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SJC-13652

COMMONWEALTH vs. BRENDAN J. GARAFALO  
(and nine companion cases<sup>1</sup>).

Plymouth. January 6, 2025. - May 2, 2025.

Present: Budd, C.J., Gaziano, Kafker, Wendlandt, & Georges, JJ.

Trafficking. Prostitution. Attempt. Statute, Construction.  
Probable Cause. Practice, Criminal, Dismissal. Words,  
"Obtain by any means," "Entice," "Recruit."

Indictments found and returned in the Superior Court  
Department on October 15, 2021.

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

After review by the Appeals Court, 104 Mass. App. Ct. 161  
(2024), the Supreme Judicial Court granted leave to obtain  
further appellate review.

Julianne Campbell, Assistant District Attorney, for the  
Commonwealth.

Patrick J. Noonan (Richard J. Sweeney, Sabrina Bonanno,  
& Joshua D. Werner also present) for the defendants.

Andrea Joy Campbell, Attorney General, & Nicole Nixon,  
Assistant Attorney General, for the Attorney General.

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<sup>1</sup> One against Brandon J. Garafalo and two each against Brian  
D. Dick, Eric P. VanRiper, James Bi, and Viet H. Nguyen.

WENDLANDT, J. This case presents the question whether an individual who responds to an advertisement for commercial sexual services ostensibly from an adult sex worker purporting to be acting independently, selects from among the types of sexual services offered by the sex worker, agrees to pay the price set by the sex worker for the selected services, and goes to a location determined by the sex worker has engaged in "the crime of trafficking of persons for sexual servitude" in violation of G. L. c. 265, § 50 (sex trafficking statute or statute). We conclude that such an individual has not. On that basis, we affirm the decision of the Superior Court judge dismissing the indictments charging violation of the sex trafficking statute by the five defendants in these consolidated cases, each of whom was indicted on proof before a grand jury that they essentially engaged in the acts described supra.<sup>2</sup>

1. Background. a. Facts.<sup>3</sup> In August 2021, each defendant responded to an online advertisement ostensibly offering sexual services for a fee.<sup>4</sup> The advertisement contained photographs of

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<sup>2</sup> We acknowledge the amicus brief submitted by the Attorney General.

<sup>3</sup> "We recite the facts presented to the grand jury in the light most favorable to the Commonwealth . . . ." Commonwealth v. Clinton, 491 Mass. 756, 758 (2023).

<sup>4</sup> There were two online advertisements; as relevant to our analysis, however, the details of each were the same.

an adult woman, a list of sexual services offered, and contact information for the woman. The advertisement stated that the woman depicted was "independent," meaning -- as clarified in one text message exchange between the ostensible sex worker and one of the defendants -- that the woman was not affiliated with a "pimp" or "boyfriend." The advertisement also contained a "legal disclaimer," which reserved the woman's "right not to enter into any arrangement . . . for any . . . reason at [her] sole discretion."

Using the contact information in the advertisement, each defendant called or sent a text message to the woman. In the telephone calls and text message exchanges that followed, each defendant selected sexual services from a list of services offered in the advertisement and agreed to pay the fee set by the woman. Each defendant was given a specific time and location for the prearranged encounter. Upon arriving at the appointed time and place, each defendant received a text message identifying a particular hotel room where the sexual services were to be performed.

Unbeknownst to the defendants, however, the advertisement had been posted by State police troopers and local police officers as part of a sting operation. The ostensible sex worker in each case was an undercover police officer.

Approaching the specified room, each defendant was met by police officers and arrested.

b. Prior proceedings. In October 2021, a Plymouth County grand jury returned indictments charging each defendant with trafficking of persons for sexual servitude, under the sex trafficking statute; and engaging in sexual conduct for a fee, in violation of G. L. c. 272, § 53A (sex for a fee statute). The defendants filed motions to dismiss the sex trafficking indictments pursuant to Commonwealth v. McCarthy, 385 Mass. 160 (1982),<sup>5</sup> alleging that the facts presented to the grand jury did not establish probable cause to support the sex trafficking charges.

A Superior Court judge allowed the motions on the basis that the defendants did not attempt to traffic "another person" because the purported sex worker, unbeknownst to the defendants, was a police officer working undercover as part of a sting operation. The Commonwealth appealed.

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<sup>5</sup> In Commonwealth v. McCarthy, 385 Mass. 160, 163 (1980), we set forth the standard for a defendant to challenge whether the proof before the grand jury was insufficient to "establish the identity of the accused . . . and probable cause to arrest him." If "the grand jury did not have before it any evidence of criminality by the defendant," the indictment must be dismissed to protect "against unfounded criminal prosecutions." Id., quoting Lataille v. District Court of E. Hampden, 366 Mass. 525, 532 (1974).

Although disagreeing with the Superior Court judge's reasoning, the Appeals Court affirmed the dismissal of the defendants' indictments, concluding that "the evidence presented to the grand jury did not as a matter of law . . . constitute trafficking of a person for sexual servitude." Commonwealth v. Garafalo, 104 Mass. App. Ct. 161, 172 (2024). The Commonwealth filed a timely petition for further appellate review, which we allowed.

2. Discussion. a. Standards of review. We review de novo "a judge's decision to dismiss for lack of sufficient evidence [to support an indictment]" and "do not defer to the judge's factual findings or legal conclusions." Commonwealth v. Clinton, 491 Mass. 756, 765 (2023), quoting Commonwealth v. Stirlacci, 483 Mass. 775, 780-781 (2020). We consider only whether the "grand jury have heard sufficient evidence, when viewed in the light most favorable to the Commonwealth, to warrant a person of reasonable caution in believing that the identified defendant has committed each of the elements of the charged offense." Clinton, supra, quoting Stirlacci, supra at 780. "The 'probable cause' standard is a 'considerably less exacting standard' than proof beyond a reasonable doubt, which is required to support a conviction at trial" (quotation omitted). Clinton, supra, quoting Stirlacci, supra.

We likewise review questions of statutory construction de novo. Conservation Comm'n of Norton v. Pesa, 488 Mass. 325, 331 (2021). "Our primary goal in interpreting a statute is to effectuate the intent of the Legislature." Id., quoting Casseus v. Eastern Bus Co., 478 Mass. 786, 795 (2018). In doing so, we abide by "[t]he general and familiar rule," which

"is that a statute must be interpreted 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."

Pesa, supra, quoting Commissioner of Revenue v. Dupee, 423 Mass. 617, 620 (1996). "[O]ur analysis begins with the principal source of insight into legislative intent -- the plain language of the statute" (quotations omitted). Commonwealth v. Rainey, 491 Mass. 632, 641 (2023), quoting Patel v. 7-Eleven, Inc., 489 Mass. 356, 362 (2022), S.C., 494 Mass. 562 (2024). And in the absence of statutory definitions, we may "derive the words' usual and accepted meanings from sources presumably known to the statute's enactors, such as their use in other legal contexts and dictionary definitions." Curtatone v. Barstool Sports, Inc., 487 Mass. 655, 658 (2021), quoting Commonwealth v. Matta, 483 Mass. 357, 372 (2019). "We do not construe terms in isolation; instead, we consider the specific language of a

provision in the context of the statute as a whole." Garcia v. Steele, 492 Mass. 322, 326 (2023).

b. Factual impossibility. Because the defendants continue to press the argument on appeal, we pause briefly to address the question whether, in view of the fact that the supposed sex worker was actually an undercover police officer and although the defendants did not know that fact at the time, it was impossible for them to have attempted to traffic "another person" as required by the statute. As relevant here, the statute provides that

"[w]hoever knowingly . . . 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" (emphases added).

G. L. c. 265, § 50 (a).

It is a basic proposition of our criminal laws that factual impossibility<sup>6</sup> is not a defense to a charge of attempt. See

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<sup>6</sup> "Factual impossibility occurs when the objective of the defendant is proscribed by the criminal law but a [physical] circumstance unknown to the [defendant] prevents him from [accomplishing] that [intended] objective" (citation omitted). Commonwealth v. Bell, 67 Mass. App. Ct. 266, 270 (2006). In the context of charges arising out of undercover sting operations, "[w]hether the targeted victim . . . [actually exists], the defendant's conduct, intent, culpability, and dangerousness are all exactly the same" (citation omitted). Id. at 271. To be sure, the defendants couch their argument in terms of the absence of the element of "another person"; however, this characterization does not alter the crux of their claim, which is one of factual impossibility.

Commonwealth v. Peaslee, 177 Mass. 267, 272-274 (1901)

(collecting cases involving convictions of attempted crimes);

2 W.R. LaFave, Substantive Criminal Law § 11.5(a)(2) (3d ed.

2024) ("All courts are in agreement that what is usually

referred to as 'factual impossibility' is no defense to a charge

of attempt"). See also Commonwealth v. Disler, 451 Mass. 216,

223 (2008), quoting Commonwealth v. Bell, 67 Mass. App. Ct. 266,

271 (2006) (where defendant was convicted of violating child

enticement statute, G. L. c. 265, § 26C, "it is of no

consequence that [the child] was not a real person, because

'factual impossibility is not a defense to a crime'").<sup>7</sup>

Accordingly, as the Appeals Court concluded, the Superior Court

judge erred in dismissing the indictments on that basis. See

Garafalo, 104 Mass. App. Ct. at 164-166.

c. Trafficking of persons for sexual servitude. We turn to the question whether the conduct of responding to the advertisements for commercial sexual services, agreeing to the terms of the proposed sexual tryst, and going to the locale set

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<sup>7</sup> The defendants' reliance on our decision in Commonwealth v. Fan, 490 Mass. 433, 448 (2022), is misplaced. There, in connection with the prosecution of a brothel owner, we concluded that the Commonwealth need not prove the identity of the victims who were trafficked with particularity. Id. at 453-454. Instead, it was sufficient for the Commonwealth to show that a victim was trafficked. Id. We did not address, much less alter, the basic principle of law that factual impossibility is not a defense to an attempt crime.



by the sex worker for the performance of the services comprised "the crime of trafficking of persons for sexual servitude."

G. L. c. 265, § 50 (a). The Commonwealth contends that such conduct supports probable cause that the defendants each attempted "to recruit, entice, . . . or obtain by any means" the sex worker, as proscribed by the statute. Id.

i. Attempt to entice and to recruit. Relying on our prior case law, we readily dispose of the Commonwealth's argument that the defendants' conduct constituted an attempt to "entice" or to "recruit," each of which requires conduct by the perpetrator aimed to persuade the recipient. See Commonwealth v. Dabney, 478 Mass. 839, 856, cert. denied, 586 U.S. 846 (2018) ("Evidence introduced at trial showed that the victim returned to prostitution following the defendant's specific encouragement"); Commonwealth v. McGhee, 472 Mass. 405, 416 (2015) (statute requires "knowing commission of specified acts for the purpose of enabling or causing another person to engage in commercial sexual activity").

We have explained that "entice" means to allure, to attract, or to tempt. See Dabney, 478 Mass. at 855, quoting Webster's Third New International Dictionary 757 (1993) (noting dictionary definitions of "entice," meaning "to 'incite,' 'instigate,' 'draw on by arousing hope or desire,' 'allure,'

'attract,' 'draw into evil ways,' 'lead astray,' or 'tempt').<sup>8</sup>

"[O]ne may entice, for example, simply by making an attractive offer."<sup>9</sup> Dabney, supra at 856. Similarly, the word "recruit" connotes conduct intended to persuade one to join a scheme, organization, or enterprise.<sup>10</sup> See Cambridge Dictionary Online,

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<sup>8</sup> See also Oxford English Dictionary Online ("entice" means "to allure, attract by the offer of pleasure or advantage; esp[ecially] to allure insidiously or adroitly"). See generally G. L. c. 265, § 26C ("entice" as used in crime of enticing child under age sixteen "shall mean to lure, induce, persuade, tempt, incite, solicit, coax or invite"); G. L. c. 265, § 26D (same for crime of enticement of child under age eighteen to engage in prostitution, human trafficking, or commercial sexual activity).

<sup>9</sup> Our decision in Dabney is instructive. There, the defendant told the victim, a person who previously had been a sex worker, "that she was beautiful and would make 'good money' from prostitution, controlled the terms of her client visits, encouraged her to advertise on Backpage, [a website that allows users to create posts offering various products and services,] and helped her pay for and set up the Backpage account." Dabney, 478 Mass. at 854. We concluded that the defendant's conduct aimed to persuade the victim to engage in commercial sexual activity and thus fell within the scope of the terms "entice" and "recruit." See id. See also McGhee, 472 Mass. at 409-410 ("the defendants started talking with [the victim] about a business arrangement whereby she could 'make a lot of money,' 'have a nice car,' and 'have a nice apartment,'" which victim understood as engaging in prostitution).

<sup>10</sup> Seizing on our reference in Dabney to dictionary definitions of the term "recruit" as "to 'hire or otherwise obtain to perform services,' [or] to 'secure the services of' another" (citation omitted), Dabney, 478 Mass. at 856, the Commonwealth contends that "recruit" captures the defendants' conduct because they each attempted to hire the sex worker. This argument fails to consider that, in addition to these definitions, we simultaneously noted definitions of the term "recruit" to mean "to 'muster,' 'raise,' or 'enlist.'" Id., quoting Webster's Third New International Dictionary 1899

<https://dictionary.cambridge.org/dictionary/english/recruit>  
 [https://perma.cc/YK6W-65RR] ("recruit" means "to persuade someone to work for a company or become a new member of an organization").

Importantly, although the terms "entice" and "recruit" require proof that the defendant engaged in conduct aimed at alluring, attracting, tempting, or persuading the victim to engage in commercial sexual activity, we reject the defendants' additional suggestion that these acts require proof of the victim's state of mind. As we have repeatedly stated, the central focus of the statute is the defendant's conduct and the defendant's state of mind; whether the victim was predisposed or otherwise willing to engage in commercial sexual activity is not an element of the crime proscribed.<sup>11</sup> See, e.g., Dabney, 478 Mass. at 856 (in connection with determination that defendant "enticed" and "recruited" victim, stating that "[t]he fact that

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(1993). These latter terms inform the type of "hiring" conduct captured by the term "recruit," which, as set forth supra, requires conduct intended to persuade someone to join a scheme, organization, or enterprise. See Cambridge Dictionary Online, <https://dictionary.cambridge.org/dictionary/english/recruit> [https://perma.cc/YK6W-65RR]. See also Oxford English Dictionary Online ("recruit" means "to induce [an athlete] to enrol[1] at a college or university").

<sup>11</sup> The elements of the crime of trafficking of persons for sexual servitude are 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." Fan, 490 Mass. at 448.

. . . the victim had been engaged in prostitution . . . before she met the defendant does not insulate him"); McGhee, 472 Mass. at 426-427 ("[I]t was irrelevant whether [the victim] was a willing participant in the defendants' activities. The exclusion of evidence pertaining to [the victim's] alleged history of prostitution had no bearing on whether the defendants violated G. L. c. 265, § 50 [a]"). Contrast G. L. c. 265, § 53 (crime of "organ trafficking" expressly provides that defendant intend or know that removal for sale of organ, tissue, or other body part was "against such person's will").

Of course, the perpetrator's conduct need not rise to the level of "force, fraud, [or] coercion," an element set forth in 18 U.S.C. § 1591 (Federal sex trafficking statute) but absent in the State statute. See 18 U.S.C. § 1591(a) (where victim has attained eighteen years of age, requiring that defendant knew or recklessly disregarded "the fact . . . that means of force, threats of force, fraud, coercion . . . or any combination of such means will be used to cause the person to engage in a commercial sex act"). See McGhee, 472 Mass. at 413 n.8, quoting Globe Newspaper Co. v. Boston Retirement Bd., 388 Mass. 427, 433 (1983) ("We point out that the omission of language from G. L. c. 265, § 50 [a], that is included in the previously enacted analogous Federal [sex trafficking] statute 'reflect[s] a conscious decision by the Legislature to deviate from the

standard embodied in the Federal [sex trafficking] statute"). See also Dabney, 478 Mass. at 854-855 (same). A person may "entice" or "recruit" another to engage in commercial sexual activity through, for example, words or acts of encouragement, assistance, incentives, gifts, money, housing, benefits, promises, drugs, or alcohol, without engaging in threats of serious harm (coercion), physical force, or fraud.

Here, however, the defendants are not alleged to have engaged in conduct aimed to allure, to attract, to tempt, or to persuade the sex worker to engage in commercial sexual activity. Nothing in the telephone calls or text message interactions between the defendants and the sex worker reasonably suggests any effort by the defendants to allure, to attract, to tempt, or to persuade the sex worker to engage in commercial sexual activity; instead, in those calls and messages, they selected sexual activities from a menu of activities she proposed. Thereafter, the defendants each accepted the terms -- price, time, and location -- as dictated by the purported sex worker. Such responsive acceptance of the terms extended by the sex worker cannot reasonably be found to be conduct aimed to entice or to recruit the sex worker.

ii. Attempt to obtain by any means. We turn next to the Commonwealth's contention that the defendants' conduct fell within the phrase to "obtain by any means" a sex worker to

engage in commercial sexual activity. The Commonwealth asserts that the verb "obtain" means to get or to acquire and, here, the defendants each attempted to get a sex worker by responding to the advertisement.

To be sure, the definition of "obtain" is broad. Generally, as the Commonwealth notes, the word "obtain" means to get, to acquire, to secure, or to attain possession of. See Webster's Third New International Dictionary 1559 (1993) ("obtain" means "to gain or attain possession of or disposal of usu[ally] by some planned action or method"); Oxford English Dictionary Online ("obtain" means "[t]o come into the possession of; to procure; to get, acquire, or secure"). The modification "by any means" suggests the Legislature intended to capture a wide range of conduct related to trafficking persons for sexual servitude. See Department of Hous. & Urban Dev. v. Rucker, 535 U.S. 125, 131 (2002) ("[T]he word 'any' has an expansive meaning, that is, one or some indiscriminately of whatever kind" [quotation and citation omitted]); United States v. Jungers, 702 F.3d 1066, 1070-1071 (8th Cir.), cert. denied sub nom. Bonestroo v. United States, 571 U.S. 866 (2013) (Jungers II) (rejecting "restrictive interpretation" of enumerated means in Federal sex trafficking statute because terms "whoever" and "any" "are expansive" [citation omitted]). Thus, at least as an initial matter, the Commonwealth's construction of the phrase "obtain by

any means" as meaning to acquire a sex worker by whatever method is reasonable given the breadth of the phrase "obtain by any means." Indeed, without purchasers, including the purchasers whose conduct is responding to an offer for commercial sexual activity, the demand side of the business of sex trafficking would be thwarted, which arguably furthers the apparent legislative intent to punish those who participate "by any means" in trafficking of persons for sexual servitude.

The Commonwealth's proposed construction becomes less supportable when the phrase "obtain by any means" is read, as it must be, in the context of the statute as a whole. See Garcia, 492 Mass. at 326. Significantly, the phrase "obtain by any means" comes at the end of a list that includes, as discussed supra, "entice" and "recruit," as well as "harbor," "transport," and "provide."<sup>12</sup> G. L. c. 265, § 50 (a). Each of these acts describes stages in the business of sex trafficking. The illicit operation may start with traffickers who engage in conduct to "recruit" and to "entice" victims, luring victims to participate in the business to build the "supply" necessary for the conduct of a sex trafficking scheme. Once the supply of sex

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<sup>12</sup> These enumerated acts when done knowingly and culminating in commercial sexual activity expressly define "the crime of trafficking of persons for sexual servitude." See G. L. c. 265, § 50 (a). See note 11, supra.

workers is acquired, the same or other traffickers might "harbor" the victim, giving shelter or refuge to the victim to keep the victim within the "supply chain" of the operation. The same or a different trafficker might then "transport" the victim, acting as a "distributor" in the trafficking operation. And a trafficker may "provide" the victim to either another trafficker, such as a pimp, or to the ultimate "consumer," and in that way act like a "retailer" in the sex trafficking business.

Because each of the enumerated acts describes a step in the operation of trafficking of persons for sexual servitude, the traditional canon of construction, *noscitur a sociis*, informs our construction of the final phrase "obtain by any means."<sup>13</sup>

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<sup>13</sup> In its construction of the phrase "obtain by any means," the Appeals Court applied the related canon of *ejusdem generis*, which means "of the same kind or class" (citation omitted). Commonwealth v. Perez Narvaez, 490 Mass. 807, 814 (2022). See 2A N.J. Singer & J.D. Shambie Singer, *Statutes and Statutory Construction* § 47:17 (7th ed. 2021 & Nov. 2024 update) (Sutherland) (describing *ejusdem generis* doctrine as "variation of the maxim *noscitur a sociis*"). The canon of *ejusdem generis* provides that, "[w]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." Perez Narvaez, *supra*, quoting Banushi v. Dorfman, 438 Mass. 242, 244 (2002) (applying doctrine to limit phrase "other noxious or filthy substance"). Courts "typically use *ejusdem generis* to ensure that a general word will not render specific words meaningless." CSX Transp., Inc. v. Alabama Dep't of Revenue, 562 U.S. 277, 295 (2011) (declining to apply doctrine to list of distinct prohibitions). See Sutherland, *supra* ("*ejusdem generis* seeks to



That canon "counsels that a word is given more precise content by the neighboring words with which it is associated. Noscitur a sociis means literally 'it is known from its associates,' and means practically that a word may be defined by an accompanying word, and that, ordinarily, the coupling of words denotes an intention that they should be understood in the same general sense." (Footnotes omitted.) 2A N.J. Singer & J.D. Shambie Singer, *Statutes and Statutory Construction* § 47:16 (7th ed. 2021 & Nov. 2024 update). See Outfront Media LLC v. Assessors of Boston, 493 Mass. 811, 818 (2024), quoting Richardson v. UPS Store, Inc., 486 Mass. 126, 130-131 (2020) (noscitur a sociis "counsels that terms must be read within the context of the statute in which they appear. . . . The literal meaning of a general term in an enactment must be limited so as not to include matters that, although within the letter of the enactment, do not fairly come within its spirit and intent"). See also Dole v. United Steelworkers of Am., 494 U.S. 26, 36 (1990) ("That a more limited reading of the phrase . . . was

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reconcile an incompatibility between specific and general words"). Because we do not conclude that the phrase "obtain by any means" generically captures each of the enumerated acts that precede it, we do not apply this canon. To the extent the Appeals Court's application of ejusdem generis suggests that the enumerated acts set forth in the sex trafficking statute require changing the victim's will or that the victim's state of mind is an element of the offense proscribed by the statute, we disagree. See discussion supra.

intended derives some further support from the words surrounding it").

Applying this canon to the phrase "obtain by any means," it is ambiguous, in the context of the preceding verbs describing the steps of an operation of a sex trafficking business, whether the Legislature intended to capture a purchaser of services offered by an ostensibly independent sex worker. Indeed, the phrase "obtain by any means" reasonably may be construed to capture the conduct of an individual who "gets" by whatever means a victim to participate in a sex trafficking business even if those means do not fall within the previously listed acts of enticing, recruiting, harboring, transporting, or providing the trafficked person.<sup>14</sup> In short, the breadth of the Commonwealth's

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<sup>14</sup> Our case law addressing the sex trafficking statute has not extended its reach to those who purchase sex from an independent sex worker. Instead, our cases have involved the conduct of boyfriends, pimps, and brothel owners who in some manner have encouraged or exploited another person for purposes of commercial sexual activity. See, e.g., Fan, 490 Mass. at 435-436 (describing conduct of defendant brothel owners); Dabney, 478 Mass. at 840-844 (describing conduct of defendant who "enticed" and "recruited" victim to engage in commercial sex with others); McGhee, 472 Mass. at 408-412 (describing "pimping" activities of defendants). In McGhee, for example, the defendant supplied the victim with heroin before discussing a "business arrangement" involving prostitution, took photographs of the victim and posted them in an online advertisement, listed one defendant's cellular telephone number as the contact in the advertisement, coached the victim on what to say when speaking to callers responding to the advertisement, established prices for the victim's sexual services, walked the victim to the location where she was to perform said services, confiscated any

proposed construction of the phrase "obtain by any means" to capture the conduct alleged here arguably is at odds with the language of the sex trafficking statute as a whole, which delineates specific enumerated acts of those who engage in the steps of the business of buying and selling human beings for sexual exploitation rather than at purchasers who agree to pay an independent sex worker for sexual activities she has offered on the terms she has set.

Nor does the statute's title, "Trafficking of persons for sexual servitude," clearly suggest that the Legislature sought to capture the conduct at issue in this case. See G. L. c. 265, § 50 (a). See, e.g., Young v. Contributory Retirement Appeal Bd., 486 Mass. 1, 10 (2020), citing Olmstead v. Department of Telecomm. & Cable, 466 Mass. 582, 589 & n.12 (2013) (where text of statute is ambiguous, title of act may be relevant to statutory interpretation). The title indicates that the statute is meant to encompass activity related to the operation of a sex trafficking scheme -- that is, the trade, both buying and

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money the victim received, and provided the victim with drugs and alcohol. McGhee, supra at 409-410. We stated that such conduct "fell squarely within the conduct unambiguously proscribed by [the sex trafficking statute,] G. L. c. 265, § 50 (a)." Id. at 416.

selling, of human beings for sexual exploitation.<sup>15</sup> Consistent with this title, we have previously stated that the statute is designed "to protect victims of sex trafficking." McGhee, 472 Mass. at 419-420 ("The purpose and intent of the Legislature in enacting [the sex trafficking statute,] G. L. c. 265, § 50 [a], was to prohibit the trafficking of persons for sexual servitude, not to prohibit all range of sexually oriented activities and expressions" [emphasis added]). The title does not evince an obvious intent to capture that subset of purchasers of commercial sexual activity who respond to an offer from an independently operating sex worker.

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<sup>15</sup> "Trafficking" means the activity of engaging in trade, which includes both buying and selling. See Merriam-Webster Online Dictionary, <https://www.merriam-webster.com/dictionary/traffic> [<https://perma.cc/87C6-URD7>] ("trafficking" means "the business of bartering or buying and selling"); Oxford English Dictionary Online ("trafficking" means "illegal or illicit trade or dealing, esp[ecially] the distribution and sale of illegal drugs, or the trade in or procurement of human beings, typically for the purpose of exploitation"); Oxford English Dictionary Online ("traffic" means "[t]o trade in or procure human beings for the purpose of . . . exploitation"). See also Oxford English Dictionary Online ("sex trafficking" means "the action or practice of coercing people into prostitution, pornography, or other forms of commercial sexual exploitation, usually involving illegal or forcible relocation"). We set forth these dictionary definitions to inform our construction of the phrase "obtain by any means" in the context of the delineated acts constituting "trafficking" under the sex trafficking statute; although certain dictionary definitions suggest the use of force, coercion, or fraud, the Commonwealth's sex trafficking statute explicitly does not. See McGhee, 472 Mass. at 413 n.8.

iii. Legislative history. Given the ambiguity in the plain meaning of the phrase "obtain by any means," when viewed in the context of the statute as a whole, we turn to the statute's legislative history to determine whether the history clarifies the Legislature's intent. See HSBC Bank USA, N.A. v. Morris, 490 Mass. 322, 332-333 (2022), quoting Chandler v. County Comm'rs of Nantucket County, 437 Mass. 430, 435 (2002) ("Where the statutory language is not conclusive, we may 'turn to extrinsic sources, including the legislative history and other statutes, for assistance in our interpretation'").

As we have noted, the legislative history shows that the Legislature enacted the sex trafficking statute in 2011 to empower State and local law enforcement to combat the relatively smaller human trafficking operations in the Commonwealth, which had not been the focus of Federal law enforcement efforts under the Federal sex trafficking statute. See Dabney, 478 Mass. at 852-853. Indeed, the list of enumerated acts in the State sex trafficking statute largely mirrored that of the then-existing Federal sex trafficking statute. Compare 18 U.S.C. § 1591(a)(1) (2006) ("Whoever knowingly . . . recruits, entices, harbors, transports, provides, obtains, or maintains<sup>[16]</sup> by any

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<sup>16</sup> "Maintains" is not included in the Commonwealth's sex trafficking statute.

means . . .") with G. L. c. 265, § 50 (a) ("Whoever knowingly . . . recruits, entices, harbors, transports, provides, or obtains by any means . . ."). Significantly, the words "obtains" and "by any means" appear in both.

Thus, the legislative history of the Federal sex trafficking statute is a helpful source of our Legislature's intent. See Dorrian v. LVNV Funding, LLC, 479 Mass. 265, 272-273 (2018) ("For further guidance we turn to the legislative history of the [Federal statute], which is relevant to our consideration because the [Federal statute] was the model for the [State statute]"). Specifically, in enacting the Federal statute, Congress stated:

"Existing legislation and law enforcement in the United States and other countries are inadequate to deter trafficking and bring traffickers to justice, failing to reflect the gravity of the offenses involved. No comprehensive law exists in the United States that penalizes the range of offenses involved in the trafficking scheme. Instead, even the most brutal instances of trafficking in the sex industry are often punished under laws that also apply to lesser offenses, so that traffickers typically escape deserved punishment."

22 U.S.C. § 7101(b)(14). In other words, the Federal sex trafficking statute was meant to fill a perceived gap in existing laws designed for lesser offenses that, in Congress's view, meted punishments inadequate to deter human trafficking. Thus, Congress passed the Federal sex trafficking statute to target human trafficking, which Congress concluded "involves

sexual exploitation of persons . . . involving activities related to prostitution . . . and other commercial sexual services." Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, § 102(b)(2).

Because the Legislature intended that the sex trafficking statute empower State and local law enforcement to combat the smaller sex trafficking schemes that fell within the Federal law<sup>17</sup> but that Federal law enforcement efforts had not had the resources to pursue, it follows that the Legislature intended the sex trafficking statute to fill the same perceived gap in existing laws used against sex traffickers at the State level. It is instructive, then, that the type of conduct in which the defendants here are alleged to have engaged already was proscribed expressly by the existing sex for a fee statute. See G. L. c. 272, § 53A.

It is also notable that when the Legislature enacted the sex trafficking statute, it simultaneously increased the punishment for purchasers of commercial sex under the existing sex for a fee statute. See G. L. c. 272, § 53A. Specifically, the Legislature increased the punishment for a violation of the sex for a fee statute from a maximum of one year in a house of

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<sup>17</sup> As discussed supra, unlike the Federal sex trafficking statute, our State statute does not require "force, fraud, [or] coercion." See McGhee, 472 Mass. at 413 n.8.

correction to a maximum of two and one-half years in a house of correction. See St. 2011, c. 178, § 25. By contrast, a violation of the sex trafficking statute carries with it a five-year mandatory minimum sentence. See G. L. c. 265, § 50.<sup>18</sup>

This context supports the conclusion that the Legislature intended the sex trafficking statute to target the conduct of suppliers and purchasers who perpetrate the operation of trafficking of persons for sexual servitude, rather than the responsive conduct of the subset of purchasers of commercial sexual activity who answer advertisements by an independent adult sex worker. The latter conduct already was proscribed by the sex for a fee statute and further addressed by the Legislature through increased penalties for that crime, indicating that the subset of purchasers already targeted by the

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<sup>18</sup> While isolated statements of legislators may not speak for the Legislature as a whole, it is notable that when discussing the importance of the broader act to combat human trafficking within the Commonwealth, a proponent noted that separately "[w]e also increased the penalties for the johns," in reference to the sex for a fee statute. State House News Service (Sen. Sess.), Nov. 15, 2011 (statement of Sen. Mark C. Montigny). The Attorney General also distinguished between the two statutes, testifying before the Joint Committee on the Judiciary that "[i]n order to address the continued supply of victims, this bill creates the crime of trafficking of persons for sexual servitude, with a penalty of up to [twenty] years in [S]tate prison. . . . To stem the demand side, the bill increases penalties for current 'John' crimes." Testimony of Attorney General Martha Coakley on S.827/H.2850, An Act Relative to the Commercial Exploitation of People (May 18, 2011).



sex for a fee statute were not considered to be covered by the new sex trafficking statute.

We are also informed by Federal courts' constructions of the phrase "obtain[] . . . by any means" in the Federal statute. See Commonwealth v. Braune, 481 Mass. 304, 308 (2019), quoting Commonwealth v. Eberhart, 461 Mass. 809, 815 (2012) (where "State statute 'largely replicates' a cognate provision of Federal law, we consider the Federal courts' interpretation of the Federal statute 'highly persuasive' in interpreting our own law").<sup>19</sup> It is telling that the Federal courts have come to different conclusions whether the phrase "obtain[] . . . by any means" in the Federal statute extends to capture responsive conduct akin, in some respects, to the conduct at issue here. Compare United States v. Jungers, 834 F. Supp. 2d 930, 934 (D.S.D. 2011) (Jungers I) (concluding that "obtain[] . . . by any means" in Federal statute did not capture conduct of

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<sup>19</sup> The State statute does not mirror the Federal statute entirely. For example, as we have observed, the State statute does not require that the perpetrator know that the victim was caused to engage in commercial sexual activity through coercion, force, or fraud. See McGhee, 472 Mass. at 415. In this regard, our State statute is more akin to the portion of the Federal statute dealing with children who are victims of sex trafficking. Compare 18 U.S.C. § 1591(a) (requiring only that defendant knew or recklessly disregarded "that the person has not yet attained the age of [eighteen] years and will be caused to engage in a commercial sex act") with G. L. c. 265, § 50 (a). For this reason, the Federal case law addressing the Federal child sex trafficking law is particularly illuminating.

purchaser who responded to advertisement requesting commercial sex with minor), Fierro vs. Taylor, U.S. Dist. Ct., No. 11 Civ. 8573 (S.D.N.Y. July 2, 2012) (in context of civil case, concluding that "obtain[] . . . by any means" in Federal statute did not apply to those who purchase sex with victims of trafficking), and United States vs. Bonestroo, U.S. Dist. Ct., No. CR 11-40016-01-KES (D.S.D. Jan. 4, 2012) (concluding that "obtain[] . . . by any means" in Federal statute did not capture conduct of purchaser who responded to advertisement requesting commercial sex with minor), with Jungers II, 702 F.3d at 1075-1076 (concluding that Federal statute applied to those who attempted to purchase sex from minors, and reversing judgments of acquittal in Jungers I and Bonestroo).

Recognizing that this split among the Federal courts reflected an existing ambiguity in the phrase "obtain[] . . . by any means," Congress amended the list of enumerated means that comprise sex trafficking under the Federal statute in 2015. Specifically, Congress added "solicits" and "patronizes" to the list of enumerated means, to make "absolutely clear for judges, juries, prosecutors, and law enforcement officials that criminals who purchase sexual acts from human trafficking victims may be arrested, prosecuted, and convicted as sex trafficking offenders when this is merited by the facts of a particular case." Justice for Victims of Trafficking Act of

2015, Pub. L. No. 114-22, § 109, <https://www.govinfo.gov/content/pkg/PLAW-114publ22/html/PLAW-114publ22.htm> [<https://perma.cc/7TA7-WS3J>]. Our Legislature has not similarly amended the State counterpart to add the verbs "solicits" and "patronizes."<sup>20</sup> See G. L. c. 265, § 50 (a).

Absent clarification by our Legislature, we cannot conclude that the sex trafficking statute unambiguously captures those, like the defendants in this case, who respond to an advertisement by an independent adult for commercial sex and accept without negotiation the terms set forth by the sex worker. Indeed, there is no indication here that the defendants were participating in a sex trafficking scheme, particularly where the purported adult sex worker asserted that she was independent and expressly declared for herself the "right not to enter into any arrangement . . . for any . . . reason at [her] sole discretion."

"[W]here the language of a criminal statute plausibly can be found ambiguous, the rule of lenity requires that the defendant receive the benefit of the ambiguity." Commonwealth

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<sup>20</sup> In contrast, several other States have included these terms in their sex trafficking statutes. See, e.g., Ala. Code § 13A-6-152 (includes "solicits"); Del. Code. Ann. tit. 11, § 787 (amended to include same); N.C. Gen. Stat. § 14-43.11 (amended to include "solicits" and "patronizes"); 18 Pa. Cons. Stat. § 3011 (includes same).

v. Dayton, 477 Mass. 224, 226 (2017). Applying the rule of lenity, we interpret the statute as not applying to this subset of purchasers engaged in the conduct alleged here. See id.

3. Conclusion. For the foregoing reasons, we affirm the dismissal of the defendants' indictments charging trafficking of persons for sexual servitude under G. L. c. 265, § 50 (a), and remand for further proceedings on the remaining indictments.<sup>21</sup>

So ordered.

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<sup>21</sup> That the defendants did not engage in sex trafficking does not absolve them of being prosecuted for the crime the grand jury were warranted in finding probable cause that they did commit: engaging in sexual conduct for a fee in violation of G. L. c. 272, § 53A (sex for a fee statute).