

Schedule A to the Complaint of Dafonte Miller

OIPRD TPS Complaint E-file # E-201708151603116254

OIPRD DRPS Complaint E-file # E-201708151600096215

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A. Overview

1. This complaint raises conduct and systemic issues arising from the deliberate acts of members of two police services to cover-up the violent crime of a Toronto Police Service (“TPS”) Officer, Michael Theriault and his brother Christian Theriault.

2. In the early morning hours of December 28, 2016, in Whitby, Ontario, Dafonte Miller was viciously attacked by TPS Constable Michael Theriault and his brother Christian Theriault. PC Theriault and Christian Theriault savagely beat Dafonte with a metal pipe. The violence perpetrated by PC Theriault and Christian Theriault left Dafonte Miller with permanent

vision loss to his left eye, reduced vision in his right eye, a broken orbital bone, a broken nose, a fractured wrist, bruised ribs, and severe psychological and emotional distress. The attack was gratuitous and prompted by racism.

3. During the vicious attack, 911 calls were placed by Dafonte Miller, Christian Theriault, and two eyewitnesses to the attack, [REDACTED], [REDACTED], [REDACTED], [REDACTED]. Durham Regional Police Service (“DRPS”) responded to the 911 call.
4. Both TPS and DRPS conspired to deliberately conceal the crime committed by PC Theriault and his brother Christian Theriault to assist in protecting them from prosecution for the brutal and heinous attack they perpetrated against Dafonte.
5. The deliberate acts of concealment by the DRPS to cover up the crimes of PC Theriault and Christian Theriault include, but are not limited to, the following:
 - Failure to interview eyewitnesses, [REDACTED] who were able to view most of the attack from the windows in their home and who presented themselves to the Durham officers at the scene that night;
 - Blindly accepting the accounts of PC Theriault and Christian Theriault, where they stated that they had been repeatedly struck by Dafonte with a metal pipe despite not sustaining any injuries or even a single scratch;
 - Failure to investigate how Dafonte sustained the severe injuries he suffered;

- Failure to properly investigate whether or not there had actually been any break-in, as reported by PC Theriault and Christian Theriault, of their vehicles parked at ■■■■■■■■■■
 - Conducting a wrongful and illegal arrest of Dafonte Miller, and charging him with criminal offences despite the clear evidence that he was a victim; and
 - Failure to notify the SIU of the crimes committed by PC Theriault against Dafonte.
6. The deliberate acts of concealment by the TPS to cover up the crimes of PC Theriault and his brother Christian Theriault include, but are not limited to, the following;
- Permitting the father of the attackers, Detective John Theriault, to communicate with and have access to the DRPS investigators about the case and thereby furthering the concealment of his sons' brutal crime. In addition to being the father of PC Michael Theriault and Christian Theriault, John Theriault is a long-time Detective with the TPS Professional Standards Unit which, according to Chief Saunders, is the Toronto Unit responsible for investigating the Miller incident and determining not to contact the SIU and initiate a timely independent investigation; and
 - Failing to notify the SIU and consequently short-circuiting any independent investigation of the incident, ultimately furthering the concealment of the assaults committed by PC Theriault and his brother, Christian Theriault. Chief Saunders has formally accepted that, "members of the Professional Standards Unit applied the policy regarding SIU involvement with the facts they had at that time and made the decision not to contact the SIU based on that information." The utter failure to

competently inquire into the incident represented a blatant dereliction of duty by the Professional Standards Unit officers.

7. In furtherance of the conspiracy to aid PC Theriault and Christian Theriault from prosecution for their crimes, the DRPS charged Dafonte with the following charges:

- 2 x Assault with a weapon;
- Possession of a dangerous weapon;
- Theft under \$5000; and
- Possession of marijuana under 30 grams

8. All charges against Dafonte were withdrawn by the Crown on May 5, 2017.

9. The complainant states that the acts detailed above clearly demonstrate a course of calculated, coordinated and deliberate conduct to conceal the crimes committed by PC Theriault and his brother Christian and therefore constitute misconduct, including deceit, dereliction of duty, and failure to protect a victim of crime. In the alternative, the manner in which the investigation was conducted was grossly negligent and lead to a dereliction of duty.

10. In respect of PC Michael Theriault, we submit that he has violated the following sections of the *Police Service Act, Code of Conduct*:

- 2(1)(a)(i), (v), (viii), (x), (xi);
- 2(1)(c)(i)(A), (ii), (vi), (vii), (viii);

- 2(1)(d)(i), (ii);
- 2(1)(f)(v);
- 2(1)(g)(i), (i.1), (ii), (iii); and
- 3.

11. It is respectfully submitted that the following officers from DRPS violated the following sections of the *Police Service Act, Code of Conduct*:

a. Investigating Officers, which includes, but is not limited to, Officers Jane and John Doe, PC Barbara Zabdyr (Badge #3291), PC Jennifer Bowler (Badge #3340), PC Justine Gendron (Badge #3687), DC Craig Willis (Badge #3047), PC Villena (Badge #3339), PC Allison Lamb (Badge #3710), PC Ryan Jeffs (Badge #887), PC Thompson (Badge #3214), and PC Sean McQuoid (Badge #3140):

- 2(1)(a)(i), (viii), (x), (xi);
- 2(1)(c)(i)(A), (ii), (v), (vi), (vii), (viii);
- 2(1)(d)(ii);
- 2(1)(g)(i), (i.1), (ii); and
- 3.

b. Supervising Officers, which includes, but is not limited to, Officers Jane and John Doe, A/Sgt. Chmelowsky (Badge #3252), A/Insp. Wagengerg (Badge #971), Sgt. Rayner (Badge #3647), S/Sgt. Elliott (Badge #953), and Sgt. Andrews:

- 2(1)(a)(i), (viii), (x), (xi);
- 2(1)(c)(i)(A), (ii), (v), (vi), (vii), (viii); and
- 3.

c. DRPS Chief Paul Martin:

- 2(1)(a)(i), (viii), (x), (xi);
- 2(1)(c)(i)(A), (ii), (v), (vi), (vii), (viii); and
- 3.

12. With respect to the TPS, it is respectfully submitted that the following officers violated the following sections of the *Police Service Act, Code of Conduct*:

a. Detective John Theriault:

- 2(1)(a)(viii)
- 2(1)(c)(ii), (v), (vii);
- 2(1)(d)(ii);
- 2(1)(f)(v); and
- 3.

b. TPS Professional Standards Unit Officers John and Jane Doe:

- 2(1)(a)(viii), (x), (xi);
- 2(1)(c)(i)(A), (ii), (vi), (vii); and
- 3.

c. TPS Chief Mark Saunders:

- 2(1)(a)(viii), (x), (xi);
- 2(1)(c)(i)(A), (ii), (vi), (vii); and
- 3.

13. In addition to conduct outlined above, this complaint also seeks a systemic review regarding the obligations of police services to cooperate and not impede SIU investigations.

around a number of sub-divisions in Whitby without any issue in the past. Dafonte and his friends did not respond to PC Theriault's question and continued towards the home of their other group of friends.

18. Suddenly, Dafonte noticed that his friends began running and he turned around and saw PC Theriault and Christian Theriault running towards him. ■ saw PC Theriault and Christian Theriault exit their garage carrying a metal pipe.
19. Concerned for his safety, Dafonte began running away from PC Theriault and Christian Theriault. At no time while Dafonte was being chased did PC Theriault instruct Dafonte to stop or advise him that he was under arrest for any criminal offense.
20. Christian Theriault caught up to Dafonte first and grabbed him by his sweater. Dafonte attempted to pull out of the grasp of Christian and asked why they were doing this. PC Theriault and Christian informed Dafonte that they saw some kids in their vehicle about 2 hours earlier. Dafonte repeatedly advised PC Theriault and Christian that they had the wrong guy and that he was never in their vehicle.
21. PC Theriault and Christian Theriault threw Dafonte to the ground and began kicking him in his head and his back. Dafonte tried to stand up, but he was placed in a headlock by Christian Theriault. While being held in the headlock, Dafonte was struck in his head and face by PC Theriault. PC Theriault struck Dafonte with his fists and with a metal pipe that he had with him when he left his garage.

22. At some point during the beating, Dafonte was able to escape from the headlock, but once he broke free he was struck in the face with the metal pipe by PC Theriault no fewer than ten (10) times.

23. Dafonte, terrified that he would be beaten to death by PC Theriault and Christian, struggled to make his way to the front door of [REDACTED], in Whitby. When he made it to the front door, he began banging on the door and begging for the occupants to help him and/or call 911.

24. PC Theriault and his brother Christian were able to pull Dafonte away from the front door at [REDACTED], and continued to hit him in the face with the metal pipe they had. Dafonte made it down the front steps of the house and collapsed on the hood of the vehicle parked in the driveway. PC Theriault and Christian continued to strike Dafonte with the metal pipe and with their fists.

25. Christian Theriault called 911 and advised that they had a suspect in custody that they alleged was breaking into their vehicle. Christian Theriault advised the 911 dispatcher that his brother, Michael Theriault, was an off-duty police officer with the Toronto Police Service, 42 Division. Christian Theriault further advised the 911 dispatcher that his brother PC Theriault had Dafonte restrained. PC Theriault can be heard on the 911 dispatch yelling that Dafonte was under arrest.

26. Dafonte collapsed on the ground and was able to retrieve his phone from his pants pocket and placed a call to 911. Before Dafonte could speak with the 911 dispatcher, PC Theriault took the phone from Dafonte and advised the 911 dispatcher that his brother was on the phone with another 911 dispatcher, and that they had Dafonte in custody.
27. PC Theriault held Dafonte on the ground by placing one knee in Dafonte's neck and the other in his back. Dafonte repeatedly told PC Theriault that he was having trouble breathing, and PC Theriault told him to "shut the fuck up."
28. PC Theriault had neither reasonable grounds nor reasonable suspicion to pursue Dafonte, to detain him, or to use any force against him.
29. As a result of the vicious assault on Dafonte by PC Theriault and Christian Theriault, Dafonte suffered severe damage to his left eye. The left eye had been dislodged from the eye socket and was split in four.
30. Dafonte was transported to Lakeridge Hospital Oshawa, while in handcuffs. Once he arrived at the hospital he remained in handcuffs until a nurse requested that the handcuffs be removed so that she may attend to treating Dafonte.
31. Dafonte underwent a CT Scan and it was determined that his left eye was no longer intact and he would lose all vision in his left eye. In addition to the damage sustained to his eye,

Dafonte also suffered a broken nose, broken orbital bone, bruised ribs, reduced vision in his right eye, and fractured right wrist.

32. When DRPS officers arrived on scene both PC Theriault and his brother Christian provided statements to the investigating officers. They both alleged that Dafonte had struck them repeatedly with the metal pipe. PC Theriault did not suffer any injuries as a result of the incident. Christian Theriault suffered a scratch at the base of his thumb and was subsequently diagnosed with a concussion although all x-rays performed showed no signs of any injury.

ii. Investigation by Durham Regional Police Service

33. DRPS Officers Jennifer Bowler and Barbara Zabdyr were the first DRPS officers to arrive on the scene. When they arrived Dafonte was face down on the ground. PC Bowler placed Dafonte in handcuffs and told him to stand up. Dafonte advised that he couldn't stand and so PC Bowler dragged Dafonte up from the ground by the handcuffs and placed his upper torso over the hood of the vehicle parked in the driveway of [REDACTED].

34. PC Bowler proceeded to search Dafonte and seized his cell phone, \$13.50 in cash that was found on the ground, and Officers located 0.4 grams of marijuana that had been removed from Dafonte's pockets by PC Theriault.

35. Dafonte was not advised what he was being charged with nor of his right to counsel.

36. Once Dafonte was searched he was immediately transferred by ambulance to Lakeridge Health, Oshawa for treatment. He was accompanied by PC Zabdyr.

37. In addition to PC Bowler and PC Zabdyr, DRPS officers A/Sgt. A. Chmelowsky, PC Justine Gendron, and PC Sean McQuoid all attended at the scene and assisted in the investigation.
38. PC Gendron interviewed Christian Theriault and failed to ask him how Dafonte had come to sustain the injuries he suffered. During the interview, PC Gendron was advised by Christian Theriault that Dafonte had struck him multiple times using the pipe in the back of his head and on his arm and his body. Despite this alleged attack, Christian Theriault had no signs of any injuries.
39. PC McQuoid interviewed PC Michael Theriault and failed to ask whether or not PC Theriault had struck Dafonte with the metal pipe at all during the altercation. PC McQuoid was advised by PC Theriault that he feared for his life and the life of his brother during the altercation, and alleged that he was hit an unknown amount of times by Dafonte with the metal pipe. PC McQuoid failed to scrutinize this account by PC Theriault, especially considering PC Theriault suffered no injuries as a result of the incident.
40. PC Bowler was tasked with taking crime scene photos. She attended at the residence of Christian Theriault, [REDACTED] and photographed the truck Dafonte was alleged to have broken into. PC Bowler failed to ascertain how Dafonte allegedly got into the vehicle, i.e., did he break a window or lock; she failed to determine if Dafonte's fingerprints were located in or on the vehicle; and she failed to ascertain if Dafonte's fingerprints were found

on the metal pipe he allegedly used to repeatedly strike Christian Theriault and PC Michael Theriault.

41. Additionally, the DRPS Officers that investigated the incident failed to take a statement from [REDACTED], [REDACTED] who had placed a call to 911 and advised that he had witnessed portions of the altercation.

42. The DRPS who arrived on scene and investigated the incident did not have reasonable and probable grounds to charge Dafonte with any of the offences with which he was charged. These officers failed to carry out even the most rudimentary investigation of the incident.

iii. Interference in the DRPS investigation by Detective John Theriault

43. Detective John Theriault is the father of PC Michael Theriault and Christian Theriault and a veteran Detective of TPS. Detective Theriault is currently a member of TPS Professional Standards Unit.

44. Detective John Theriault repeatedly contacted DRPS investigators to gain information relating to the status of the investigation and to provide additional false information about injuries suffered by his son Christian to aid in the concealment of the crimes committed by his sons, PC Theriault and Christian Theriault, against Dafonte Miller.

iv. Failure to Notify the SIU

a. Toronto Police Service

45. On December 28, 2016, Senior officers with DRPS contacted the TPS SIU Liaison to notify them of the incident involving PC Theriault. As stated by Chief Mark Saunders of TPS, an investigation into whether or not the SIU should be notified was conducted by the Professional Standards Unit.

46. On the night of the incident, TPS was advised that one of their off-duty officers had pursued and apprehended a suspect that was alleged to have been breaking into his vehicle. Additionally, TPS was advised that PC Theriault had identified himself as a police officer with 42 Division during the course of the incident. TPS was further advised that during PC Theriault's apprehension of Dafonte Miller, Dafonte suffered severe and likely irreversible damage to his left eye.

47. The SIU mandate is clear and unambiguous. Section 3 of *O. Reg. 267/10: Conduct and Duties of Police Officers Respecting Investigations by the Special Investigations Unit* states:

Notice to SIU

3. A chief of police shall notify the SIU immediately of an incident involving one or more of his or her police officers that may reasonably be considered to fall within the investigative mandate of the SIU, as set out in subsection 113 (5) of the Act. O. Reg. 267/10, s. 3.

48. Furthermore, the SIU website clearly states that incidents involving off-duty police officers will be investigated by the SIU if “...the officer identifies himself/herself as a police officer in the course of the occurrence...[and] it involves serious injury, death or an allegation of sexual assault.”

49. Despite the information TPS received, they advised DRPS that they would not be contacting the SIU as they deemed the incident to be outside of the SIU mandate.

50. The SIU was notified on April 27, 2017 by Dafonte Miller with the assistance of counsel. The SIU conducted an investigation of the incident and on July 17, 2017, PC Theriault was charged with aggravated assault, assault with a weapon, and public mischief.

51. On July 21, 2017, the SIU took the unprecedented step of charging a civilian, Christian Theriault, with aggravated assault, assault with a weapon, and public mischief as the Director, Tony Loparco, determined that there were reasonable and probable grounds to believe that Christian Theriault committed the offences in concert with his brother, PC Michael Theriault.

b. Durham Regional Police Service

52. On December 28, 2016, DRPS Senior Officers A/Sgt. Chmelowsky, A/Insp. Wagengerg, Sgt. Rayner and Sgt. Andrews were all aware that PC Michael Theriault was an off-duty police officer, who, during the pursuit and arrest of Dafonte Miller, caused serious bodily harm to him.

53. A/Sgt Chmelowsky had turned his mind to the fact that the matter likely required notification of the SIU and advised the Duty Sergeant of the details of the arrest and the injuries sustained by Dafonte Miller.
54. DRPS Officers took steps to secure the scene of the incident and notified TPS on December 28, 2016 of PC Theriault's involvement in the incident and advised of the injuries suffered by Dafonte.
55. Sometime in and around mid-morning on December 28, 2016, these DRPS Senior Officers were advised that TPS would not be notifying the SIU of the incident.
56. These DRPS Senior Officers took no steps to ascertain whether or not they were required to notify the SIU of the injuries suffered by Dafonte.

C. Systemic Issues

57. The investigation conducted by the DRPS and the failure of the TPS and the DRPS to contact the SIU heightens the lack of public confidence in police investigations.
58. The lack of an enforcement mechanism for compliance with SIU investigations has created a blatant disregard by police services for ensuring that police officers comply with their statutory obligations. Instead, a culture has been created where officers participate in SIU investigations at their own will and can obstruct and obfuscate lawful SIU investigations without any concern of criminal consequences.

59. These systemic failures go the heart of our criminal justice system and instead of creating transparency and public confidence in the oversight mechanisms for police, they breed contempt and distrust of police officers from members of the public.

60. The issue of the requirement of police officers to cooperate with an SIU investigation has been adjudicated by the Supreme Court of Canada in *Odhavji Estate v Woodhouse* (“*Odhavji*”)¹ and *Wood v Schaeffer* (“*Schaeffer*”).² In *Odhavji* the court stated the following regarding the obligation of police to cooperate with an SIU investigation:

... police officers are under a statutory obligation to cooperate fully with members of the SIU in the conduct of investigations, pursuant to s. 113(9) of the *Police Services Act*. On the face of it, the decision not to cooperate with an investigation constitutes an unlawful breach of statutory duty. Similarly, the alleged failure of the Chief to ensure that the defendant officers cooperated with the investigation also would seem to constitute an unlawful breach of duty. Under s. 41(1)(b) of the *Police Services Act*, the duties of a chief of police include ensuring that members of the police force carry out their duties in accordance with the *Act*. A decision not to ensure that police officers cooperate with the SIU is inconsistent with the statutory obligations of the office.³

61. In *Schaeffer*, the Supreme Court discusses the vital role the SIU plays in ensuring public confidence in oversight of police interactions with members of the public. The Court stated:

The legislative scheme is designed to foster public confidence by specifically combating the problem of appearances that flowed from the old system of “police investigating police”. The problem under that system, of course, was that it created the unavoidable appearance that officers were “protecting their own” at the expense of impartial investigations. The legislature deemed this appearance unacceptable and created the SIU to guard against it by placing investigations of the police in the hands of civilians.⁴

¹*Odhavji*, 2003 SCC 69

²*Schaeffer*, 2013 SCC 71

³*Odhavji*, at para 34

⁴*Schaeffer*, at para 49

62. The actions of the TPS and the DRPS show a systemic pattern of concealment of a crime to avoid SIU involvement in an attempt to thwart public oversight and accountability for the crime committed by PC Theriault.

D. Request

63. In light of the systemic issues raised in this complaint and the fact that the misconduct stems across two police services, we respectfully request that the Office of the Independent Police Review Directorate investigate this complaint, and not refer the matter to the Toronto Police Service or the Durham Regional Police Service or any other police service for investigation.

64. For the sake of clarity, we are submitting this complaint against the following Toronto Police Service officers:

- a. PC Michael Theriault of the Toronto Police Service. We believe his actions give rise to misconduct as they are breaches of sections 2(1)(a)(i), (v), (viii), (x), (xi); 2(1)(c)(i)(A), (ii), (vi), (vii), (viii); 2(1)(d)(i), (ii); 2(1)(f)(v); 2(1)(g)(i), (i.1), (ii), (iii); and 3 of the *Code of Conduct*.
- b. Detective John Theriault. We believe his actions give rise to misconduct as they are breaches of sections 2(1)(a)(viii); 2(1)(c)(ii), (v), (vii); 2(1)(d)(ii); 2(1)(f)(v); and 3 of the *Code of Conduct*.
- c. Officers Jane and John Doe of the Toronto Police Service. We believe their actions give rise to misconduct as they are breaches of sections 2(1)(a)(viii), (x), (xi); 2(1)(c)(i)(A), (ii), (vi), (vii) of the *Code of Conduct*.

- d. Chief Mark Saunders. We believe his actions give rise to misconduct as they are breach of sections 2(1)(a)(viii), (x), (xi); 2(1)(c)(i)(A), (ii), (vi), (vii) of the *Code of Conduct*.

65. In respect of DRPS, we submit the following conduct complaints against DRPS officers:

- a. Officers Jane and John Doe, PC Barbara Zabdyr (Badge #3291), PC Jennifer Bowler (Badge #3340), PC Justine Gendron (Badge #3687), DC Craig Willis (Badge #3047), PC Villena (Badge #3339), PC Allison Lamb (Badge #3710), PC Ryan Jeffs (Badge #887), PC Thompson (Badge #3214), and PC Sean McQuoid (Badge #3140), of the Durham Regional Police Service. We believe their actions give rise to misconduct as they are breaches of sections 2(1)(a)(i), (viii), (x), (xi); 2(1)(c)(i)(A), (ii), (v), (vi), (vii), (viii); 2(1)(d)(ii); 2(1)(g)(i), (i.1), (ii); and 3 of the *Code of Conduct*.
- b. Officers Jane and John Doe, A/Sgt. Chmelowsky (Badge #3252), A/Insp. Wagengerg (Badge #971), Sgt. Rayner (Badge #3647), S/Sgt. Elliott (Badge #953), and Sgt. Andrews, of the Durham Regional Police Service. We believe their actions give rise to misconduct as they are breaches of sections 2(1)(a)(i), (viii), (x), (xi); 2(1)(c)(i)(A), (ii), (v), (vi), (vii), (viii); and 3 of the *Code of Conduct*.
- c. Chief Paul Martin. We believe his actions give rise to misconduct as they are breaches of sections 2(1)(a)(i), (viii), (x), (xi); 2(1)(c)(i)(A), (ii), (v), (vi), (vii), (viii); and 3 of the *Code of Conduct*.

66. Finally, given the crisis in confidence in the way this matter was investigated and reported to the SIU, we respectfully request that a systemic review be conducted by the OIPRD, to look at the underlying causes, and determine whether TPS and DRPS practices comply with their underlying legal and policy frameworks. In addition, we request that this review be tasked to determine whether the legal and policy frameworks can be improved to prevent such issues from arising in the future.