Moreover, since April 2008, Smothers has confessed to the Runyon murders at least seven times to police, prosecutors, his attorney Gabi Silver, see Affidavit of Gabi Silver, 3/20/15; App. 2, and members of Mr. Sanford's legal team, Smothers' Affidavit, 3/6/15, 21-24; App. 1. Each account has been thorough, detailed, and consistent with previous accounts and with the objectively known facts of the case. See Trainum Affidavit, 3/23/15, 47; App. 3.

Smothers passed a polygraph test in 2012. Vincent Smothers' Polygrapb 5/21/14; App. 26. His confession is also corroborated by his former attorney, Gabi Silver. Silver Affidavit, 3/20/15; App. 2; see also COA Opinion at 5-6 (describing Silver's corroborating testimony as "substantial evidence of [Sanford's] innocence").

Smothers' confession not only reliably inculpates himself, but it also proves that Davontae Sanford is innocent. There is overwhelming evidence that Smothers' only accomplice was Ernest Davis. *Every* neighbor (Jesse King, Sonya Gaskin, and John Matyn) who observed the perpetrators described seeing only two perpetrators and/or hearing only two guns. King Testimony, TT 3/18/08, 7-11; Statement of John Matyn, 9/18/07; App. 11. Moreover, the .45 used at Runyon was found at Davis' cousin's house. Ira Todd Testimony, EH 3/16/10, 35. There is not a scintilla of evidence indicating that Smothers even knew Davontae Sanford, let alone that Smothers would have chosen him as an accomplice.[10]

Indeed, Smothers never used a juvenile accomplice in any of his murders-for-hire, and for good reason: his hits were dangerous to commit and, as Smothers has explained, required not only meticulous preparation – including weeks of surveillance – hut precise execution by an accomplice on whose cold-bloodedness Smothers could rely. Smothers' Affidavit, 3/6/15, 4;

[10] Indeed, there is no evidence to the contrary, despite a thorough investigation by the DPD and the Wayne County Prosecutor's Office, to find a connection between this adult professional murderer and 14-year-old child. EH, 3/16/10, 40-44, 46, 76-77.

App. 1. It is ludicrous – and entirely unsupported by any evidence – to speculate that Smothers invited a developmentally challenged, inexperienced, and impulsive 14-year-old boy who was blind in one eye to participate in a professional hit with him, and then allowed him to go straight home afterwards, less than two blocks away, where he likely would be located by police canvassing the area and vulnerable to police questioning. To assume such a liability would be extraordinarily out of character for Smothers. Smothers' Affidavit, 3/6/15; App. 1.

ii. The Purported Evidence of Guilt Presented at Trial Would Be Far Outweighed by Smothers' Accurate and Reliable Confession.

Vincent Smothers' detailed, corroborated, and consistent confessions trump Davontae Sanford's error-filled, uncorroborated, and ever-changing stories. An analysis of Smothers' and Davontae Sanford's confessions against the known and provable facts leads inexorably to the conclusion that Smothers' confessions are reliable and Davontae's are not. Without Davontae's confessions, the only remaining evidence is a meaningless gunshot residue test result on a pair of pants and a statement by the surviving Runyon murder victim, months after the killings, that Mr. Sanford's voice was merely similar to that of the man she heard. In the face of such paltry and unreliable evidence, the new evidence of Mr. Sanford's innocence is compelling, and it would be manifestly unjust to let his conviction stand.

1. Davontae Sanford's Confessions Are Inherently Unreliable

Davontae Sanford's confessions are inherently unreliable on their face and inconsistent with each other. In stark contrast to Vincent Smothers, his confessions get more wrong than right – they misstate the most basic facts of the crime, omit highly memorable details of the crime, are wholly uncorroborated by the evidence, and are wildly inconsistent with each other.

Interrogations expert James Trainum highlighted three significant red flags indicating the unreliability of Davontae's primary inculpatory statement, i.e. the confession he gave police on

that the interrogation consisted mainly of him answering yes or no to leading questions. *Miranda* Competency Report, 12/4/07, 7; App. 13 ("I was like answering questions yes and no.").[13] With regard to the scene sketch, Cmdr. Tolbert conceded he could not recall whether this was actually drawn entirely by Davontae. EH, 7/13/10, 137-38. It is undisputed that Sgt. Russell had also been to the crime scene and seen the bodies.

Second, Davontae's confession to police contains a *false fed fact*; a detail that police believed to be true at the time of the interrogation but that later turned out to be false.[14] When Davontae identified "Tone Tone" and "Tone" as two of his accomplices at approximately 4:00 a.m. on September 18, police already regarded them as suspects due to a tip provided by neighbor Sadie Hunt. Crime Scene Summary Police Report, 9/17/07, 2; App. 8; EH 7/13/10, 27, 188-92.[15] The information was accordingly included in Davontae's confessions on September 17 and 18 – even though both Tone Tone and Tone were later completely cleared by police. To assume that both Davontae and the police independently got this key fact wrong is implausible. The far more likely explanation is that police provided him this information, believing it to be right, and convinced him to adopt it as part of his confession.

Deputy Chief Tolbert claimed that DPD did not issue digital cameras until 2008, but Russell testified in an unrelated case that he used his personal digital camera to document his police work as early as 2006. TT, 7/13/09,139; *People v Marcell Mills,* 1/18/2007 Transcript, 77, 108.

[13] Davontae's written answers on his first typed statement further suggest that he was just answering questions by rote and not independently providing information. Davontae's First Statement, 9/18/07; App. 15 (giving identical answer of "Yes" to all six questions even though the third question did not call for a yes or no response).

[14] See e.g., N.Y. Times, *Brooklyn District Attorney Will Ask Judge to Throw Out Murder Convictions* (accessed April 8, 2015), <http://www.nytimes.com/2014/10/15/nyregion/district-attorney-will-ask-judge-to-throw-out-murder-convictions.html?_r=0> (highlighting cases of two men, whose murder convictions were vacated after prosecutor concluded they had falsely confessed "in large part because these 16-year-olds were fed false facts").

[15] While "Tone" is spelled "Twan" on the police report, Sgt. Williams believed this referred to the same individual who went by "Tone," Antonio Langston. EH 7/13/10, 187.

Third, a confession can be screened for contamination by analyzing how much of the information contained in the confession was already known to the interrogator. Trainum Affidavit, 3/23/15, 34-35, 39-42; App. 3. In the heat of interrogation, it can be hard for an interrogator to realize that he or she has begun asking leading questions that provide the suspect with details of the crime. *Id.* at 9. Rather than relying on Russell's memory of the interrogation, accordingly, a surer way of finding the truth is to compare the facts known to the police against the facts that appear in Davontae's confession. *Id.* at 39-47. If the suspect is unable to get a single detail right about the crime except those facts that the police already knew before the interrogation, then a strong inference of fact-feeding arises. *Id.* at 8-9. Such analysis here indicates that Davontae's confession was very likely contaminated because the few accurate facts in the confessions were *all* known to Russell at the time of interrogation. See *id.* at 1, 39-42, 45 (observing that Russell knew where the victims' bodies were found, that shots were fired from outside the house, that casings from assault-style weapon and a .45 gun were at the scene, and the escape route of the perpetrators).

Unlike Smothers, moreover, Davontae was not able to provide a single piece of information about the crime that the police were able to *subsequently* confirm. Indeed, the few pieces of new information Davontae provided turned out to be false. For example, he said he threw his gun into the AT&T lot, but no gun was found there.

On the other hand, Smothers' confession was not contaminated. His statements were volunteered, unprompted, and did not contain any details previously mentioned by police. During his confession, Smothers was able to describe the Runyon crime scene with uncanny accuracy, including non-public facts about the crime scene that only the true perpetrator would know, in the absence of any contamination whatsoever. See Smothers' Affidavit, 3/6/15; App. 1.

And he provided the police with new key information, including the identity of the guns used, which they independently corroborated. *Id.* Application of the contamination test to both sets of confessions thus leaves no question that Smothers' confessions are far more reliable. Trainum Affidavit, 3/23/15, 1, 50; App. 3.

3. Police Obtained This Unreliable Confession by Knowingly Exploiting Highly Vulnerable 14-Year-Old Davontae Sanford

There is now near-universal agreement that youth are particularly vulnerable to police pressure and, in turn, to making false confessions. The U.S. Supreme Court has found that "[i]t is beyond dispute that children will often feel bound to submit to police questioning when an adult in the same circumstances would feel free to leave," and, accordingly, that the "risk [of false confessions] is all the more troubling—and recent studies suggest, all the more acute—when the subject of custodial interrogation is a juvenile." *J.D.B. v North Carolina*, 131 S Ct 2394, 2398-99, 2401; 180 L Ed 2d 310, 317 (2011).[16] Researchers confirm that people under age 18 are between two and three times as likely to falsely confess as adults.[17] Law enforcement also recognizes this risk: "Over the past decade, numerous studies have demonstrated that juveniles are particularly likely to give false information – and even falsely confess – when questioned by law enforcement." *See* International Association of Chiefs of Police Guide, <http://www.theiacp.org/Portals/0/pdfs/ReducingRisksAnExecutiveGuidetoEffectiveJuvenileInterviewandInterrogation.pdf> (accessed March 25, 2015). John E. Reid & Associates, the firm that markets the most commonly used interrogation technique in the country, agrees that "[i]t is well

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[16] *See also Gallegos v Colorado*, 370 US 49, 54; 82 S Ct 1209, 1212; 8 L Ed 325, 328 (1962) (noting that "a 14-year-old boy, no matter how sophisticated, is unlikely to have any conception of what will confront him when he is made accessible only to the police"); *In re Gault*, 387 US 1, 52; 87 S Ct 1428, 1456; 18 L Ed 2d 527, 559 (1967) (explaining that "authoritative opinion has cast formidable doubt upon the reliability and trustworthiness of 'confessions' by children").
[17] Samuel R. Gross et al., *Exonerations in the United States, 1989 Through 2003*, 95 J Crim L & Criminology 523, 545 (2005).

accepted that juvenile suspects are more susceptible to falsely confess than adult suspects,"[18] and warns that investigators must take great care when interviewing or interrogating a juvenile.

Davontae Sanford was only 14 years old when he was interrogated by police, and he also exhibited all three risk factors known to leave a person particularly vulnerable to making a false confession: immaturity, cognitive disability, and psychological impairment. Aaron Affidavit, 3/2/15, 5-7, 19; App. 4. He was a developmentally delayed, traumatized, and emotionally compromised 14-year-old child with a learning disability that had required special education placement from an early age and impaired both his ability to comprehend nuanced situations and to competently perform in social situations. *Id.* at 7-11, 14-16. As a result, he was naïve, gullible, suggestible, and prone to make up stories to mask his problems and impress others. *Id.* at 2, 19.

Like any juvenile, he was also impulsive, unable to understand the long-term consequences of his actions, and likely to respond to immediate offers – such as going home. *Id.* at 19. The police exploited his eagerness to please others by apparently offering him friendship in the early morning hours of September 18, by taking him out to Coney Island for food and allowing him to play on the computer at the police station, a rare treat for a boy who typically only had access to a computer at school or at his aunt's house. *Id.* at 2, 17-19.

By the time the police shifted to confrontation mode in the evening of September 18, Davontae had been taken in by their apparent friendship. *Id.* Once police tactics became more traditionally coercive – they repeatedly told him they knew he did the crime because they found blood on his shoes (fabricated evidence), refused to entertain his denials, lied and said they talked to his "momma" who wanted him home, and promised him he would go home once he

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[18] *Take Special Precautions When Interviewing Juveniles or Individuals With Significant Mental or Psychological Impairments*. John E. Reid & Assoc., Inc., Investigator Tips, March-April 2014. See http://www.reid.com/educational_info/r_tips.html?serial=20140301&print=[print] (last visited 3/25/15).

told them what they wanted to hear – Davontae was primed to start, in his words, "making stuff up." *Miranda* Competency Report, 12/4/07; App. 13; Trainum Affidavit; 3/23/15, 19; App. 3; Aaron Affidavit 3/10/15, 18-19; App. 4. According to Davontae, Russell was a different person and his interrogation tactics took a different tone from the moment he picked him up on the evening of September 18. Russell lied to him about evidence and accused him of lying in the car en route to the station. When Davontae asked for a lawyer, he was mocked; police called him a "dumbass" and claimed that no lawyer would be up at that time of night. *Miranda* Competency Report, 12/4/07, 7; App. 13; Trainum Affidavit, 3/23/15, 18; App. 3.

Such psychologically coercive tactics are known to produce false confessions, particularly from juvenile and cognitively impaired suspects. Sgt. Russell should have known to adapt his tactics given the age and obvious immaturity of his suspect. See *Colorado v Connelly*, 479 US 157; 107 S Ct 515; 93 L Ed 2d 473 (1986) (holding police unconstitutionally "overreach" when their questioning "exploit[s]" known weaknesses of a vulnerable suspect). His exploitation of a vulnerable suspect was successful – Davontae ultimately gave a statement admitting he participated in the murder.

4. Davontae Sanford Recanted at His First Opportunity Because His Confession Is False

Davontae Sanford recanted his confession at his first opportunity. *Miranda* Competency Report; App. 13. Results of a polygraph test Davontae took in 2014 confirm the truth of his recantation; his confession to the Runyon homicides was utterly false. Davontae Sanford's Polygraph Report, App. 25.[19]

[19] The test showed he truthfully answered "no" to these questions: (1) whether he was in the Runyon house when four people were killed in September 2007; (2) whether he had any part in the shooting; and (3) whether he participated in the shootings. Polygraph Report; App. 25.

Davontae's guilty plea is no reason to doubt his actual innocence. Just as juveniles are more likely to falsely confess, juvenile defendants are overrepresented among the exonerated who have pleaded guilty. See Gross, *Convicting the Innocent*, 4 Ann Rev L & Soc Sci 173, 181 (2008). This makes sense because guilty pleas are essentially a specialized form of false confession, and the same developmental issues that make juveniles prone to falsely confessing make them similarly prone to entering false guilty pleas. Allison D. Redlich, *The Susceptibility of Juveniles to False Confessions and False Guilty Pleas*, 62 Rutgers L Rev 943, 957 (2010) ("[T]here is good reason to suspect that [juveniles] are … more vulnerable to guilty pleas").

iii. Valerie Glover's Testimony That Davontae Sanford's Voice "Sounded Like" That of the Killer Is Inherently Unreliable and Meaningless.

At the trial, Valerie Glover testified that Davontae Sanford's voice "sound[ed] like" that of one of the killers after he was ordered to state "[W]ho back here? Where the shit at? I'm about to kill you" on the record for her to hear. TT, 3/18/08, 49. Despite this highly suggestive in-court show-up identification procedure, Glover was not able to positively identify Davontae's voice as that of the killer or say anything more than that the voices were similar. Glover's testimony is therefore a far cry from reliable or sufficient evidence to sustain the conviction, particularly given the new evidence supplied by Vincent Smothers.

Even if she had identified Davontae's voice as that of the killer, Glover's testimony would not have been sufficient evidence of guilt for several reasons. First, her testimony has several recognized hallmarks of unreliability:

- *Passage of time*: Six months passed before Glover was ever asked if Davontae's voice sounded like the killer's voice. In one study, researchers found that accuracy in voice identification dropped from 50% accuracy after a one-week period to 9% accuracy after a three-week period. A. Daniel Yarmey, *Earwitness Speaker Identification,* 1 Psychol Pub Pol'y & L 792, 805 (1995).

- *Duration of exposure*: Glover only heard the shooter speak three short phrases totaling 12 words. Research indicates that voice-sample durations can affect the listener's ability to identify the speaker; the longer the opportunity to listen to the speaker, the greater the accuracy of identification. *Id.* at 804 (citing three studies).

- *Familiarity with voice*: Glover had never met or heard Davontae before his arrest. Research shows accurate identification of a voice drops precipitously if the identifier has not heard the voice before. *Id.* at 796-97 (citing studies).

- *Level of attention*: Glover had just witnessed the murder of four friends and was shot five times herself. Stress and emotional events have been shown to negatively influence earwitness performance. Solan & Tiersma, *Speaking of the Crime: The Language of Criminal Justice* (Chicago: University of Chicago Press, 2005), ch 7, pp 127-129.

- *Determination of Physical Attributes of Speaker*: Glover testified that the shooter sounded young. Research indicates earwitnesses are not able to reliably estimate a speaker's specific physical characteristics, with studies showing underestimation of speakers' ages by an average of ten years. Yarmey at 799-80 (citing studies).

Recognizing the inherent risks of voice misidentification, Michigan courts have held that vocal identification evidence is competent *only if* the witness's testimony is "positive and unequivocal." See *People v Bozzi*, 36 Mich App 15, 22; 193 NW2d 373 (1971). Since Glover could not identify Davontae's voice as that of the killer, her testimony should not have been admitted, and certainly cannot be used to overcome the new evidence of Davontae's innocence.

Third, the highly suggestive, in-court, single-person, show-up identification procedure used to obtain Glover's testimony renders it inherently unreliable. See *People v Gray*, 457 Mich 107, 111; 577 NW2d 92 (1998) (holding suggestive techniques, like show-ups, "give[] rise to a substantial likelihood of misidentification"). When Glover was asked to identify Davontae's voice – which, again, she failed to do – he was in court, seated next to his lawyer at the defense table, and she knew that he had been charged with shooting her and murdering four of her friends and family. The fact that, despite all of that powerful suggestion, Glover was still unable to identify Davontae's voice as that of the killer demonstrates that her testimony that the voices were merely similar is essentially worthless.

iv. The Purported Gunshot Residue Evidence is Inherently Unreliable and Meaningless.

At trial, the prosecution presented evidence that gunshot residue was found on pants seized from a closet in Davontae's home and argued that he must have recently fired a gun. TT, 3/18/08, 64. Significantly, the prosecution never proved that these pants, which were seized from a closet Davontae shared with three other teenage males, even belonged to him.

But even if the prosecution had shown that the pants belonged to Davontae, this evidence still would have been meaningless. Gunshot residue is easily transferable from one person or one item of clothing to another, and it can remain on an item or a person for an extended period of time. Balash Affidavit, 3/19/15, 3; App. 5. The Michigan State Police has never conducted a gunshot residue test for precisely this reason (and the FBI has stopped doing such tests); the results can he highly misleading and thus are considered essentially meaningless. *Id.* Even if some probative value could be attributed to the gunshot residue on the pants in this case, there was still no gunshot residue found on Davontae's hands or on any other clothes that he claimed to have been wearing during the crime, and no blood whatsoever was found on any of his clothing – a highly improbable result given the bloodbath at the victim's house. *Id.* at 3-4; Trainum Affidavit, 3/23/15, 43; App. 3.

v. Courts Across the Country have Overturned Convictions in Situations Analogous to This Case.

Mr. Sanford's case is hardly unique. Courts have overturned convictions of defendants who confessed, including cases where they also pled guilty, when those defendants were later exonerated by more accuratc, corroborated third party confessions. Examples include:[20]

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[20] *See* National Registry of Exonerations, *Christopher Ochoa* <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3511>; *Raymond*

- **Christopher Ochoa**: In 1989, Christopher Ochoa confessed, pled guilty, and was convicted of rape and murder of Nancy DePriest. Years later, the true perpetrator, Achim Marino, who was imprisoned on other convictions, wrote to the police, the governor of Texas, and the prosecutor's office to confess that he actually raped and killed DePriest. He provided detailed knowledge of the crime scene, revealed the locations of items taken from the victim, and led police to the murder weapon. He also said he did not know Ochoa and had no idea why he would confess and plead guilty to this crime. Based on Marino's corroborated confession, Ochoa was exonerated in 2001.

- **Antron McCray, Kevin Richardson, Yusef Salaam, Raymond Santana and Korey Wise**: In 1989, these five boys, aged 14 to 16, now known as the "Central Park 5," all confessed to the brutal rape and beating of jogger Tricia Meili. They were all convicted despite the fact that the DNA evidence taken from the victim's body did not match any of them. In 2002, convicted rapist and murderer Matias Reyes confessed that he had committed the assault alone. The prosecutor recommended that the boys' convictions be vacated, recognizing: "*[T]he defendants' statements were not corroborated by, consistent with, or explanatory of objective, independent evidence. And some of what they said was simply contrary to established fact.*" Moreover, the prosecutor could not find any connection between Reyes and the five defendants.

As in those cases, Vincent Smothers' highly accurate corroborated confession amounts to overwhelming, compelling evidence that Davontae Sanford is completely innocent of all of the charges against him, and it would be a manifest injustice for this Court to permit his conviction to stand. This Court should hold an evidentiary hearing and permit Vincent Smothers to testify and, after hearing that testimony, should vacate Mr. Sanford's convictions and sentences.

II. DAVONTAE SANFORD IS ENTITLED TO RELIEF BECAUSE TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE IN FAILING TO MOVE TO SUPPRESS OR CHALLENGE HIS STATEMENTS BEFORE OR AT TRIAL AND FAILING TO EXCLUDE MS. GLOVER'S PURPORTED VOICE COMPARISON TESTIMONY BEFORE OR AT TRIAL.

In order to prevail on an ineffective assistance of counsel claim, a defendant must show: 1) counsel's representation fell below an "objective standard of reasonableness" and 2) defendant

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Santana http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3610 (accessed March 17, 2015).

was prejudiced. *Strickland v Washington*, 466 US 668, 670; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Where the defendant has pled guilty, he must establish prejudice by demonstrating that "there is a reasonable probability that, but for counsel's errors, [the defendant] would not have pleaded guilty . . . ." *Hill v Lockhart*, 474 US 52, 59; 106 S Ct 366; 88 L Ed 2d 203 (1985).

A. Trial Counsel's Failure to Move to Suppress the Police Statements Was Objectively Unreasonable.

A trial attorney's failure to move to suppress a highly inculpatory confession could be justified only if such a motion would certainly fail on the merits. But in this case, there were two strong grounds for the suppression of Mr. Sanford's police statements.

1. A Reasonably Competent Lawyer Would Have Moved to Suppress the Statements on *Miranda* Grounds.

A reasonably competent attorney would have moved to suppress on *Miranda* grounds those statements made by Davontae to the DPD on the evening of September 18, 2007, on two separate bases. See Affidavit of Randolph Stone, 3/17/15, 8-10; App. 6. First, Sgt. Russell failed to read Davontae his *Miranda* rights before interrogating him on the night of September 18. Exactly the same approach to *Miranda* has been condemned by the U.S. Supreme Court in *Missouri v Seibert*, 542 US 600; 124 S Ct 2601; 159 L Ed 643 (2004). Second, Davontae asked for a lawyer, invoking his *Miranda* right to counsel, but his request was denied. *Miranda* Competency Report, 12/4/07, 7; App. 13.

As the DPD's time-stamped *Miranda* form makes clear, and as confirmed by Sgt. Russell's own testimony, Russell did not administer *Miranda* until 10:00 p.m. *Miranda* Form, 9/18/07; App. 18. According to the typed confession, however, the interrogation itself started no later than 9:30 p.m. – and Davontae clearly made inculpatory statements before 10:00 p.m. Davontae's Second Statement , 9/18/07; App. 18.

A non-*Mirandized* statement obtained through custodial interrogation must be suppressed in its entirety. Since there is no question that Russell interrogated Davontae at the station on September 18, 2007, the only question is whether he was in custody, which requires an objective determination as to whether a reasonable person would have felt free to terminate the encounter. *Thompson v Keohane,* 516 US 99, 112; 116 S Ct 457 133 L Ed 2d 383 (1995).

Courts have found custody in nearly identical but less compelling circumstances. In *United States ex. rel. A.M. v Butler*, *Miranda* custody was found where an 11-year-old boy with no prior police experience was interrogated for over an hour by two detectives in a police station interview room outside his parents' presence. 360 F3d 787, 797-98 (7th Cir 2004) (holding the Illinois court's finding that the hoy was not "in custody" was an "unreasonable application" of U.S. Supreme Court case law).

Like A.M., 14-year-old Davontae had no prior police experience and was interrogated at a DPD station. See *Miranda v Arizona*, 384 US 436, 467; 86 S Ct 1602; 16 L Ed 2d 694 (1966) (noting police-dominated environment is especially likely "to undermine an individual's will to resist and compel him to speak"). He was never told he was free to leave; he was questioned for longer than A.M.; and neither his mother nor grandmother was there. He was also driven to DPD Homicide by police and was dependent upon them to get back home. See *A.M.*, 360 F3d at 797-98 (boy was "at the mercy of the detectives to drive him home" and "had no way of leaving the police station even if he felt he could leave"); *Moody v State*, 209 Md App 366, 384; 59 A3d 1047, 1058 (2013) (concluding finding of custody was supported by the fact that the juvenile did not drive himself to police station).

In sum, Davontae Sanford was surely in custody on the evening of September 18. See *J.D.B. v North Carolina*, 131 S Ct 2394, 2399; 180 L Ed 2d 310 (2011) (holding that reasonable

juveniles "often feel bound to submit to police questioning when an adult in the same circumstances would feel free to leave"). In turn, Sgt. Russell's interrogate-first but *Mirandize*-later approach violated Davontae's constitutional rights and rendered his statement suppressible in its entirety. *Seibert*, 542 US at 616-17. The record reveals no possible strategic reason for Slameka's failure to move to suppress Davontae's statement.[21]

Slameka also inexplicably failed to raise Davontae's invocation of his *Miranda* right to counsel. He knew or should have known that his client had invoked his right to counsel during the interrogation because Dr. Schwartz described his invocation in her report which Slameka received in early December 2007. Davontae told Dr. Schwartz that, when he asked for a lawyer, he was called a "dumbass" and told no lawyer would be up at this time of night to help him. Davontae's statement should have been suppressed in its entirety on this basis as well.

2. An Effective Attorney Would Have Moved to Suppress the Police Statements on Due Process Voluntariness Grounds.

An effective attorney also would have moved to suppress the police statements from the night of September 18, 2007 as the product of coercion and thus involuntary. See Stone Affidavit, 3/17/15, 10-11; App. 6. To assess voluntariness, courts examine the "totality of the circumstances," including age, experience, education, background and intelligence, prior police experience, whether questioning was repeated or prolonged, and the absence of a parent, guardian or attorney. *Fare v Michael C,* 442 US 707, 725; 99 S Ct 2560; 61 L Ed 2d 197 (1979). Because juveniles are particularly vulnerable to police pressure, an interrogation that may not be coercive for an adult might be coercive when the suspect is a juvenile. *See Gallegos,* 370 US at 54-55; *Haley v State of Ohio*, 332 US 596, 599; 68 S Ct 302; 92 L Ed 224 (1948). While

[21] The record is the only possible source for illumination of Slameka's reasoning, as he has told current counsel that he does not have any files from this case.

coercion must be shown, the Court has found "police overreaching" in cases where the suspect is vulnerable, police knew of the suspect's vulnerabilities, and their questioning "exploit[ed] this weakness." *See, e.g., Connelly,* 479 US at 165.

Sgt. Russell knew, at the time he began interrogating Davontae on the evening of September 18, that: (1) Davontae was only 14 years of age; (2) he had little or no prior experience with the police; (3) he had never been interrogated in connection with a homicide; and (4) he had been up much of the night before being questioned. By all accounts, including those of family, teachers, juvenile detention facility personnel, and Department of Corrections personnel, Davontae was a very immature boy with a severe learning disability. It must have been obvious to Russell that Davontae was an unsophisticated, highly vulnerable person.

Nonetheless, Russell interrogated Davontae alone, without a parent, guardian, or attorney present, contrary to DPD's own policy requiring parental presence for juvenile interrogations.[22] And then, as set forth above, Russell utterly failed to *Mirandize* him at all before interrogating him and eliciting his 9:30 p.m. statement. This conduct exploited Davontae Sanford's known vulnerabilities and constituted "police overreaching," thus providing grounds for the suppression of the evening statements as involuntary.

Even more bases for suppression, however, exist. Had Slameka read the report of court-appointed psychologist Dr. Lynne Schwartz, he also would have known that Davontae described an accusatory interrogation that involved the following coercive tactics: *deception* when Russell

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[22] From 2003 to July 2008, the governing Detroit Police Department policy provided: "A member wishing to interview and question a juvenile with respect to the juvenile's part in the commission of a crime *must* do so in the presence of a parent or legal guardian of the juvenile." Ann Mullet, Detroit Metro Times, *Confessions and Recantations*, <http://www.metrotimes.com/detroit/confessions-and-recantations/Content?oid=2177868> (accessed March 10, 2015) (emphasis added) (quoting policy).

falsely stated that there was blood on Davontae's shoes; *promises of leniency* when Russell suggested that Davontae would be allowed to go home if he confessed; and *contamination* when Russell fed Davontae facts about the crime by showing him photographs, taking him to the crime scene, and disclosing crime scene facts through leading questions. A reasonably effective attorney would have recognized that these facts supported a motion to suppress on voluntariness grounds. Stone Affidavit, 3/17/15; App. 6; see, e.g., *United States v Preston*, 751 F3d 1008, 1023-24 (9th Cir 2014) (en banc) (holding a confession from a disabled 18-year-old was coerced where it was contaminated because the police "asked him the same questions over and over until he finally assented and adopted the details that the officers posited").

At a minimum, even where counsel failed to file a motion to suppress for all of the above reasons, a reasonably competent attorney would have challenged the voluntariness and reliability of his client's statements at trial. Stone Affidavit, 3/17/15, 12-13; App. 6. Slameka knew or should have known that Davontae was a vulnerable juvenile suspect; that his statements to police were inconsistent, wildly inaccurate, and uncorroborated by the evidence; that his purported accomplices had been investigated and cleared by police; that the few accurate details included in his confession were all known to Sgt. Russell; that police had failed to independently corroborate a single piece of new information he provided; and that Davontae had recanted and explained that he confessed due to psychological pressure and coercive tactics used by the police. *Id.* at 10-13. Nonetheless, at trial, Slameka never even asked Sgt. Russell to explain why he ignored DPD policies despite knowing he was dealing with a vulnerable suspect, to defend his decision not to advise the boy of his constitutional rights before questioning him on the evening of September 18, or to confront him about contamination of Davontae's confession or the lack of corroboration of that confession. *Id.* In fact, he never asked Sgt. Russell a single question. The

record reveals no strategic reason – nor can current counsel fathom one – for counsel's failure to move to suppress the statements before trial or to challenge their reliability at trial.

B. A Reasonably Competent Attorney Would Have Moved to Exclude, or at Least Objected to, Valerie Glover's Testimony Regarding Davontae's Voice.

A reasonably competent attorney would have moved to exclude testimony from Valerie Glover regarding the similarities of Davontae's voice to that of the shooter, or at least objected once this testimony was presented. Pursuant to Michigan case law, voice identification testimony is admissible only if: (1) the certainty of the identifying witness is "positive and unequivocal," and (2) there is "some reason to which the witness can attribute his ability to make the voice identification, of which familiarity and peculiarity are the most common example." *Bozzi*, 36 Mich App at 22. Glover's testimony fails to satisfy either prong. Her testimony lacked any degree of certainty – she agreed only that Davontae's voice was consistent with the shooter's voice, "sound[s] like it," and then qualified even these equivocal statements by saying: "[H]e still sound young right now. Only thing I knew that the person wasn't grown." She also admitted she was not familiar with Davontae's voice, and failed to identify any peculiarities. Thus, her purported voice comparison testimony was not admissible and should have been excluded.

Moreover, identification or comparison evidence, like any other type of evidence, must be excluded where its prejudicial effect outweighs any possible probative value. See MRE 403 ("[E]vidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the [jury] . . . ."). As explained in detail on pp. 30-32, *supra*, Ms. Glover's testimony regarding Davontae's voice had little to no probative value, as she had no reliable basis to identify the voice as that of the killer (and, in fact, could not identify the voice as that of the killer). It was prejudicial, however, because the mere fact that she was allowed to compare the two voices was likely to mislead the fact-finder.

A reasonably competent attorney would have moved to exclude Ms. Glover's purported voice comparison testimony as inadmissible evidence and as more prejudicial than probative, or at least objected to its admission on these grounds. The record does not provide any strategic reason for Slameka's failure to do so.

C. Davontae Sanford Was Prejudiced by Trial Counsel's Failure to Move to Suppress His Statements and Challenge Them at Trial, and by His Failure to Move to Exclude Ms. Glover's Testimony Regarding His Voice.

A "defendant's own confession is probably the most probative and damaging evidence that can be admitted against him." *Arizona v Fulminante,* 499 US 279, 296; 111 S Ct 1246; 113 L Ed 2d 302 (1991). Defense counsel thus must make every effort to try to suppress a confession, especially where, as here, the case is built primarily on the defendant's confession.

As explained in detail in Section I, *supra*, the prosecution simply would not have had a case without the confession. Had his confession and Glover's purported voice comparison testimony been excluded, the prosecution would have been left only with a non-inculpatory statement from Davontae and inherently unreliable, essentially meaningless, gunshot residue evidence allegedly found on pants seized from a closet shared by several boys. If the confession and the voice testimony had been excluded or even discredited at trial, Davontae certainly would not have pleaded guilty and no reasonably competent attorney would have advised him to do so. Therefore, trial counsel's failure to challenge the police confession and Glover's testimony satisfies both *Strickland* prongs.

III. DAVONTAE SANFORD IS ALSO ENTITLED TO RELIEF FROM JUDGMENT UNDER THE ACTUAL INNOCENCE STANDARD DEFINED BY THE U.S. SUPREME COURT IN *HERRERA v COLLINS.*

Actual innocence can be a freestanding federal constitutional claim where the defendant can make a compelling showing of innocence. In *Herrera v Collins*, 506 US 390; 113 S Ct 853;

122 L Ed 2d 203 (1993), the Supreme Court assumed that a truly persuasive post-trial demonstration of actual innocence renders the execution of a person unconstitutional. While the Court has left open the question of whether a freestanding innocence claim can apply in non-capital cases, it is within this Court's discretion to interpret the U.S. Constitution and find such protection. See *Arizona v Evans*, 514 US 1, 8-9; 115 S Ct 1185; 131 L Ed 34 (1995) (where U.S. Supreme Court has not authoritatively decided a constitutional question, "[s]tate courts, in appropriate cases, are not merely free to—they are bound to—interpret the United States Constitution"). Mr. Sanford urges the Court to do so here because it is "fundamentally unfair" as a matter of procedural and substantive due process to punish an innocent person for a crime he did not commit, regardless of whether the person is sentenced to death, to life in prison, or, as here, to a sentence of 37 to 90 years. *Herrera*, 506 US at 398 (citation omitted) ("[T]he central purpose of any system of criminal justice is to convict the guilty and free the innocent.").

IV. DAVONTAE SANFORD SHOULD ALSO BE GRANTED RELIEF UNDER MCL 770.1 BECAUSE "JUSTICE HAS NOT BEEN DONE."

Additionally, Mr. Sanford is entitled to a new trial under MCL 770.1. The Michigan Legislature has created an avenue by which a trial judge can ensure that justice is done in a criminal case. This statute, MCL 770.1, provides that: "The judge of a court in which the trial of an offense is held may grant a new trial to the defendant . . . *when it appears to the court that justice has not been done*, and on the terms or conditions as the court directs." (Emphasis added).

While Michigan Court Rules 6.500 *et seq*. provides a procedural framework for post-conviction hearings, the court rules do not supersede MCL 770.1, a substantive statute enacted by the legislature.[23] See *McDougall v Schanz*, 461 Mich 15, 26-27; 597 NW2d 148 (1999)

[23] MCL 770.1 is a substantive code of criminal procedure pertaining to the prosecution and punishment of criminal defendants. It provides a substantive right to defendants to be granted a

(explaining Michigan Supreme Court is "not authorized to enact court rules that establish, abrogate, or modify the substantive law"). MCL 770.1's edict that courts should intervene when justice has not been done is well recognized. See e.g., *People v Lemmon,* 456 Mich 625, 634-35; 576 NW2d 129 (1998) (eiting both MCL 770.1 and court rule in granting motion for a new trial).

The court should exercise its discretion pursuant to MCL 770.1 to grant relief to Mr. Sanford in light of the new evidence presented to the Court in this motion. As set forth in detail in Section I, *supra*, powerful new evidence demonstrates that Mr. Sanford is absolutely innocent of the crimes of which he was convicted. His conviction and continued incarceration undermine the fundamental goals of our criminal justice system. See *People v Butler,* 30 Mich App 561, 565; 186 NW2d 786 (1971) ("[The prosecutor] must see that the defendant has a fair trial and protect the public who are as concerned with protecting thc innocent as convicting the guilty.").

V. BECAUSE DAVONTAE SANFORD'S CONSTITUTIONAL RIGHTS TO EFFECTIVE APPELLATE COUNSEL WERE VIOLATED, HE IS ENTITLED TO HAVE THIS COURT REVIEW HIS CLAIMS WITHOUT PREJUDICE FROM ANY PRIOR POST-CONVICTION RULINGS.

The Sixth and Fourteenth Amendments to the U.S Constitution guarantee a defendant the effective assistance of counsel both at trial and on direct appeal of right. *Strickland*, 466 US 668; *Evitts v Lucey*, 469 US 387, 395-97; 105 S Ct 830; 83 L Ed 2d 821 (1985). A defendant alleging ineffective assistance must establish that "counsel's performance was deficient" and tbat "the defieient performance prejudiced the defense." *Strickland*, 466 US at 687.

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new trial in two types of situations: (1) when there are specific cognizable legal dcficiencies in the defendant's conviction (i.e., "for any cause for which by law a new trial may be granted"), "**or**" — even in the absence of such cognizable violations — (2) "when it appears to the court that justice has not been done." MCL 770.1. Thus, the Legislature has made clear that, when justice has not been done, a trial court should take action to achieve justice.

B. Appellate Counsel's Failure to Raise Claims of Ineffective Assistance of Trial Counsel Was Constitutionally Deficient.

Given the Michigan Supreme Court's April 25, 2014 Order, it appears that appellate counsel could not have properly raised the instant ineffective assistance of trial counsel claims in her motion to withdraw Mr. Sanford's guilty plea under MCR 6.310(C) because neither of these claims constitutes a "defect in the plea-taking process." Thus, this motion is the first time these claims could have been raised. If this Court disagrees, however, then appellate counsel's ineffectivencss amounts to good cause for this Court to consider those claims pursuant to MCR 6.508(D)(3). See *People v Reed*, 449 Mich 375, 378; 535 NW2d 496 (1995) (holding ineffective assistance of appellate counsel can establish "good cause"). Appellate counsel's failure to raise trial counsel's ineffectiveness in the motion to withdraw the plea amounted to ineffective assistance of appellate counsel. For the reasons set forth in the ineffective assistance of trial counsel claim, it should have been equally obvious to appellate counsel and trial counsel that there were strong grounds to move to suppress Davontae Sanford's police statements and Valerie Glover's testimony regarding the killer's voice.[24]

[24] While appellate counsel did plead an ineffective assistance of counsel claim in the original motion to withdraw the guilty plea, filed on December 4, 2008, this claim addressed only trial counsel's failure to advise his client about the sentencing consequences of his guilty plea and his failure to present mitigation evidence at his sentencing hearing.

CONCLUSION AND RELIEF REQUESTED

For all of these reasons, Davontae Sanford respectfully requests that this Court hold an evidentiary hearing on the claims presented in this motion and, after considering the evidence presented in that hearing, vacate his judgments of conviction and sentence and order a new trial.

Respectfully Submitted,

Dated: April 15, 2015

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[25] Motions to permit Ms. Crane, Mr. Drizin, and Ms. Nirider to practice *pro hac vice* have been filed simultaneously with this Motion for Relief from Judgment.