No. 23PA22 TWENTY-SIXTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

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STATE OF NORTH CAROLINA )

 )

v. ) From Mecklenburg County

 )

ERIC PIERRE STEWART )

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**DEFENDANT-APPELLEE’S NEW BRIEF**

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No. 23PA22 TWENTY-SIXTH DISTRICT

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**DEFENDANT-APPELLEE’S NEW BRIEF**

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# ISSUE PRESENTED

Did the Court of Appeals correctly hold that the indictment in this case failed to allege an essential element of sexual battery and deprived the trial court of jurisdiction?

# STATEMENT OF THE CASE

On 11 April 2016, the Mecklenburg County Grand Jury indicted Eric Pierre Stewart for second-degree forcible sexual offense and sexual battery. (Rp 7). The count in the indictment for sexual battery alleged “that on or about the 17th day of January, 2016, in Mecklenburg County, Eric Pierre Stewart, did unlawfully and willfully for the purpose of sexual arousal, engage in sexual contact with another person, [Amber Campbell], without her consent.”[[1]](#footnote-1) (Rp 7).

The matter came on for trial at the 6 May 2019, Criminal Session of Superior Court, Mecklenburg County, the Honorable George Bell, presiding. (Tp 1). The jury found Mr. Stewart not guilty of second-degree sexual offense and guilty of sexual battery on 16 May 2019. (Rpp 118-19).

The trial court found Mr. Stewart to be a prior record level 1 and sentenced him to 60 days in the custody of the Sheriff of Mecklenburg County. (Rpp 123-126). The trial court suspended this sentence for 24 months of supervised probation and ordered an active term of 15 days as a condition of special probation. (Rpp 123-126). The trial court also ordered Mr. Stewart to surrender his massage license and to register as a sex offender for a period of 30 years. (Rpp 124, 127-29). Mr. Stewart appealed. (Rpp 132-33).

On appeal, Mr. Stewart argued that the trial court lacked jurisdiction over the sexual battery charge because the indictment omitted an essential element of the offense, filing a petition for a writ of certiorari contemporaneously with his brief to address a potential defect in the notice of appeal. (Mr. Stewart’s COA Brief at 5-10). On 4 January 2022, a unanimous panel of the Court of Appeals issued an unpublished opinion granting Mr. Stewart’s petition for a writ of certiorari and vacating his conviction for sexual battery after concluding the indictment “failed to allege an essential element, [and] it failed to confer subject matter jurisdiction upon the trial court to try Defendant for sexual battery.” *State v. Stewart*, 2022-NCCOA-24
, ¶¶ 5, n. 1, 11 (unpublished, attached in appendix).

On 20 January 2022, the State applied for a temporary stay of the Court of Appeals order, petitioned for a writ of supersedeas, and indicated its intent to petition this Court for discretionary review on the indictment issue. On 21 January 2022 this Court entered an order granting the State’s temporary stay application. On 7 February 2022, the State filed a Petition for Discretionary Review of the Court of Appeals’ unpublished opinion in this case vacating the sexual battery conviction for lack of jurisdiction. This Court granted the State’s petition for discretionary review on 6 May 2022.

# STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW

Review of the Court of Appeals’ decision in this case is based upon this Court’s Order allowing the State’s petition for discretionary review pursuant to N.C. R. App. P. 15 and N.C.G.S. § 7A-31.

# STATEMENT OF THE FACTS

### The evidence at trial:

On 17 January 2016, Amber Campbell was treated by two of her friends to a massage at Zen Massage in Charlotte. (Tpp 60-63). The massage was scheduled to last an hour, and Mr. Stewart was the massage therapist. (Tpp 63, 69). Ms. Campbell testified that, when there were about ten or fifteen minutes left in the massage, Mr. Stewart asked her to turn over on her back “so he could work on the top of [her] legs.” (Tp 76). Ms. Campbell complied, and Mr. Stewart massaged her left leg. (Tpp 76-77). Mr. Stewart began massaging her leg and Ms. Campbell testified she felt “his pinky kind of graze the fabric of [her] panties.” (Tp 79). Ms. Campbell thought this may have been an accident and did not say anything. (Tp 79). Ms. Campbell testified Mr. Stewart continued massaging her and “all of a sudden it was just the fabric was pushed aside and there was digital penetration, digital penetration, digital penetration, and I just. . . .” (Tp 79).

Ms. Campbell was “just frozen” but felt a shift in the room, like something had changed. (Tpp 79-82). Ms. Campbell testified there were three acts of penetration, with barely a second passing between the first and second. (Tpp 81-82). The penetrations did not last long, “just like a split second.” (Tp 81).

Ms. Campbell testified that she began to feel sick. (Tp 82). Mr. Stewart then began massaging her arms and said “[w]ell, I wouldn’t want to do anything that would make you uncomfortable.” (Tp 83). Mr. Stewart then told her “[o]kay that’s it. You can go ahead and get dressed[,]” and left the room. (Tp 84). Ms. Campbell did not tell anyone about the incident until she was in the car with her friends. (Tpp 85-86).

Ms. Campbell went home with one of her friends and played cards. (Tpp 86-87). Over the course of the evening, Ms. Campbell received text messages she believed to be from Mr. Stewart, which Ms. Campbell responded to “try and get a confession.” (Tp 104). One of her friends later “found him on Facebook” and Ms. Campbell called the police the next day. (Tp 87).

An investigation was conducted, leading to the charges in this case. At trial, the State presented the testimony of Ms. Campbell and one of her friends. (Tpp 58-151; 151-159). The State also presented, under Rule 404(b), the testimony of three other women who claimed to have had similar experiences when receiving massages from Mr. Stewart. (Tpp 479-627). The State also introduced a video showing an interview Mr. Stewart had at the police station with investigators. (Tpp 682-84).

Mr. Stewart presented the testimony of Mr. Stewart’s then-current employer, Adriene Jankovics. She testified that Mr. Stewart was an “excellent” massage therapist. She had never had any complaints regarding Mr. Stewart and improper touching. (Tpp 777-82).

The jury found Mr. Stewart not guilty of second-degree sex offense and guilty of sexual battery. (Tp 945; Rpp 118-19) The trial court found that Mr. Stewart was a prior record level I for misdemeanor sentencing purposes, and sentenced him to 60 days, suspended for 24 months, with an active 15 day sentence as a special condition of probation. (Tpp 952-953, 955; Rpp 123-126). The trial court ordered Mr. Stewart to register as a sex offender for 30 years. (Tpp 953-54; Rpp 127-29). Finally, the trial court ordered Mr. Stewart to surrender his massage license and prohibited him from practicing as a massage therapist in North Carolina. (Tp 954; Rp 124).

### The appeal:

On appeal, Mr. Stewart argued that the trial court lacked jurisdiction over the sexual battery charge because the indictment omitted an essential element of the offense, filing a petition for a writ of certiorari contemporaneously with his brief to address a potential defect in the notice of appeal. (Mr. Stewart’s COA Brief at 5-10). On 4 January 2022, a unanimous panel of the Court of Appeals issued an unpublished opinion granting Mr. Stewart’s petition for a writ of certiorari and vacating his conviction for sexual battery after concluding the indictment “failed to allege an essential element, [and] it failed to confer subject matter jurisdiction upon the trial court to try Defendant for sexual battery.” *Stewart*, 2022-NCCOA-24, ¶¶ 5, n. 1, 11.

# STANDARDS OF REVIEW

This Court reviews a decision of the Court of Appeals to determine if it contains an error of law. *State v. Brooks*, 337 N.C. 132, 149 (1994)
. The arguments in this brief address the sufficiency of the indictment, which is reviewed *de novo*. *State v.*
*Oldroyd*, 2022-NCSC-27, ¶ 8.

# ARGUMENT

This case is before this Court on discretionary review of an unpublished, unanimous decision of the lower Court which correctly applied more than a century of case law to the plain language of the relevant statutes. In response to the Court of Appeals’ proper action, the State asks this Court to disregard the plain language of the statute defining sexual battery and those governing criminal pleadings, overrule precedent dating back almost to the founding of our nation, and to do all of this in utter disregard for separation of powers requiring this Court to interpret and apply the laws written by our legislature and not to usurp that power for its own and enact whichever policies the judiciary prefers. This Court should reject the State’s arguments and affirm the decision of the lower court.

## The Court of Appeals correctly held that the indictment in this case failed to allege an essential element of sexual battery and deprived the trial court of jurisdiction.

### The Court of Appeals correctly held that force is an essential element of sexual battery under N.C.G.S. § 14-27.33.

The State first improbably argues that force is not an element of a crime defined by statute as occurring “by force.” The State’s argument is not only wrong, but is contradicted by the plain language of the statute itself, appellate interpretation of the statute, and the wide array of secondary materials and courtroom manuals describing sexual battery. The Court of Appeals correctly rejected the State’s argument.

#### The statute lists force as an essential element of sexual battery.

The State’s argument misreads the statute itself, which defines sexual battery, in pertinent part, as occurring when a person, “for the purpose of sexual arousal, sexual gratification, or sexual abuse, engages in sexual contact with another person. . . *By force* and against the will of the other person[.]” N.C.G.S. § 14-27.33(a)(1) (emphasis added). “The plain language of this statute leaves no room for judicial construction” in listing force as an element. *State v. Bryant*, 361 N.C. 100, 103 (2006)
. If the General Assembly had intended to not have “force” be an element of sexual battery, they could easily have done so by omitting “force” from the definition of the statute. *See, e.g.,* *State v.*
*Thomsen*, 369 N.C. 22, 26 (2016) (“the General Assembly knows how to [achieve an intended result] when it elects to do so[.]”); *accord* *Fabrikant v. Currituck County*, 174 N.C. App. 30, 42 (2005)
 (“Had the General Assembly intended [a particular application,] it knew how to say so.”).

It is a fundamental principle of statutory interpretation that, “[w]hen a statute is unambiguous, this Court will give effect to the plain meaning of the words without resorting to judicial construction.” *State v. Barnett*, 369 N.C. 298, 304 (2016)
 (cleaned up). Simply reading the text of N.C.G.S. § 14-27.33, it is clear that force is an element of sexual battery.

#### Our Courts have recognized that force is an essential element of sexual battery.

Indeed, our appellate Courts have routinely confirmed that force is an element of sexual battery. The Court of Appeals has repeatedly reaffirmed that “[t]he elements of sexual battery are: (1) engaging in sexual contact with another person, (2) *by force* and against the will of the other person, and (3) for the purpose of sexual arousal, sexual gratification, or sexual abuse. *State v. Corbett*, 196 N.C. App. 508, 511 (2009) (emphasis added)
; *accord State v. Kelso*, 187 N.C. App. 718, 722 (2007)
.“Sexual battery must occur “[b]y force and against the will of the other person.” *State v. Viera*, 189 N.C. App. 514, 517 (2008)
 (cleaned up).

#### The pattern jury instructions, courtroom manuals, and other secondary sources recognize that force is an element of sexual battery.

Further, the pattern jury instructions list force as an element of sexual battery. *See* N.C.P.I.-Crim. 207.90 (listing “the contact was by force and against the will of the other person” as an element the state must prove). Finally, secondary materials and courtroom manuals recognize that force is an element of sexual battery. *See* Robert L. Farb, *Arrest Warrant and Indictment Forms* (UNC School of Gov’t 5th ed. 2005) (listing “by force” as part of the “charging language” for sexual battery) (App. 5-6); *and* Jessica Smith, *North Carolina Crimes: a Guidebook on the Elements of Crime* 254 (UNC School of Gov’t 7th ed. 2012) (listing “by force” among the elements of sexual battery) (App. 7-8). While these sources are not binding authority, they nevertheless demonstrate how far afield the State’s position is.

#### The State’s unsupported argument about sexual battery is contradicted by the sources it relies upon.

The State’s theory that “force” is not an element of sexual battery defies the plain language of the statute, the interpretation of that statute by our appellate courts, the implementation of that statute in our pattern jury instructions, and even the understanding of that statute promulgated in courtroom manuals and secondary materials. The State’s position is entirely unsupported by any compelling authority. Instead of legal authority, the State relies upon a convoluted but flawed syllogism, reasoning that: force is necessary, the necessary force need not be physical force, therefore force is not necessary.

The State first notes that, “in a similar context, this Court has held that the force necessary to commit a sex crime need not be physical force, but can be substituted by either ‘fear, fright or coercion’ or by surprise.” (State’s New Brief at p. 6, no citation in the original). From that well-established proposition, the State reasons that “force” must not be required at all. (State’s New Brief at p. 6). The State’s reasoning is unsound. First, the State refers to *State v. Hines*, which discusses “the force *necessary*” to commit a rape. *State v. Hines*,286 N.C. 377, 380 (1975)
. Even assuming the *Hines* analysis of the 1975 rape statute is applicable to sexual battery, *Hines* still recognizes that “force” is “necessary.” That “force” is an essential element is therefore implicit in the State’s argument and the cases it cites.

Second, the State cites *State v. Locklear*, 304 N.C. 534, 540 (1981)
, which simply provides that the force “necessary” to commit a crime need not be “actual physical force[.]” The State draws from this inapposite proposition the wholly illogical and unsupported conclusion that “Since physical force is not required to complete the crime, it follows that ‘by force’ is not an essential element.” (State’s New Brief at p. 10). The State reasons that, “[o]therwise, an indictment would necessarily need to include the ‘by force’ language because it is an essential element, but the State would not need to prove that force occurred, because the crime can be completed without an essential element being present.” (State’s New Brief at p. 11).

However, the State is ignoring the fact that “by force” and “by physical force” are simply different concepts – not all force is physical force. The fact that physical force may not be required to show that an act was done by force does not mean that the act need not be done by force at all. Indeed, this is the very point *Locklear* made: the State’s evidence there that the acts occurred out of fear of death or serious bodily harm was sufficient to show that they occurred forcibly. *See id*. The State is required to allege, and to prove, that a sexual battery occurred “by force,” and the State’s argument otherwise is unavailing.

#### A significant portion of the General Assembly’s regulatory framework for sexual offenses is built on the distinction between offenses that involve force and those that do not.

If this Court accepts the State’s invitation to read the term “by force” out of N.C.G.S. § 14-27.33(a)(1), the consequences will dramatically impact the civil regulatory schemes for sex offender registration and satellite-based monitoring. Here, the State argues that “force” is a meaningless term when used in sex offense statutes. (State’s New Brief at pp. 8-10). However, if this were true, then a significant portion of Chapter 14, Article 27A would be rendered meaningless.

When determining whether to impose satellite-based monitoring, or to order a defendant to register as a sex offender, a crucial step is determining whether the offense is an “aggravated offense” under N.C.G.S. § 14-208.6(1a). *See, e.g.,* N.C.G.S. § 14-208.23; N.C.G.S. § 14-208.40A(c). When determining whether an offense is an aggravated offense under N.C.G.S. § 14-208.6(1a), the trial court is to consider only the elements of the offense and not any underlying factual circumstances. *State v. Davison*, 201 N.C. App. 354, 364 (2009), *State’s petition for* *disc. review denied*, 364 N.C. 599 (2010)
. N.C.G.S. § 14-208.6(1a) defines an aggravated offense as:

Any criminal offense that includes either of the following:

1. engaging in a sexual act involving vaginal, anal, or oral penetration with a victim of any age *through the use of force* or the threat of serious violence; or
2. engaging in a sexual act involving vaginal, anal, or oral penetration with a victim who is less than 12 years old.

N.C.G.S. § 14-208.6(1a).

 If the State were correct, and the inclusion of the term “force” in a statute governing sex offenses was largely meaningless, then a major component of our State’s sex offender registry and satellite-based monitoring schemes would be rendered ineffective. If the State’s approach were correct, and “force” was not an element of any sex offenses, including those which list force as an element by statute, then no sex offenses would qualify as “aggravated offenses” under N.C.G.S. § 14-208.6(1a)(i). This Court must “construe each word of a statute to have meaning, where reasonable and consistent with the entire statute, because it is always presumed that the legislature acted with care and deliberation.” *State v. Coffey*, 336 N.C. 412, 418 (1994)
 (cleaned up). Rather than presume that the General Assembly drafted our satellite-based monitoring and sex offender registry statutes carelessly, this Court should presume it acted with care and deliberation, and that use of the word “force” in a statute describing a sex offense has meaning. This Court should affirm the lower court’s proper interpretation.

### The Court of Appeals correctly concluded that the indictment in this case did not allege force.

Next, the State takes this Court through an exercise in obfuscation and double speak. Assuming this Court concludes that “force” is an element of sexual battery, the State argues that the indictment here alleges the use of force without alleging the use of force. In support of this argument, the State cites several inapposite cases which predate more recent and more compelling authority.

 The State’s argument here relies upon *State v. Edwards*, 190 N.C. 322 (1925)
; *State v. Johnson (Johnson I)*, 67 N.C. 55 (1872)
; *State v. Marsh*, 132 N.C. 1000 (1903)
; and *State v. Johnson* (*Johnson II*), 226 N.C. 266 (1946)
. First, the State relies upon *Edwards*, and argues that “force” may be replaced in an indictment with a “just equivalent.” (State’s New Brief at p. 12). Next, the State relies upon several cases ranging from the late-nineteenth to the mid-twentieth centuries, in an attempt to argue that the indictment here does allege the use of force, despite not using any of the equivalent terms approved for that purpose in the cases cited. (State’s New Brief at pp. 12-16). The State’s argument is wrong.

#### “Force” is a term with technical significance in the context of sexual offenses.

 The State first omits a crucial detail from the “just equivalent” rule. The whole rule, in context, is as follows: “It is well recognized that in indictments on a statute the essential words descriptive of the offense or their just equivalent must be given, *and when the terms used have acquired a technical significance, for which there is no just equivalent, such words must be given with exactness*.” *State v. Mooney*, 173 N.C. 798, 799 (1917)
 (emphasis added). Our Courts have explained “technical significance” as follows: “that the term has acquired any technical significance beyond that of its ordinary meaning, which is to say that the ordinary meaning of the term has technical significance to some extent.” *Midrex Corp. v. Lynch*, 50 N.C. App. 611, 614 (1981)
.

 Since *Johnson II*, the term “force” as used in our sexual assault statutes has developed technical significance beyond its ordinary meaning. This is evident from the great body of case law which has evolved considering what constitutes force under these statutes. *See*, *e.g.*, *State v. Raines*, 72 N.C. App. 300, 303 (1985)
 (“[W]e decline . . . to expand the ‘physical force’ doctrine and bring within its ambit the conduct—the physical touching—that constitutes the ‘sexual act’ itself in this case.”); *and* *State v. McCravey*, 203 N.C. App. 627, 640 (2010)
 (discussing the technical significance of the term “force” and noting that “[o]ur Courts have *further defined the element of force* in these sexual offenses[,]” and that the meaning of the term “force” as used in N.C.G.S. § 14-208.6(1a) “reflects the *established definitions* as *set forth in case law* of both physical force and constructive force, in the context of the sexual offenses[.]” (emphasis added)). Because the term “force” has acquired technical significance in this context, it “must be given with exactness.” *Mooney*, 173 N.C. at 799.

#### The indictment here does not include any “just equivalent” for the term “force.”

 Next, even assuming the term “force” had not acquired a technical significance in the 75 years since the cases relied upon by the State were decided, those cases do not support the State’s argument here. The State’s argument relies upon an overly broad reading of *Johnson II*. *Johnson II* addressed an adult rape indictment under the then-applicable statute which failed to allege the crime was committed “forcibly” or “against her will.” *Johnson II*, 226 N.C. at 267. At the time, rape was a capital offense, and this Court explained that “the *elements* of force *and* lack of consent must be alleged and proven before a conviction may be had on which death sentence may be imposed. *Allegation is as necessary as proof*. In the absence of *either*, death sentence may not be imposed.” *Id.* (emphasis added).

 In reviewing relevant case law, the *Johnson II* Court noted:

“In [*Johnson I*], it was held that the omission of the word ‘forcibly’ was not fatal when the charge was ‘against her will did feloniously ravish,’ the Court saying through Reade, J., that any equivalent word would answer in lieu of ‘forcibly’; that though the word ‘ravish’ would seem to imply force, yet that word is not an express charge of force, standing alone, but that the addition thereto of the words ‘feloniously’ and ‘against her will’ was sufficient under our statute as an express charge of force.”

*Id.* at 267-268 (quoting *Marsh*, 132 N.C. at1002). Thus, in dictum, the *Johnson II* Court said that adding the words “feloniously” and “against her will” to the term “ravish,” in an indictment that also included the phrase “carnally know,” all together were sufficient to allege force. *Id.* (discussing *Johnson I*, 67 N.C. at 55-56).

 Based on the foregoing, the State now argues that the terms “unlawfully and willfully” and “without her consent” are synonymous with “by force.” (State’s New Brief at p. 15). However, as noted above, the *Johnson II* Court did not say that “feloniously” and “against her will” alone are enough to allege force. *Johnson II* is clear that there needs to be an “equivalent word” for “forcibly.” *Johnson II*, 226 N.C. at 267-268. As *Johnson II* explained, “[t]he words ‘unlawfully, wilfully, and feloniously’ did ‘ravish and carnally know,’ do not charge it was ‘against her will,’ except by implication, and it is held in [[*Johnson*](https://advance.lexis.com/search/?pdmfid=1000516&crid=e53bd572-2cff-4d8d-be96-0fa52027d868&pdsearchterms=226+N.C.+at+267&pdstartin=hlct%3A1%3A1&pdcaseshlctselectedbyuser=false&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdqttype=and&pdpsf=&pdquerytemplateid=urn%3Aquerytemplate%3A71eccf7366a532e8357325a87e70f1b7~%5ENorth%2520Carolina&ecomp=zghxk&earg=pdpsf&prid=5df9966d-f87a-41fc-af72-c4e1d638e4f1) *I*]*,* that they do not even sufficiently charge that the act was ‘forcibly’ perpetrated in the absence of the words ‘against her will.’” *Id.*

 Thus, the words “unlawfully, willfully, and feloniously” *combined with* “ravish and carnally know” and “against her will,” may be sufficient to allege force. As the Court in *Johnson II* noted, the Court in *Johnson I* held that “although ravishing would seem to imply force, yet it is necessary to charge force expressly, in some appropriate language. In our case the indictment charges, that the assault was violent and felonious, and that the ravishing was felonious and, ‘*against her will*.’ This is sufficient under our statute[.]” *Johnson I*, 67 N.C. at 57 (emphasis in the original). Here, the indictment did not allege the crime was committed “feloniously.” Nor did the indictment allege that the crime was “violent,” nor did it use the language “ravishing.” None of the language relied upon to save the indictment in *Johnson I* is present in this case.

Moreover, while it is possible the phrases “against her will,” as discussed in *Johnson II*, and “without her consent,” as used in the present case, may be roughly equivalent, this fact does nothing to help the State’s argument. Under the applicable definition of sexual battery, a phrase such as “against her will” or “without her consent” is required to satisfy an independent, *non-force*, element of the alleged crime. N.C.G.S. § 14-27.33.

The State’s reasoning on this point was firmly addressed and rejected in *State v.* *Alston*, where this Court made clear the phrase “against her will” by itself is not equivalent to “forcibly.” *State v.* *Alston*, 310 N.C. 399, 407 (1984)
 (holding charge of second-degree rape must be dismissed when the State introduced evidence of lack of consent but not force, because “[s]econd degree rape involves vaginal intercourse with the victim *both* by force *and* against the victim’s will.” (emphasis added)). As with the evidence in *Alston*, the indictment here alleges a lack of consent, but not force. Under *Alston*, the State’s argument cannot prevail.

 Moreover, *Johnson II* has never been cited by this Court for the proposition for which the State cites it. That is likely because in the 75 years since *Johnson II* was decided, statutory law enacted to govern criminal cases and precedent from this Court have made the modern requirements for a sexual battery pleading clear: a criminal pleading “*must contain . . .* [a] plain and concise factual statement in each count which . . . asserts facts supporting *every element of a criminal offense*[.]” N.C.G.S. § 15A-924(a)(5) (emphasis added). Force is an element of sexual battery under N.C.G.S. § 14-27.33, and facts supporting it *must* be alleged in the pleading either in the form of actual, physical force or constructive force. *See State v. Ellis*, 368 N.C. 342, 345 (2015);

 *accord* *State v. Etheridge*, 319 N.C. 34, 45 (1987); *see also* Farb, *Arrest Warrant and Indictment Forms*, *supra* (listing “by force” as part of the “charging language” for sexual battery) (App. 5-6); *and* Smith, *North Carolina Crimes*, *supra* (listing “by force” among the elements of sexual battery) (App. 7-8). Here, neither the element of force nor facts to support it were alleged in the pleading. The Court of Appeals was correct to conclude the indictment failed to confer jurisdiction and therefore to vacate the adjudication.

The indictment here is devoid of any allegation of force in connection with sexual battery. The use of force in sexual assault cases has a specific meaning and should be alleged expressly. But even if it didn’t, none of the “just equivalent” terms relied upon to save indictments in forcible sexual offenses from the early twentieth century are present in the indictment here. If this Court were to hold that the indictment in the present case sufficiently alleged force, it would either be rewriting the indictment to include language not present, or rewriting the statutes to omit requirements the General Assembly specifically included. This Court can do neither, and it should affirm the Court of Appeals’ proper interpretation of the statute and indictment here.

### An indictment must allege each essential element of an offense and its failure to do so is a jurisdictional defect.

Finally, the State asks this Court to ignore *stare decisis* and overturn centuries of caselaw in favor of a new practice completely at odds with the explicit language of our statutes. This Court should decline.

#### The State’s Argument:

Here, the State cites *United States v. Cotton*, 535 U.S. 625 (2002)
. (State’s New Brief at p. 18). In *Cotton*, the Supreme Court of the United States held that defects in an indictment for a federal offense no longer deprive the court of jurisdiction. *Cotton*, 535 U.S. at 630-31. *Cotton*’s analysis of federal requirementsis neither controlling nor persuasive authority with respect to how this Court addresses its own precedent and our General Assembly’s legislation.

Next, the State cites *State v. Oldroyd*, 2022-NCSC-27. The State argues that the Criminal Procedure Act of 1973[[2]](#footnote-2) “had the effect of relaxing the strict common law pleading rules” that existed at common law, and that “this reasoning should apply to the common law jurisdictional approach to indictments as well.” (State’s New Brief at p. 19). However, as discussed below, *Oldroyd* is irrelevant because it did not address whether an indictment needed to allege all essential elements of an offense. *See Oldroyd,* 2022-NCSC-27, ¶ 9 (the “defendant argues that the indictment here violated his constitutional right to be protected from double jeopardy because the indictment failed to provide the legal name of a person against whom his alleged offense was directed.”). Moreover, the State’s understanding of the Criminal Procedure Act, as discussed in *Oldroyd*, is fundamentally flawed.

#### The State did not raise this argument below and should not be allowed to do so for the first time in this Court.

At the Court of Appeals, the State did not contest that an indictment must allege each essential element of an offense, nor did it argue that the failure to do so should not be considered a jurisdictional defect. Indeed, the State opened its brief at the lower court with a concession that: “[W]here an indictment is alleged to be invalid on its face, thereby depriving the trial court of [subject matter] jurisdiction a challenge to that indictment may be made at any time, even if it was not contested in the trial court.” (State’s COA Brief at p. 5, alterations in the original, citations omitted). The State’s Brief never questioned the well-established principles it now attacks before this Court. (State’s COA Brief at pp. 6-9). The State has not only abandoned this argument, *see*, N.C. R. App. P. 28(a), but it has switched positions in the course of this appeal. *State v. Hooper*, 358 N.C. 122, 127 (2004)
 (“[W]here the same party . . . switches positions during the course of a single appeal, we believe that party has a responsibility to advise the affected courts and, if asked, to justify its actions. . . . These factors apply with particular force where the party in question is the State, which has the elevated responsibility to seek justice above all other ends.”).

This Court should not consider the State’s argument in this posture. *See, e.g.*, *M.E. v. T.J.*, 2022-NCSC-23
, ¶ 62 (“Because this argument was not raised by defendant below and was first raised by the Court of Appeals dissent, though, it is not properly before this Court, and we therefore decline to consider it.”); *accord PHG Asheville, LLC v. City of Asheville*, 374 N.C. 133, 145 n.2 (2020)
 (“The City failed to argue before the Court of Appeals that the trial court had erred by concluding that PHG had satisfied its burden of producing competent, material, and substantial evidence addressing the three ordinance criteria that are not discussed in the text of this opinion, thereby abandoning its right to challenge the trial court’s decision with respect to those criteria on appeal.” (citingN.C. R. App. P. 28(a))); *Roumillat v. Simplistic Enters.*, 331 N.C. 57, 67 (1992)
 (“Because it appears that this argument was not raised by plaintiff before the Court of Appeals, plaintiff arguably waived any right to argue that the slope amounted to negligence here.”). This Court has explicitly rejected the State’s attempts to argue new issues for the first time before it, albeit without precedential value, in *State v. Sturkie*, 325 N.C. 225, 226 (1989)
 (Concluding that “[o]ur review of the complete record now before us indicates that the arguments the State has now presented concerning this issue were made directly for the first time in this case in its petition and its brief before this Court” and dismissing appeal after determining review was improvidently allowed, but noting that the Court’s holding in this regard was without precedential value).

#### More than a century of precedent holds that indictments must allege each essential element of an offense, and that a failure to do so deprives the court of jurisdiction.

In the event this Court considers the State’s new argument, it should reject it. There has never been any dispute that, in North Carolina, “‘a valid bill of indictment [or information] is essential to the jurisdiction of the trial court to try an accused[.]’” *Ellis*, 368 N.C. at 345 (quoting *State v. Sturdivant*, 304 N.C. 293, 308 (1981)
). Likewise it is equally well-established that “[t]o be sufficient, an indictment must include, *inter alia*, ‘[a] plain and concise factual statement’ asserting ‘facts supporting every element of a criminal offense and the defendant’s commission thereof.’” *State v. Rankin*, 371 N.C. 885, 886 (2018)
(quoting N.C.G.S. § 15A-924(a)(5)). Finally, “[i]f the indictment fails to state an essential element of the offense, any resulting conviction must be vacated.” *Id.* at 886-87(citing *State v. Campbell*, 368 N.C. 83, 86 (2015)
, and *State v. Wagner*, 356 N.C. 599, 601 (2002)
 (per curiam)).

These principles have been in effect since at least the mid-nineteenth century:

After the very many adjudications which have been had on this statute, it must be regarded as being now completely settled that it does not supply nor remedy the omission of a distinct averment of any fact or circumstance which is an essential constituent of the offense charged. *State v. Haddock*, 3 N.C. 152; *State v. Owen*, 5 N.C. 152, commented on in *State v. Moses*, 13 N.C. 452; *State v. Davis*, 4 N.C. 271; *State v. Neese*, 4 N.C. 691; *State v. Brown*, 7 N.C. 224; *State v. Jim*, 12 N.C. 142; *State v. Shaw*, 13 N.C. 196; *State v. Aldridge*, 14 N.C. 201; *State v. Fitzgerald*, 18 N.C. 408; *State v. Enloe*, 20 N.C. 508. The ground of these adjudications is that sufficient *does not appear to the court in the face of any indictment to induce them to proceed to judgment when, in the indictment, they do not see distinctly every fact and circumstance which make up the crime. Call the defect in the indictment what you may--a defect of form or a defect of substance, a departure from good sense or only from the refinement of pleading--if by reason thereof there be this insufficiency in the indictment the court has no authority to render judgment*.

*State v. Gallimore*, 24 N.C. 372, 376-77 (1842) (emphasis added)
.

This Court “faithfully adheres to the ‘doctrine of stare decisis which proclaims, in effect, that where a principle of law has become settled by a series of decisions, it is binding on the courts and should be followed in similar cases.’” *Connette v. Charlotte-Mecklenburg Hosp. Auth.*, 2022-NCSC-95
, ¶ 36 (Barringer, J., dissenting) (quoting *State v. Ballance*, 229 N.C. 764, 767 (1949)
). “This Court has never overruled its decisions lightly.” *Rabon v. Rowan Mem’l Hosp., Inc.*, 269 N.C. 1, 20 (1967)
.

Should this Court find occasion to depart from precedent, it should consider the factors relied upon by the Supreme Court of the United States in the same situation:

On rare occasion, a Court will find it necessary to depart from the conclusions and reasoning it endorsed in its own prior decisions. Although this Court has not articulated factors to consider when examining the continued vitality of our precedents—perhaps because this Court has for so long respected the doctrine of stare decisis—the United States Supreme Court considers “the quality of [ ] reasoning [of the precedent being challenged], the workability of the rule it established, its consistency with other related decisions, developments since the decision was handed down, and reliance on the decision.”

*State v. Hilton*, 2021-NCSC-115
, ¶ 78 (Earls, J., dissenting) (quoting *Janus v. Am. Fed’n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2478-79 (2018)
).

The rule that an indictment must allege every essential element of an offense and that its failure to do so is a jurisdictional defect is ancient and well-reasoned. It has proven, for more than a century, to be entirely workable. For that time, this Court has consistently applied it, and the decisions of this Court have never wavered. Finally, as will be described below, the legislature has formalized the rule in statutes. There is simply no compelling reason to depart from precedent in this instance.

#### The General Assembly codified a jurisdictional approach to indictments by enacting the Criminal Procedure Act.

Contrary to the State’s argument, the General Assembly has shown no intent whatsoever to “move away from technical pleading requirements” concerning the essential elements of an offense. Indeed, the statutes governing criminal pleadings, criminal motions, and appellate review all show an express intent by our elected representatives to codify a jurisdictional approach to criminal pleadings and the requirement that each essential element of an offense be alleged.

First, N.C.G.S. § 15A-924 requires that a criminal pleading contain a “plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting every element of a criminal offense[.]” N.C.G.S. § 15A-924(a)(5). The official commentary to N.C.G.S. § 15A-924 explains that “[t]he pleading rule, requiring factual (but not evidentiary) allegations to support each element, is in accord with traditional ideas, *see* *State v. Greer*, 238 N.C. 325, 77 S.E.2d 917 (1953)
, and provides a concise statutory statement.” N.C.G.S. § 15A-924 (Official Commentary).

By way of contrast, N.C.G.S. § 15A-924(a)(6) provides that a criminal pleading must contain “[f]or each count a citation of any applicable statute, rule, regulation, ordinance, or other provision of law alleged therein to have been violated. *Error in the citation or its omission is not ground for dismissal of the charges or for reversal of a conviction*.” By including in subsection (a)(6) an explicit provision stating that the failure to cite a statute in a charging document was not grounds for a reversal of a conviction, the General Assembly has clearly shown that they were fully aware of how to use such language when they intended to. *See* *Thomsen*, 369 N.C. at 26, *and Fabrikant*, 174 N.C. App. at 42 (“Had the General Assembly intended [a particular application,] it knew how to say so.”).

The fact that N.C.G.S. § 15A-924(a)(5) does not contain similar language shows that the General Assembly intended the failure to list every element of an offense to be grounds for dismissal of charges or reversal of a conviction. However, this is not the only instance where the General Assembly’s intent is evident.

N.C.G.S. § 15A-924(e) provides that “[u]pon motion of a defendant under G.S. 15A-952(b) the court must dismiss the charges contained in a pleading which fails to charge the defendant with a crime in the manner required by subsection (a), unless the failure is with regard to a matter as to which an amendment is allowable.” Likewise, N.C.G.S. § 15A-952(b)(6)(a) describes the filing of “motions to dismiss for failure to plead under G.S. 15A-924(e).” The statute further provides that “[m]otions concerning jurisdiction of the court or the failure of the pleading to charge an offense may be made at any time.” N.C.G.S. § 15A-952(d). Thus, at the trial court, the failure to allege each essential element of a crime in a criminal pleading is an error which *requires* the trial court to dismiss the charges, and motions raising the issue can be made at any time. Indeed, the General Assembly has also written a statute specifically listing “defects which do not vitiate” an indictment, and a failure to allege an essential element of an offense is not included therein. *See* N.C.G.S. § 15-155; *see also Evans v. Diaz*, 333 N.C. 774, 779-80 (1993)
 (“Under the doctrine of *expressio unius est exclusio alterius*, when a statute lists the situations to which it applies, it implies the exclusion of situations not contained in the list.”).

The General Assembly’s approach to criminal pleadings is also evident in its statutes governing appeal. For example, N.C.G.S. § 15A-1442 provides:

The following constitute grounds for correction of errors by the appellate division.

. . . .

(2) Error in the Criminal Pleading. — Failure to charge a crime, in that:

1. The criminal pleading charged acts which at the time they were committed did not constitute a violation of criminal law; or
2. The pleading fails to state essential elements of an alleged violation as required by G.S. 15A-924(a)(5).

N.C.G.S. § 15A-1442(a)(2).[[3]](#footnote-3) Likewise, N.C.G.S. § 15A-1447(b) provides that “[i]f the appellate court finds that the facts charged in a pleading were not at the time charged a crime, the judgment must be reversed and the charge must be dismissed.” Finally, N.C.G.S. § 15A-1446 provides that errors based upon a claim that “the pleading fails to state essential elements of an alleged violation, as required by G.S. § 15A-924(a)(5)” may be the subject of appellate review even though no objection, exception, or motion has been made in the trial division. N.C.G.S. § 15A-1446(d)(4).[[4]](#footnote-4) These statutes show that the same considerations relevant in the trial court apply on appeal: If a criminal pleading does not list each essential element of an offense, a conviction obtained thereupon must be reversed, and the issue can be raised at any time.

The General Assembly’s clear intent is also compatible with the Rules of Appellate Procedure, which provide that “Any such issue . . . which by rule or law was deemed preserved or taken without any such action, including, but not limited to, whether the judgment is supported by the verdict or by the findings of fact and conclusions of law, whether the court had jurisdiction over the subject matter, and *whether a criminal charge is sufficient in law*, may be made the basis of an issue presented on appeal.” N.C. R. App. P. 10(a)(1) (emphasis added).

In the foregoing statutes, the General Assembly has made several things clear: First, a criminal pleading must allege all essential elements of an offense; Second, the remedy for failure to allege all essential elements of an offense is dismissal; Third, motions to dismiss based on a failure to allege all elements of an offense may be made at any time; Fourth, the failure to allege each element of an offense is grounds for correction by the Appellate division; Fifth, the appellate remedy for a failure to plead is reversal of a conviction and dismissal of the charges; and Sixth, the General Assembly has stated an express intent that these errors are preserved automatically for appeal. There is nothing in these statutes which suggests the General Assembly wishes to relieve the State of its burden to allege each element of a criminal offense in its pleadings, nor that the General Assembly wants to move away from the practice of treating indictments as jurisdictional requirements.[[5]](#footnote-5)

As this Court recognized in *Rankin*, “[t]he General Assembly, no doubt aware of this practice, has never acted to abrogate this common law rule, although it does retain the right to do so for policy-related reasons. There is no unsettled question of whether the common law remedy for invalid indictments was abrogated by the Criminal Procedure Act.” *Rankin*, 371 N.C. at 898.

#### The legislature has demonstrated its ability and willingness to change the general rule, and it has only done so in specific, limited instances, choosing instead to preserve for most crimes the rule that indictments must allege each essential element of an offense.

Further evidence of the General Assembly’s preference for requiring criminal pleadings to allege each essential element of an offense may be found in those few instances where it has, in fact, eased the requirements for criminal pleadings: short-form indictments. Its failure to do so for all criminal offenses is further evidence that the General Assembly intended for the common law rule to remain in effect.

For example, in N.C.G.S. § 15-144 and N.C.G.S. § 15-144.1, the legislature has specifically authorized the use of “short-form” indictments for murder and rape. These statues allow an indictment for certain offenses to omit certain language, including essential elements of the offense charged. In cases affirming the practice authorized by these statutes, this Court has recognized “the power of the legislature to relieve the State of the common law requirement that every element of the offense be alleged.” *State v. Lowe*, 295 N.C. 596, 603 (1978)
.

 Crucially, the General Assembly has not enacted a statute authorizing a short-form indictment for sexual battery under N.C.G.S. § 14-27.33. Indeed, the General Assembly has not authorized short-form indictments for the vast majority of criminal offenses. *See, e.g.,* N.C.G.S. §§ 15-144 through 15-147. As described above, if the General Assembly wished to “relieve the State of the common law requirement that every element of the offense be alleged” for a specific offense, or for all offenses, it knew how to do so. *See*
*Thomsen*, 369 N.C. at 26, *and* *Fabrikant,* 174 N.C. App. at 42. The fact that the legislature chose instead to relieve the State of its burden for only some offenses, but not all offenses, and that it specifically codified the requirement as a general rule makes its intent clear: criminal pleadings must allege each essential element of an offense.

#### This Court should follow its own well-established precedent and the clearly expressed will of the General Assembly, and reject the State’s invitation to hold that a valid indictment is a jurisdictional requirement.

Put simply, the State’s argument invites this Court to usurp the role of the legislature and change centuries of criminal law against the expressed will of our General Assembly, and by extension, the will of the people of North Carolina. *See Hoke Cty. Bd. of Educ. v. State*, 2022-NCSC-108
, ¶247 (Berger, J., dissenting) (“[T]he people act through the General Assembly[.]”). In support of this proposition, the State offers no compelling argument. At best, the State argues that it would be better policy for indictment defects to be non-jurisdictional. However, this Court is not a policy-making body. Rather, our General Assembly is the sole policy-making body in our State. *See id*. (Berger, J., dissenting); *accord Cooper v. Berger*, 370 N.C. 392, 429-30 (2018)
 (Newby, J., dissenting) (“The General Assembly is the policy-making agency because it is a far more appropriate forum than the courts for implementing policy-based changes to our laws.”) (cleaned up). Here, the General Assembly has spoken, and it has spoken clearly.

The statutes discussed above were all enacted by the General Assembly. Since their enactment, our Appellate Courts have consistently applied those statutes as they were written. Put simply, indictments always have been treated this way, and the General Assembly has not changed the statutes to alter the Court’s interpretation. “Although legislative inaction should not, standing alone, be treated as dispositive, the failure of a legislature to amend a statute which has been interpreted by a court is some evidence that the legislature approves of the court’s interpretation.” *State v. Steen*, 376 N.C. 469, 481 (2020)
 (cleaned up). If the General Assembly disapproved of our judiciary’s continued jurisdictional approach to indictments and the requirement that an indictment allege each essential element of an offense, “it could have addressed the matter during the course of these many years[.]” *State v. Jones*, 358 N.C. 473, 484 (2004)
 (cleaned up).

 However, as the State points out, there have been calls for a change. Most recently, in *Rankin*, Chief Justice Martin urged the General Assembly to reconsider its policies. Chief Justice Martin wrote: “[T]he General Assembly may wish to consider revisions to our criminal code to lessen the detrimental impact of the common law jurisdictional approach on the administration of justice in North Carolina.” *Rankin*, 371 N.C. at 898 (2018) (Martin, C.J., dissenting). However, in the four years since Chief Justice Martin invited the General Assembly to act, it has not accepted his invitation. It is not this Court’s place to accept the invitation on behalf of the General Assembly. To do so would be an “arbitrary usurpation of purely legislative power” bordering on tyranny. *Hoke Cty. Bd. of Educ.*, 2022-NCSC-108, ¶ 245 (Berger, J., dissenting). Indeed, “[r]egardless of whether these changes may be perceived as beneficial for litigants, the justice system, or this State, they have no basis in our General Statutes, and any such a policy shift should be undertaken by the legislature, not this Court.” *Reynolds-Douglass v. Terhark*, 2022-NCSC-74
, ¶ 44 (Berger, J., dissenting). This Court should hold, as it has for over a century, that an indictment must allege each essential element of an offense and its failure to do so deprives the trial court of jurisdiction.

# CONCLUSION

For the foregoing reasons and authorities, Mr. Stewart respectfully requests this Court affirm the Court of Appeals.

Respectfully submitted this, the 28th day of November, 2022.

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# CERTIFICATE OF FILING AND SERVICE

I hereby certify that the original Defendant-Appellee’s New Brief has been duly filed, pursuant to Rule 26, by electronic means with the Clerk of the Supreme Court of North Carolina.

I further certify that a copy of the foregoing Defendant-Appellee’s New Brief has been served upon Zachary K. Dunn, Assistant Attorney General, by sending it electronically to the following current email address, zdunn@ncdoj.gov.

This, the 28th day of November, 2022.

 Electronically Submitted

 Sterling Rozear

 Assistant Appellate Defender

No. 23PA22 TWENTY-SIXTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

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STATE OF NORTH CAROLINA )

 )

v. ) From Mecklenburg County

 )

ERIC PIERRE STEWART )

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**APPENDIX TO**

**DEFENDANT-APPELLEE’S NEW BRIEF**

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No. Appendix Document

 Page

1 1 *State v. Stewart*, 2022-NCCOA-24 (unpublished)

2 5 Robert L. Farb, *Arrest Warrant and Indictment Forms*

 (UNC School of Gov’t 5th ed. 2005)

3 7 Jessica Smith, *North Carolina Crimes: a Guidebook on*

 *the Elements of Crime* (UNC School of Gov’t 7th ed.

 2012)

1. Although this case falls outside the scope of N.C. R. App. P. 42(b) (requiring use of pseudonyms in cases which “involve a sexual offense committed against a *minor*”), counsel nevertheless uses the pseudonym “Amber Campbell” pursuant to IDS policy. *See Shielding the Identities of Juveniles and Victims of Sexual Crimes in Appellate Filings*,https://www.ncids.org/wp-content/uploads/2021/04/ShieldingJuveniles\_Victims.pdf (last visited 25 November 2022). [↑](#footnote-ref-1)
2. Drafted in 1973, ratified in 1974, made effective 1 July 1975. *See* 1973 Sess. Laws 1286, § 31. [↑](#footnote-ref-2)
3. In a footnote, the State also takes issue with the common phrasing that an indictment must state all essential elements of an offense. (State’s Brief at pp. 12-13, n.4). The State cites N.C.G.S. § 15A-924 and argues that an indictment need only allege “facts supporting every element” of an offense. However this appears to be a distinction without a difference; as shown in N.C.G.S. § 15A-1442(a)(2)(b) and N.C.G.S. § 15A-1446(d)(4), the General Assembly uses the language “state essential elements” to refer to the requirements of 15A-924(a)(5). In any event, the indictment here does neither and is therefore invalid regardless of which language is used to describe the requirement. [↑](#footnote-ref-3)
4. *See* note 3, *supra.* [↑](#footnote-ref-4)
5. Even if this Court were to hold that a valid indictment was not a “jurisdictional” requirement, the practical effect of an indictment failing to allege an essential element would not change. As discussed herein, under our statutes, an indictment which fails to allege every essential element of an offense is an error which requires the reversal of a conviction and the dismissal of the charges, and this error may be raised at any time, including for the first time on appeal, regardless of whether the Court calls the error “jurisdictional.” [↑](#footnote-ref-5)