

**IN THE COURT OF APPEALS  
STATE OF GEORGIA**

|                        |   |                         |
|------------------------|---|-------------------------|
| ERIC SUNG KIM          | : |                         |
| Appellant - Defendant, | : | DIRECT CRIMINAL APPEAL  |
|                        | : |                         |
| vs.                    | : | Docket Number: A26A2067 |
|                        | : |                         |
| STATE OF GEORGIA       | : |                         |
| Appellee - Plaintiff.  | : |                         |

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**A direct appeal from the State Court of Forsyth County  
Accusation 24M-2234-B  
The Honorable T. Russell McClelland, III., presiding.**

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**OPENING BRIEF FOR APPELLANT  
ERIC SUNG KIM**

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**ORAL ARGUMENT REQUESTED**

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### **STATEMENT OF JURISDICTION**

The Court of Appeals of Georgia, rather than the Supreme Court of Georgia, has jurisdiction over this appeal because the conviction, speeding, is a misdemeanor traffic offense not punishable by death nor otherwise reserved to the exclusive appellate jurisdiction of the Supreme Court of Georgia. GA. CONST. Art. 6 § 5 ¶ III. No direct constitutional questions are presented. GA. CONST. Art. 6 § 5 ¶ II (1).

## **PART ONE: COURSE OF PROCEEDINGS BELOW**

This speeding appeal raises an issue of first impression over the State's burden to prove precise speed where precise speed is specifically alleged in the accusation. Alternatively, because this same speeding count did not allege that the speed limit was posted or designated by an appropriate sign, trial counsel's omission of a general demurrer requires that this case be reversed.

### **A. Factual Background.**

On Father's Day, June 15, 2024, Deputy Sam Roberts with the Forsyth County Sheriff's Office in his marked patrol car travelling southbound on Georgia Hwy 400. [T. Vol. 1 at 73, 77]. Dep. Roberts was assigned to the HEAT Unit (Highway Enforcement of Aggressive Traffic), focused on DUI, reckless driving, and speeding.<sup>1</sup> [T. Vol. 1 at 71-72]. This patrol car was equipped with a 2022 "Dual Stalker" radar unit, which the deputy tested for accuracy both before and after his shift on the day he encountered Kim. [T. Vol. 1 at 75, 88-90].

While traveling in a "busier area," near Exit 16 (Pilgrim Mill), [T. Vol. 1 at 78: 18-19], Dep. Roberts claimed to see via his driver's side rear mirror a black Lamborghini Urus approaching, "like a rocket." [T. Vol. 1 at 77-78, 125]. The deputy "visually estimated" the Urus's speed at 110 mph and claimed to have

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<sup>1</sup> Dep. Roberts was certified to operate radar and LIDAR and serves as an instructor/observer for new deputies learning speed detection. [T. Vol. 1 at 82-84].

confirmed a radar reading of 107 mph in a 65-mph zone. [T. Vol. 1 at 78, 93]. But there were no radar notes of this speed and Dep. Roberts could not recall his own speed nor the closing distance allegedly reported by the radar. [T. Vol. 1 at 117]. The Urus did not pass the deputy. [T. Vol. 1 at 78].

Traffic conditions were moderate for this area. No BOLO calls nor concerned citizens reported speeding or reckless driving. [T. Vol. 1 at 125]. According to Dep. Roberts, when the Urus saw the patrol car, the driver braked, and reduced his speed significantly to 39 mph. [T. Vol. 1 at 66, 79] (“It wasn’t immediate. We were slowing down, slowing down, slowing down.”). The Urus began in the left lane, merged into the middle lane, and did not pass until Roberts pulled onto the shoulder to force the pass. [T. Vol. 1 at 79].

Dep. Roberts did not turn on his dash camera. [T. Vol. 1 at 126]. Dep. Roberts’s body-worn camera did not activate during the stop due to a Bluetooth connectivity issue. [T. Vol. 1 at 74].

Dep. Roberts claimed that his front dash camera and backseat camera did not capture violations occurring behind his vehicle, [T. Vol. 1 at 74-75], but this “fisheye” camera showed several vehicles in traffic moving at concurrent speeds with the officer. [T. Vol. 1 at 109-11]; [State’s Ex. 1]. The camera did not capture any radar audio detecting a high rate of speed. [T. Vol. 1 at 113].

When Dep. Roberts speculated as to why the Urus did not pass him, the trial court sustained an objection. [T. Vol. 1 at 79-80]. Kim was driving, and cooperated. Kim is Korean. A language barrier existed between Kim and the deputy during this stop. [T. Vol. 1 at 128].

According to Dep. Roberts, Kim told him that traffic was "just going slow" and answered "yeah" when he accused Kim of driving 107mph. [T. Vol. 1 at 93].

There was no chase. Even the deputy agreed that as soon as he activated his blue lights, the Urus pulled over promptly. [T. Vol. 1 at 126].

Vera, Kim's wife, was the passenger in the Urus; they have been married for 26 years. [T. Vol. 1 at 129, 133]. On Father's Day, Kim and Vera had attended church and were returning from Dawsonville. [T. Vol. 1 at 129]. Vera testified that traffic on GA 400 was "very heavy" that day, making it impossible to drive at the speed alleged in the accusation. [T. Vol. 1 at 130].

Vera paid attention to Kim's driving because she suffered from a medical condition involving brain pressure; speeds exceeding 80mph would cause her nose to bleed. [T. Vol. 1 at 130, 135, 137]. Vera's nose did not bleed, which Vera offered as proof that Kim did not exceed 80 mph. [T. Vol. 1 at 130, 134]. Vera did not understand how the deputy could have detected their speed using radar because the deputy's vehicle was in front of the Urus. [T. Vol. 1 at 139].

Vera denied that Kim swerved within or between lanes and stated that Kim drove in the far-left lane as he tried to move toward Exit 14.<sup>2</sup> [T. Vol. 1 at 129, 131]. When Vera looked at the speedometer (which the Urus projects onto the window), it showed 78 mph. [T. Vol. 1 at 131, 138]. Kim had to speed up slightly to 78 mph from 70 mph to change lanes because of heavy traffic. [T. Vol. 1 at 138-140].

Vera described Kim during the stop as shocked. Dep. Roberts "scream[ed] and holler[ed]" during the stop and arrested Kim without asking for a driver's license. [T. Vol. 1 at 131-32]. Vera never heard Kim admit to going 107 mph; instead, she heard Kim ask the deputy why he was being arrested because he "didn't go that fast." [T. Vol. 1 at 132, 141]. When Vera tried to apologize for going "a little bit over the speed limit," the deputy claimed Kim drove 107mph. *Id.*

## **B. Procedural Background.**

On July 3, 2024, the Forsyth County Solicitor General drew accusation 24M-2234-B, which charged Kim in count one with reckless driving, and in count two with speeding. [R. at 14]. Significant to Kim's appeal, count two's particulars alleged a *precise* speed, i.e., that Kim operated his motor vehicle[] at a speed of 107 miles per hour on GA 400 SB, but did *not* allege that this speed limit was posted.<sup>3</sup>

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<sup>2</sup> Vera testified that she had lived in the United States for twenty-six years and attended Church the whole time. According to Vera, "I'm a true Christian, and I don't lie." [T. Vol. 1 at 132].

<sup>3</sup> This omission is to be contrasted from the Uniform Traffic Citation, which particularized in the remarks section "107 mph in a posted 65 mph speed zone." [R. at 16].

[R. at 14]. Kim denied these allegations, entered not guilty pleas, and demanded a jury trial. [R. at 25].

No motions or demurrers were filed prior to voir dire.<sup>4</sup> In its requests to charge, the State filed several proposed jury instructions that – notwithstanding the particulars of its allegation in count 2 – actual speed need not be proven beyond a reasonable doubt and was not material to liability for speeding. *See* [R. at 48-49]. Notably, all but one of the cited cases were decided prior to *Alleyne v. United States*, 570 U.S. 99 (133 S.Ct. 2151) (2013), and the sole post-*Alleyne* opinion (*LaFavor v. State*, 334 Ga. App. 112 (2015)) recycled quotations from pre-*Alleyne* Georgia cases. Kim requested the pattern jury instruction on Speeding (§ 2.86.70) and made oral supplemental requests that exact speed (to wit: 107mph) *was*, in fact, material based on the language of count two. [R. at 65]; *see* [T. Vol. 2 at 165].

Before the jury, the State called one witness – Deputy Roberts – to support its prosecution theory that Kim was speeding recklessly, over 100mph, in traffic. The defense was that the State failed to provide any evidence of recklessness and that the slim video evidence it had did not prove the exact speed alleged. Kim focused on the absence of corroboration from the Deputy’s fisheye camera and argued that Kim could not have travelled 107mph on GA 400 during those busier traffic conditions.

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<sup>4</sup> The trial court’s case management order requested particularized motions to be filed within ten days of the defendant’s receipt of discovery. [R. at 27, ¶ (B) (3)].



During the deliberations, the jury questioned whether the State had to prove precise speed as alleged. *See* [Court’s Ex. 1]; [T. Vol. 2 at 217: 4-6] (“Speeding 107 miles per hour in 65 miles per hour, or just speeding?.”); *see also* [T. Vol. 2 at 218: 1-4-] (JUROR: “Our question was, Your Honor, are we ruling on the 107, or are we ruling on speeding in general? Because speeding in general is what the paper says that y’all gave us.”).<sup>5</sup> The trial court answered that the State had no such burden and recharged that precise speed was not material. [T. Vol. 2 at 219]. Thereafter, the jury acquitted Kim of reckless driving, but convicted him of speeding. [R. at 67].

In conflict with its jury instructions, the final disposition stated that Kim was “Foung Gulty“ of “Speeding 107/65“. *Id.* The trial court sentenced Kim to 12 months probation with the first 96 hours to be served in confinement, a \$1,000 fine and 42 hours community service. [R. at 68-69].

Kim filed a timely preliminary motion for new trial. [R. at 72]. Kim retained appellate counsel, who substituted his appearance and amended this motion to particularize three enumerations of error, including ineffectiveness of trial counsel. [R. at 89-92]. Relevant here, this motion argued (1) that the State’s evidence fatally varied from count two; (2) that the trial court’s jury instructions relieved the State’s

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<sup>5</sup> In a second note, moments later, the jury requested to review the Deputy’s fisheye camera footage. [Court’s Ex. 2]; [T. Vol. 2 at 220].

burden to prove exact speed and violated *Alleyne*; and (3) that trial counsel was ineffective for failing to generally demur count two after jeopardy attached.

The trial court held an evidentiary hearing. At this hearing, Kim called trial counsel (Hon Charles Abernathy) who testified that part of his defense strategy was to argue that the State could not prove that Kim drove the Urus at 107mph. [MNT Mar. 3, 2026 at 7: 19-25].

Although trial counsel first opined that he did not think a general demurrer was appropriate, [MNT Mar. 3, 2026 at 5-6], he was then refreshed with the accusation, and noted that the language “posted“ or “designated appropriate sign“ was not used.<sup>6</sup> *Id.* Trial counsel did not notice this omission in his trial preparation, [MNT Mar. 3, 2026 at 12], and testified unequivocally there was no strategy for omitting a demurrer on those grounds. [MNT Mar. 3, 2026 at 6: 13-22, at 15].

After propounding questions at oral argument, *see* [MNT Mar. 3, 2026 at 24-25] (THE COURT: “Nobody has called that in my 20-plus years of me being on the bench in speeding cases, but you may have something.“), the trial court denied the motion. [R. at 4-12]. The next day, Kim filed a timely notice of appeal to the Court of Appeals of Georgia. [R. at 1]. This briefing follows.

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<sup>6</sup> Trial counsel was aware of Section 40-6-181 (b)’s signage requirement at the time he tried this case. [MNT Mar. 3, 2026 at 15].

## **PART TWO: ENUMERATIONS OF ERROR**

- I. The trial court committed plain error under *Alleyne v. United States*, 570 U.S. 99 (133 S.Ct. 2151) (2013) when it instructed the jury that “in the prosecution of someone for speeding, the State need not prove that the driver was traveling at a precise speed to obtain a conviction.”

**Preservation Below:** Kim did not object to this specific trial court instruction. Thus, this issue is reviewed under the plain error standard. O.C.G.A. § 17-8-58 (b).

- II. Trial counsel rendered ineffective assistance that prejudiced the verdict.

**Preservation Below:** Kim preserved his challenge to the performance of his trial lawyer by raising this issue before the trial court at the earliest possible opportunity, in the amended motions for new trial. [R. at 92, ¶ 3].

## **STANDARD OF REVIEW**

### **I. Plain error under *Alleyne v. United States*, 570 U.S. 99 (2013).**

To establish plain error, Kim has the burden to establish four factors:

First, there must be an error or defect—some sort of deviation from a legal rule—that has not been intentionally relinquished or abandoned, i.e., affirmatively waived, by the appellant. Second, the legal error must be clear or obvious, rather than subject to reasonable dispute. Third, the error must have affected the appellant's substantial rights, which in the ordinary case means he must demonstrate that it affected the outcome of the [trial] court proceedings. Fourth and finally, if the above three prongs are satisfied, the [appellate court] has the discretion to remedy the error—discretion which ought to be exercised only if the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings. *State v. Kelly*, 290 Ga. 29, 33 (2) (b) (718 SE2d 232) (2011).

### **II. Ineffective assistance of trial counsel.**

“In reviewing the trial court’s decision [on an ineffective assistance claim], we accept the trial court’s factual findings and credibility determinations unless clearly erroneous, but we independently apply the legal principles to the facts.” *Szorcsik v. State*, 303 Ga. 737, 742 (5) (814 SE2d 708) (2018) (citations omitted).

### **PART THREE: ARGUMENT AND CITATIONS TO AUTHORITY**

- I. The trial court committed plain error under *Alleyne v. United States*, 570 U.S. 99 (133 S.Ct. 2151) (2013) when it instructed the jury that, in a speeding prosecution where precise speed is alleged, the State need not prove precise speed to convict.**

The Sixth Amendment of the United States Constitution requires that any fact capable of increasing the prescribed range of penalties to which a criminal defendant is exposed must be found by the jury beyond a reasonable doubt. U.S. Const. AMEND. VI;<sup>7</sup> *see Apprendi v. New Jersey*, 530 U.S. 46 (120 S.Ct. 2348) (2000). “The touchstone for determining whether a fact must be found by a jury beyond a reasonable doubt is whether the fact constituted an “element” or ingredient” of the charged crime, and “a fact is by definition an element of the offense when it increases the punishment above what is otherwise legally prescribed.” *Alleyne v. United States*, 570 U.S. 99 (133 S.Ct. 2151) (2013) (citing *Apprendi*, 530 U.S. at 483). *Alleyne* extended *Apprendi*’s principle to facts “not only that increase the ceiling, but also those that increase the floor.” 570 U.S. at 108.

Under *Alleyne*, the trial court committed plain error by *twice* instructing the jury that “in the prosecution of someone for speeding, the State need not prove that the driver was traveling at a precise speed in order to obtain a conviction for

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<sup>7</sup> The Sixth Amendment provides that those “accused” of a “crime” have the right to a trial by an impartial jury. *Id.* “This right, in conjunction with the Due Process Clause, requires that each element of a crime be proved to the jury beyond a reasonable doubt.” *Alleyne*, 570 U.S. at 105 (citing *United States v. Gaudin*, 515 U.S. 506, 510 (1995)).

speeding.” [T. Vol. 2 at 211: 5-9, at 217: 19-24]. While precise speed may not be material in *all* speeding prosecutions, *Alleyne* made it so here, where count two expressly alleged a precise speed that triggered statutorily enhanced punishment.

Here, precise speed was, in fact, an element of count two as alleged because the accusation alleged that Kim operated his vehicle at 107mph. [R. at 14]. Under well-settled Georgia law, “the indictment’s language controls the State’s burden of proof because averments . . . as to the specific manner in which a crime was committed are not mere surplusage, and such averments must be proved as laid, or the failure to prove the same will amount to a fatal variance and a violation of the defendant's right to due process of law.” *Beckett v. State*, 372 Ga. App. 139, 141 (1), n.8 (903 SE2d 824) (2024) (internal citations omitted); *accord Butler v. State*, 352 Ga. App. 579, 583 (2019).

Kim satisfies the first plain error prong because this instruction was a deviation from the Sixth Amendment rule set forth in *Alleyne*. In *Alleyne*, the Supreme Court of the United States held that the Sixth Amendment requires any fact capable of increasing the minimum sentence for the charge offense must be found by a jury beyond a reasonable doubt. *Id.* As applied to Kim, the precise speed alleged in count two (107mph) increased the minimum punishment for this misdemeanor (from 12-months jail and \$1,000 fine to 12-months jail, \$1,000 fine,

the \$200 “superspeeder” fee and 6 *points*) by imposing a superspeeder fee and 6 points upon his license.<sup>8</sup> *See* O.C.G.A. §§ 40-6-189 (b), 40-5-57 (c) (1) (A) (viii).

Neither points nor the superspeeder fee are discretionary—these Code Sections repeatedly use the term “shall.” §§ 40-6-189 (b), 40-5-57 (b)-(c). And license points are, in fact, a punishment when applying the seven-factor test set forth in *Hudson v. United States*, 522 U.S. 93, 99-100 (118 S.Ct. 488) (1997). In *Hudson*, the Supreme Court noted seven “guideposts” for the determination of whether administrative sanctions are merely civil or a form of punishment for Double Jeopardy: (1) whether the sanction involves an affirmative disability or restraint; (2) whether it has historically been regarded as a punishment; (3) whether it comes into play only on a finding of scienter; (4) whether its operation will promote the traditional aims of punishment-retribution and deterrence; (5) whether the behavior to which it applies is already a crime”; (6) whether an alternative purpose to which it may rationally be connected is assignable for it; and (7) whether it appears excessive in relation to the alternative purpose assigned.” *Id.*

The *Hudson* factors militate for punishment. *Hudson* post-dates an opinion from this Court holding that an administrative license suspension was not punishment for purposes of double jeopardy. *Cf.*, *Nolen v. State*, 218 Ga. App. 819

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<sup>8</sup> This precise speed, in some circumstances, could trigger elevated punishment for a misdemeanor of a high and aggravated nature. O.C.G.A. § 17-10-4.

(463 SE2d 504) (1995) (whole court). *Nolen*'s analysis relied significantly on *United States v. Halper*, 490 U.S. 435 (109 S.Ct. 1892) (1989), but *Halper* was overruled by *Hudson* two years after *Nolen* was decided. Thus, *Hudson* undermines *Nolen*'s foundation.

Because precise speed *did*, in fact, change the mandatory punishment for Kim by increasing the amount of points imposed, the Sixth Amendment required the jury to find beyond a reasonable doubt that Kim operated the Urus at 107mph. *Alleyne*, 570 U.S. at 108. Accordingly, the trial court's multiple instructions to the contrary were plain and obvious error. [T. Vol. 2 at 214, 219].

This *Alleyne* error was "plain and obvious" because *Alleyne* was a published Sixth Amendment interpretation decided *after* the Georgia cases holding that proof of precise speed was not required. *Cf., In re: J.D.S.*, 273 Ga. App. 576, 577 (615 SE2d 627) (2005) (quoting *Jones v. State*, 258 Ga. App. 337, 338 (2002)); *see also Porter v. State*, 290 Ga. App. 113, 115 (2) (658 SE2d 893) (2008).

The trial court erred when it relied on *LaFavor v. State*, 334 Ga. App. 125 (778 SE2d 377) (2015). *LaFavor* quoted *Frasard v. State*, 322 Ga. App. 468, 468-69 (1) (745 SE2d 716) (2013) for the general proposition relied on by the trial court and *Frasard* recycled language from the pre-*Alleyne* decisions in *J.D.S.* and *Jones*. Neither *LaFavor* nor *Frasard* considered an *Alleyne* challenge to this charge—these were sufficiency cases.



Kim satisfies the second plain error prong because this error was not affirmatively waived. Rather, this error was forfeited through trial counsel's failure to except to the charge and the recharge. *See Stanbury v. State*, 299 Ga. 125, 130 (2) (786 SE2d 672) (2016) (holding failing to object is forfeiture, not waiver, and explaining analytical distinction).<sup>9</sup> Under *Stanbury*, this issue was not affirmatively waived because Kim opposed the challenged instruction during the charge conference. *See* [T. Vol. 2 at 165-72].

Finally, the *Alleyne* plain error affected Kim's substantial rights because the jury's first deliberation question focused on this specific principle (i.e., the standard of proof as it applied to actual speed). [T. Vol. 2 at 216: 21-25]; [Court's Ex. 1]. And, the jury did not wholesale accept the prosecution theory (or the deputies' credibility) because it acquitted Kim of reckless driving. [R. at 66].

Beyond the jury's question and the acquittal, the evidence of 107mph was not overwhelming. There was no direct evidence that Kim drove 107mph, as alleged – the body camera did not activate, and the dash camera showed normal moving traffic surrounding the patrol vehicle, impeaching the deputy's claim that there was no camera to capture the speed of vehicles approaching from the rear.

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<sup>9</sup> In *Stanbury*, our Supreme Court explained this distinction: "Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right." *Id.* (quoting *Cheddersingh v. State*, 290 Ga. 680, 685 (2) (2012)).

The remaining circumstantial evidence of Kim's speed was both disputed and not overwhelming, as indicated by the jury's acquittal of recklessness. [R. at 66]. To be sure, had the jury accepted Kim's wife's testimony that the Urus speed was 78mph, Section 40-5-57 would impose zero points instead of six.

Thus, because this compounding plain error went to the ultimate issue for count two and, the jury made express note that the legal standard was unclear, this error affects Kim's substantial rights. A new trial is therefore required.

## **II. Trial counsel rendered ineffective assistance that prejudiced the verdict.**

"To prevail on an ineffective assistance claim, a defendant must show both that counsel rendered deficient performance and that the deficient performance prejudiced his defense." *Barrett v. State*, 292 Ga. 160, 166 (3) (733 SE2d 304) (2012) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). *Strickland's* first prong requires Kim to show that trial counsel was deficient in performing in "an objectively unreasonable way considering all the circumstances." *Romer v. State*, 293 Ga. 339, 344 (3) (745 SE2d 637) (2013). To meet the second prong, Kim must show "a reasonable probability that, absent counsel's professional errors, the result of his trial would have been different." *Barrett*, 292 Ga. at 166.

Under Georgia law, *Strickland's* prejudice prong considers the combined effect of trial counsel's errors. *See Debelbot v. State*, 305 Ga. 534, 544 (2) (826 SE2d 129) (2019). The collective prejudice from counsel's errors is then considered

together with the prejudice from any trial court errors. *State v. Lane*, 308 Ga. 10, 17 (1) (838 SE2d 808) (2020) (“We hold that the proper approach [] is to consider collectively the prejudicial effect, if any, of trial court errors, along with the prejudice caused by any deficient performance of counsel.”).

Applying *Strickland* and *Lane*, trial counsel performed deficiently in two ways, the prejudice from which – both in isolation and *together with* the trial court error in enumeration two – prejudiced the outcome. Specifically, trial counsel (a) failed to generally demur count 2 after jeopardy attached for failure to allege the “posted” element of § 40-6-181 (b) (4); and (b) failed to except to the trial court’s refusal of the requested lesser-included offense, “too fast for conditions.”

**A. Failure to file a general demurrer as to count two after the jury was sworn and jeopardy attached.**

A criminal defense attorney who fails to file a meritorious general demurrer performs deficiently. *Moss v. State*, 322 Ga. 757, 766 (5) (c) (922 SE2d 56) (2025) (citing *State v. Heath*, 308 Ga. 836, 839 (2020)). Under *Heath*, omission of an apt general demurrer is prejudicial even where the defendant had notice of the charges. *Id.* at 839-41. Under well-settled Georgia law, “[a] general demurrer may be raised after jeopardy has attached and at any time during trial[,]” or in a motion for arrest of judgment after trial, within the same term of court as the verdict. *Id.* at 840, n. 2.

No such demurrer was filed. “[T]o withstand a general demurrer,<sup>10</sup> an indictment must: (1) recite the language of the statute that sets out all the elements of the offense charged, or (2) allege the facts necessary to establish a violation of a criminal statute.” *Jackson v. State*, 301 Ga. 137, 141 (1) (800 SE2d 356) (2017). “It is established in Georgia that satisfaction of this fundamental principle requires that a[n] indictment which does not recite language from the Code must allege every essential element of the crime charged.” *Everheart v. State*, 337 Ga. App. 348, 353 (3) (786 SE2d 866) (2016). “The true test of the sufficiency of an indictment . . . is:

If all the facts which the indictment charges can be admitted as true, and still the accused be innocent, the indictment is bad; but if, taking the facts alleged as premises, the guilt of the accused follows as a legal conclusion, the indictment is good. *Cohen*, 302 Ga. at 617-18 (1).

Applied here, count two failed the *Jackson* and *Cohen* standard because the particulars did not allege that the speed limit Kim allegedly exceeded was *posted* (or otherwise noticed to the public by the designated, appropriate sign) as required by each subsection of § 40-6-181(b) (1)-(4). Count two alleged:

**COUNT 2** On behalf of the people of the State of Georgia, the undersigned, as prosecuting attorney for Forsyth County, does hereby charge and accuse Eric Kim, Defendant herein, with the offense of Speeding on or about June 15, 2024, on which date Defendant did unlawfully operate a motor vehicle, at a speed of 107 miles per hour on GA 400 SB, a highway in the State of Georgia, when the speed

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<sup>10</sup> On review of a general demurrer, this Court is limited to the allegations of the indictment and requires the Court to treat the allegations as true. *State v. Cohen*, 302 Ga. 616, 633 (807 SE2d 861) (2017) (Nahmias, J., concurring in part and concurring specially in part).

limit there was 65 miles per hour, in violation of O.C.G.A. 40-6-181. [R. at 14].

As drawn, count two did *not* recite each Code element because each subsection of § 40-6-181 (b) expressly states “designated by appropriate signs.” *See id.*, (b)(1)-(4). In fact, subsection (b) (4) – which Kim was accused of violating – employs appropriate sign designation as a *qualifying* clause to establish liability. *Id.*, at (b) (4) (“... ,provided that such speed limit is designated by appropriate signs.”).

Notice is fundamental. This Court has held that notice to the accused driver of the limit, via posting or appropriate sign, is material to impose liability for speeding. *See e.g., Harper v. Brown*, 122 Ga. App. 316, 319 (2) (176 SE2d 621) (1970) (reversing judgment for negligence per se based on speeding where no “was no evidence that any maximum speed sign appeared along the highway” and jury instructions permitted liability finding without evidence of posted limit).

Without alleging this material “posted” or “notice via sign” element, count two failed to state the offense—no other pleaded facts supported a fair inference that the 65mph limit was posted, or was otherwise noticed to public drivers.

Thus, because a general demurrer was ripe, and trial counsel did not file after jeopardy attached, a meritorious defense to count two was waived. For this non-strategic waiver, [MNT Mar. 3, 2026 at 6], deficient performance is established. Here, Kim was specifically prejudiced by this deficiency because the omission of this demurrer enabled the imposition of a conviction and sentence for a non-crime.

Accordingly, ineffectiveness is proven. This Court must therefore reverse.

**B. Failure to except to the trial court's refusal of Kim's requested lesser-included offense on "too fast for conditions."**

During the charge conference, Kim requested the trial court to charge the jury on O.C.G.A. § 40-6-180 ("too fast for conditions) as a lesser included offense of count two. [T. Vol. 2 at 174]. Under § 40-6-180, "[n]o person shall drive a vehicle at a speed greater than is reasonable and prudent under the conditions and having regard for the actual and potential hazards then existing." Prior case law indicates that "too fast for conditions" is an included offense within most traffic offenses. *See generally Howard v. State*, 182 Ga. App. 403, 404 (4) (355 SE2d 772) (1987).

The trial court refused Kim's request, [T. Vol. 2 at 178-180], and trial counsel did not take exception to this ruling at the conclusion of the charge as given. [T. Vol. 2 at 215: 10-12]. Thus, this issue was waived.

At the motion-for-new-trial-hearing, trial counsel testified that the lesser-included offense was part of his trial defense for count two, [MNT Mar. 3, 2026 at 14], and that he had no strategy for failing to except to the refusal of this charge. [MNT Mar. 3, 2026 at 6]. Trial counsel's post-conviction testimony was corroborated by his trial decision to call a witness (Vera) in the defense case who testified that Kim *was*, in fact speeding, [T. Vol. 2 at 131, 138], and by closing argument remarks conceding that Kim was speeding, but not to at 107mph as alleged. *See* [T. Vol. 2 at 187] ("[Vera] saw 78 miles an hour. We're not saying

that he wasn't going above the speed limit. We're not saying that. That's not the argument here. The argument is that he wasn't going 100.").

The trial court erred when it refused Kim's lesser-included offense. "In Georgia, a written request to charge a lesser included offense must always be given if there is any evidence that the defendant is guilty of the lesser included offense." *Hall v. State*, 308 Ga. App. 858, 863 (2) (709 SE2d 348) (2011) (quoting *Edwards v. State*, 264 Ga. 131, 132-33 (1994)). Here, slight evidence supported too fast for conditions because Vera testified that Kim accelerated to 78mph briefly, to change lanes. [T. Vol. 2 at 138-40]. A rational juror seeking the truth could have accepted Vera's testimony and found that Kim's temporary, 13-mph acceleration to change lanes in traffic was "too fast for conditions."

Contrary to the trial court's opinion, Georgia law did not set a maximum speed threshold to obtain a charge on too fast for conditions. [T. Vol. 2 at 178]. Contextually viewed, Kim's trial defense was specifically prejudiced by the refusal of this included offense because the jury was not given an alternative to speeding if they accepted Kim's argument that 107mph was not proven. And, Kim was prejudiced a second way: if this instructional error were preserved for appeal, the count two conviction would be reversed due to "slight evidence" on *de novo* review.

**C. *State v. Lane*: cumulative prejudice.**

Under *State v. Lane*, 308 Ga. 10, 12 (1) (838 SE2d 808) (2020), this Court must analyze the cumulative prejudice from each of trial counsel's proven deficiencies *together with* the prejudice from the trial court errors set forth in enumerations two and three. Applying *Lane*, the collective prejudicial effect of these proven errors creates a reasonable probability of a different outcome because, but for these errors, one of three beneficial results was likely to occur: (1) count two dismissed following a successful demurrer after jeopardy attached; (2) acquittal of count two upon proper instruction that the State was required to prove precise speed; or (3) conviction for "too fast for conditions" as an included offense of speeding.

**CONCLUSION**

For the foregoing reasons, Eric Sung Kim respectfully requests this Court to **VACATE** his conviction and **DIRECT ACQUITTAL** as to count one. Alternatively, this Court should **REVERSE** the denial of his motion for new trial and **REMAND** this case to the State Court of Forsyth County with instructions that a **NEW TRIAL** be granted.

Respectfully submitted this 1st day of June, 2026.

/s/ Matthew K. Winchester

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Appellate counsel for Kim



**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served a true and correct copy of the foregoing OPENING BRIEF upon Randa Hafez, Assistant Solicitor General for Forsyth County by filing the foregoing via the Court of Appeals E-Fast service, and by depositing the same in the U.S. Mail with adequate postage affixed to insure delivery, addressed to Forsyth County Solicitor General's Office, 101 E. Courthouse Square, Cumming, Georgia 30040.

Pursuant to Court of Appeals Rule 24 (f), undersigneds hereby certify that this brief does not exceed the criminal case word limit imposed by Rule 24 (a).

This 1st day of June, 2026.

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