beautiful and would make 'good money' from prostitution, controlled the terms of her client visits, encouraged her to advertise on Backpage, and helped her pay for and set up the Backpage account." Dabney, 478 Mass. at 854.

The Dabney court addressed the meaning of "entice" and "recruit" in the context of the above facts. The court noted that the dictionary definition of "entice" is to "incite," "instigate," "draw on by arousing hope or desire," "allure," "attract," "draw into evil ways," "lead astray," or "tempt." Dabney, 478 Mass. at 855, quoting Webster's Third New International Dictionary 757 (1993). The court concluded that "[o]ne may entice, for example, simply by making an attractive offer." Dabney, supra at 856. Similarly, the court listed the **[***13]** definitions of "recruit" as to "hire or otherwise obtain to perform services," to "secure the services of" another, to "muster," "raise," or "enlist." *Id.*, quoting Webster's, *supra* at 1899. In Dabney, the court concluded that the definitions of "entice" and "recruit" were met by the facts in that case, and affirmed the convictions of human trafficking. *Id.*

The Commonwealth argues that the facts presented to the grand jury in this case are similarly sufficient to meet the statutory language — including not only "entice" and "recruit" but also "obtain" — but we are not persuaded. In our view, both "entice" and "recruit," as used in the statute, contain an element of causing another person to engage in an act or practice in which the person was not otherwise intending to engage. Many, if not all, of the definitions cited in Dabney contain this aspect. It is present, for example, in the words "tempt," and "incite," and perhaps most usefully, in "attract." Dabney, 478 Mass. at 855-856. Notably, the Dabney court's example of a broad reading of entice uses the **[*169]** word "attract" — "to make an *attractive* offer" (emphasis added). *Id.* And to attract means that the allegedly attracting party (the defendant) must at least have initiated the behavior of the party attracted **[***14]** (the victim). Indeed, the element of causing someone to do something that they otherwise were not intending is present in the Dabney court's description of the defendant's conduct in that case — the defendant "controlled," "encouraged," and "helped" the victim. Id. at 854. Nor do we think the word "recruit" is broader than "entice." "Recruit," in the context of human trafficking, similarly means that the defendant must initiate the concept that the victim will engage in commercial sexual activity.[8] See Heritage Jeep-Eagle, Inc. v. Chrysler Corp., 39 Mass. App. Ct. 254, 258, 655 N.E.2d 140 (1995) ("While courts should look to dictionary definitions and accepted

[8] For example, an employer has not "recruit[ed]" a job applicant who simply approached the employer and asked for a job.

meanings in other legal contexts … their interpretations must remain faithful to the purpose and construction of the statute as a whole").

[995]** The facts of this case do not fall within the above construction. The defendants here responded to advertisements posted by someone else — they did not initiate the offer of commercial sex nor, on these facts, did they take actions to cause another person to do something that person did not otherwise intend to do. The defendants did not "incite," or "tempt," nor did they "attract." Rather, the person they were communicating with had initiated the offer, and no tempting was required or occurred. **[***15]** [9]

The next question is whether the statute's last phrase of the list — "obtain by any means" — has even greater breadth than "recruit" or "entice," such that it can encompass the conduct of the defendants here. We conclude that it does not. The dictionary definition of "obtain" is perhaps broader than "entice" or "recruit" — it is "to gain or attain … usu[ally] by some planned action or method." Webster's Third New International Dictionary 1559 (2002). Arguably, this definition — to "attain" — could encompass actions of defendants who merely respond to an advertisement and complete (or attempt to complete) the sexual transaction first proposed by the offeror.

In the context of the human trafficking statute, however, we decline to read "obtain" so broadly, for several reasons. First, the **[*170]** word itself has a narrower but commonly used meaning, which is not simply to get or attain, but to possess or control. "Obtain" derives from the Latin "tenere" — to hold. One "obtains" property, for example, which means they hold or possess it. Similarly, here the statute requires the defendant to "obtain" a "person." Context matters, and the use of "obtain" in the statute is in the context of "trafficking," **[***16]** which implies some level of controlling or changing the victim's will or intent.[10]

So construed, the defendants' conduct here did not attempt to obtain a person, because the defendants did not attempt to possess or control someone. They responded to an offer in accordance with its terms (so far as appears from the facts before the grand jury). We are bolstered in this view by at least two useful aids to construction of statutes. The first is the doctrine of ejusdem generis, which states that where, as here, "general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Banushi v. Dorfman, 438 Mass. 242, 244, 780 N.E.2d 20 (2002)*, quoting 2A N.J. Singer, Sutherland Statutory Construction § 47.17, at 273-274 (6th ed. rev. 2000). See *Powers v. Freetown-Lakeville Regional Sch. Dist. Comm., 392 Mass. 656, 660 n.8, 467 N.E.2d 203 (1984)*. Here, the words that precede "obtain" in the list contain an element either of causing the other "person" to do something they otherwise did not intend (recruit or entice), or of somehow physically affecting the other person's actions (transport, harbor, provide). The Commonwealth would have us construe "obtain" not to be limited in either of these ways, but the **[**996]** doctrine of ejusdem **[***17]** generis suggests otherwise, and thus supports the construction of "obtain" that we adopt here.

The second helpful aid is an important piece of legislative history. As the defendants point out, the "payment for sex" statute, *G. L. c. 272, § 53A*, predates the human trafficking statute, and expressly criminalizes the act of offering to pay for sex. Of course, the fact that another criminal statute already applies to the conduct at issue does not, standing alone, mean that we should construe such conduct to be excepted from the human trafficking statute. The **[*171]** Legislature can (and often does) criminalize the same conduct under two different statutes. See *Dabney, 478 Mass. at 855-856*; *Commonwealth v. Hudson, 404 Mass. 282, 285-286, 535 N.E.2d 208 (1989)*. Here, however, the Legislature considered and amended *§ 53A* *at the same time* that it enacted the human trafficking statute.

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[9] As is evident from the above discussion, a person who pays another for sex thus could violate the human trafficking statute, if their conduct also amounted to enticing or recruiting a person to engage in commercial sexual activity where the person did not previously so intend.

[10] We are here construing only the word "obtain." The words "entice" or "recruit" do not require that the defendant control the victim, and in construing "obtain" we are not reimporting a general element of coercion into the statute. Nor does the level of control for "obtain[ing]" necessarily have to rise to the level of coercion.

We find the Legislature's amendment to G. L. c. 272, § 53A, to be material to our analysis here.[11] The human trafficking statute was first enacted on November 21, 2011, as the twenty-third section of a comprehensive bill that addressed several aspects of sex crimes in the Commonwealth. See House Bill No. 3808, § 23 (Nov. 14, 2011). At the same time, in the twenty-fifth section of the bill, the Legislature amended G. L. c. 272, § 53A, by (1) separating out the crime of offering to pay for sex, and (2) increasing the maximum **[***18]** possible punishment for that crime to two and one-half years in the house of correction. See House Bill No. 3808, § 25 (Nov. 14, 2011). Notably, however, the Legislature did *not* establish a mandatory minimum sentence for the crime of offering to pay for sex.

This legislative history is consistent with our conclusion, as it indicates that the same Legislature that enacted a five-year man- **[*172]** datory minimum sentence for human trafficking decided to treat the crime of agreeing to pay for sex differently, with a lesser, but increased, penalty. To be clear, we do not construe this history as creating a carve out, such that the human trafficking statute does not apply to any actions that fall within G. L. c. 272, § 53A. **[**997]** The language of the human trafficking statute that we have already discussed — words like "entice," "recruit" and "obtain" — plainly can encompass some conduct also covered by § 53A.[12] Where we find the history helpful, however, is in suggesting that § 53A sufficiently differs from G. L. c. 265, § 50 that some conduct covered by § 53A is not covered by § 50, and thus not subject to a five-year mandatory minimum sentence. The conduct alleged by the Commonwealth here falls into that category. As the evidence presented to the grand **[***19]** jury did not as a matter of law constitute "entic[ing]," "recruit[ing]," or "obtain[ing]" "another person" so as to constitute trafficking of a person for sexual servitude, the orders dismissing the human trafficking indictments against each defendant are affirmed.

So ordered.

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[11] The parties have each cited other purported "legislative history" to us, but we do not find the other history helpful to our analysis. The defendants, for example, cite a statement made by a single legislator during discussion of the house bill precursor to G. L. c. 265, § 50: "It's not the old fashioned model of trafficking. … We will look at perpetrators as persons who are trafficking other human beings *for financial gain*" (emphasis added). State House News Service (House Sess.), Nov. 15, 2011. As noted above, the Supreme Judicial Court has expressly rejected the notion that the statute criminalizes only actions of defendants that are directed at financial gain. See McGhee, 472 Mass. at 418-420. But in any event the cited statement carries little or no weight as "legislative history": "[e]vidence as to statements attributed to individual legislators as to their motives or mixtures of motives in considering legislation are not an appropriate source from which to discover the intent of the legislation." Administrative Justice of the Hous. Court Dep't v. Commissioner of Admin., 391 Mass. 198, 205, 461 N.E.2d 243 (1984).

The Commonwealth's purported history is equally unhelpful. The Commonwealth cites a quote from Dabney, 478 Mass. at 853, to the effect that the Legislature intended to "change the focus … from targeting prostitutes to going after *the men who pay for sex with them*" (emphasis added), suggesting that Johns are indeed covered by the statute. The quote, however, could be understood to refer to the amendments in the legislation that increased the punishment for the persons paying for sex, which previously were the same as those for sex workers. Moreover, the quote is not from the legislative history of § 50, but rather from personal comments made by then State Attorney General, Martha Coakley, following then Governor Deval Patrick's signing the bill into law. Gov. Patrick Signs Bill Against Human Trafficking, Associated Press, Nov. 21, 2011.

[12] The words "by any means" do not add materially to our analysis of the meaning of "entice," "recruit," or "obtain." "By any means" evidences the Legislature's intent that the statute have a broad scope. But the phrase "by any means" does not change the meaning of the words that it accompanies.

G.L. c. 265, § 49

Section 49. As used in sections 50 to 51, inclusive, the following words shall, unless the context clearly requires otherwise, have the following meanings:

"Commercial sexual activity", any sexual act on account of which anything of value is given, promised to or received by any person.

"Financial harm", a detrimental position in relation to wealth, property or other monetary benefits that occurs as a result of another person's illegal act including, but not limited to, extortion under by section 25, a violation of section 49 of chapter 271 or illegal employment contracts.

"Forced services", services performed or provided by a person that are obtained or maintained by another person who: (i) causes or threatens to cause serious harm to any person; (ii) physically restrains or threatens to physically restrain another person; (iii) abuses or threatens to abuse the law or legal process; (iv) knowingly destroys, conceals, removes, confiscates or possesses any actual or purported passport or other immigration document, or any other actual or purported government identification document, of another person; (v) engages in extortion under section 25; or (vi) causes or threatens to cause financial harm to any person.

"Services", acts performed by a person under the supervision of or for the benefit of another including, but not limited to, commercial sexual activity and sexually-explicit performances.

"Sexually-explicit performance", an unlawful live or public act or show intended to arouse or satisfy the sexual desires or appeal to the prurient interests of patrons.

G.L. c. 265, § 50 (a)

Section 50. (a) Whoever knowingly: (i) subjects, or attempts to subject, or recruits, entices, harbors, transports, provides or obtains by any means, or attempts to recruit, entice, harbor, transport, provide or obtain by any means, another person to engage in commercial sexual activity, a sexually-explicit performance or the production of unlawful pornography in violation of chapter 272, or causes a person to engage in commercial sexual activity, a sexually-explicit performance or the production of unlawful pornography in violation of said chapter 272; or (ii) benefits, financially or by receiving anything of value, as a result of a violation of clause (i), shall be guilty of the crime of trafficking of persons for sexual servitude and shall be punished by imprisonment in the state prison for not less than 5 years but not more than 20 years and by a fine of not more than $25,000. Such sentence shall not be reduced to less than 5 years, or suspended, nor shall any person convicted under this section be eligible for probation, parole, work release or furlough or receive any deduction from his sentence for good conduct until he shall have served 5 years of such sentence. No prosecution commenced under this section shall be continued without a finding or placed on file.

G. L. c. 272, § 53A

Section 53A. (a) Whoever engages, agrees to engage or offers to engage in sexual conduct with another person in return for a fee, shall be punished by imprisonment in the house of correction for not more than 1 year or by a fine of not more than $500, or by both such imprisonment and fine, whether such sexual conduct occurs or not.

(b) Whoever pays, agrees to pay or offers to pay another person to engage in sexual conduct, or to agree to engage in sexual conduct with another person, shall be punished by imprisonment in the house of correction for not more than 2

and one-half years or by a fine of not less than $1,000 and not more than $5,000, or by both such imprisonment and fine, whether such sexual conduct occurs or not.

(c) Whoever pays, agrees to pay or offers to pay any person with the intent to engage in sexual conduct with a child under the age of 18, or whoever is paid, agrees to pay or agrees that a third person be paid in return for aiding a person who intends to engage in sexual conduct with a child under the age of 18, shall be punished by imprisonment in the state prison for not more than 10 years, or in the house of correction for not more than 2 and one-half years and by a fine of not less than $3,000 and not more than $10,000, or by both such imprisonment and fine, whether such sexual conduct occurs or not; provided, however, that a prosecution commenced under this section shall not be continued without a finding or placed on file.

2011 Mass. H.B. 3808 § 25

Said chapter 272 is hereby further amended by striking out section 53A, as so appearing, and inserting in place thereof the following section:-

Section 53A.

(a) Whoever engages, agrees to engage or offers to engage in sexual conduct with another person in return for a fee, shall be punished by imprisonment in the house of correction for not more than 1 year or by a fine of not more than $ 500, or by both such imprisonment and fine, whether such sexual conduct occurs or not.

(b) Whoever pays, agrees to pay or offers to pay another person to engage in sexual conduct, or to agree to engage in sexual conduct with another person, shall be punished by imprisonment in the house of correction for not more than 2 and one-half years or by a fine of not less than $ 1,000 and not more than $ 5,000, or by both such imprisonment and fine, whether such sexual conduct occurs or not.

(c) Whoever pays, agrees to pay or offers to pay any person with the intent to engage in sexual conduct with a child under the age of 18, or whoever is paid, agrees to pay or agrees that a third person be paid in return for aiding a person who intends to engage in sexual conduct with a child under the age of 18, shall be punished by imprisonment in the state prison for not more than 10 years, or in the house of correction for not more than 2 and one-half years and by a fine of not less than $ 3,000 and not more than $ 10,000, or by both such imprisonment and fine, whether such sexual conduct occurs or not; provided, however, that a prosecution commenced under this section shall not be continued without a finding or placed on file.

18 U. S. C. § 1591

(a) Whoever knowingly—
(1) in or affecting interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States, recruits, entices, harbors, transports, provides, obtains, advertises, maintains, patronizes, or solicits by any means a person; or

(2) benefits, financially or by receiving anything of value, from participation in a venture which has engaged in an act described in violation of paragraph (1), knowing, or, except where the act constituting the violation of paragraph (1) is advertising, in reckless disregard of the fact, that means of force, threats of force, fraud, coercion described in subsection (e)(2), or any combination of such means will be used to cause the person to engage in a commercial sex act, or that the person has not attained the age of 18 years and will be caused to engage in a commercial sex act, shall be punished as provided in subsection (b).

CERTIFICATE OF SERVICE

I, Julianne Campbell, hereby certify under the pains and penalties of perjury that I have today made service for the Commonwealth on the defendants via the Tyler e-filing and e-service system by sending a copy of the brief and record appendix RE: *Commonwealth v. Garafalo et. al.,* SJC No. 13652, to counsel for the defendants by e-filing (or e-mailing) to the offices of

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Dated: November 7, 2024

CERTIFICATION

Commonwealth v. GARAFALO et. al
SJC-13652

I hereby certify that, to the best of my knowledge, this brief complies with the rules of court that pertain to the filing of briefs, including those rules specified in Mass. R. App. P. 16(k). This brief complies with the length limit of Mass. R. App. P. 20: it is written in a proportionally spaced font, 14-point Century Schoolbook, and contains approximately 7, 302 non-excluded words, as determined by using Microsoft Word 2010.

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Dated: November 7, 2024