

STATEMENT
OF
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BEFORE THE
U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON SCIENCE, SPACE, AND TECHNOLOGY
SUBCOMMITTEE ON INVESTIGATIONS AND OVERSIGHT

The TSA SPOT Program: A Law Enforcement Perspective

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Good morning. Chairman Broun, Ranking Member Edwards, and Members of the Committee, I thank you for this opportunity to address you today regarding the future of the TSA Screening of Passengers by Observation Techniques program that I developed, which is more commonly referred to as the SPOT program.

I am Peter DiDomenica presently employed as a Detective Lieutenant with the Boston University Police Department. I recently joined the Boston University force after serving for more than 22 years with the Massachusetts State Police where I retired as a Lieutenant. While a member of the State Police I served as an investigator in the Major Crime Unit, as the Director of Legal Training for the State Police Academy, as a staff member to five different superintendents, and as Director of Security Policy for Boston Logan International Airport in the two years after the devastating 9/11 attacks. I also served the State Police for a decade as a subject matter expert and lead trainer for Massachusetts police agencies in racial profiling and biased policing. In this capacity I designed statewide police training programs and the State Police traffic stop data collection and analysis system created to monitor enforcement efforts for indications of biased policing. I am also presently a consultant for EOIR Technologies of Fredericksburg, VA where I serve as an advisor on human behavior detection for the U.S. Army Night Vision and Electronic Sensors Directorate. I am a certified instructor in the interview, behavior assessment, and deception detection programs for The Forensic Alliance, a consulting firm of forensic psychologists based in British Columbia, Canada. I am presently an adjunct instructor for the graduate criminal justice program at Anna Maria College in Paxton, MA. I am a licensed attorney in Massachusetts having earned my J.D. in 1995. I have trained over 3,000 police, intelligence, and security officials in over 100 federal, state, and local agencies in the U.S. and U.K. in behavior assessment. I have also been a lecturer or advisor on behavior assessment for

the FBI, CIA, Secret Service, Department of Homeland Security, Defense Department Criminal Investigations Task Force, and National Science Foundation. I appear today representing only myself and not any of the organizations I am or have been employed by.

On December 22, 2001, while assigned to Logan International Airport as a member of the State Police and as Director of Security Policy, I was part of a large team of public safety officials who responded to the airfield to meet American Airlines flight 63, diverted to Boston on a flight from Paris, France to Miami. On board was a passenger named Richard Reid who attempted to detonate an improvised explosive device artfully concealed in his footwear that, if successful, would have killed all 197 passengers and crewmembers aboard. As I stood only a few feet away from Reid, who was now securely in custody in the back of a state police cruiser, it hit me that this man was the real thing, that the threat of another terrorist attack from Al Qaeda would not stop, and that we needed to do more, much more, to properly screen passengers than merely focusing on weapons detection. Over the next several days I met with the incident commander for Reid's arrest, Major Tom Robbins, who was the Aviation Security Director for Logan Airport and Troop Commander for State Police Troop F at the airport. One evening, while having dinner with Major Robbins, he wrote the words "walk and talk" on a dinner napkin - a reference to airport narcotics interdiction - and directed me to look into airport drug interdiction programs as a model for a terrorist behavioral profiling program to augment the weapons screening process. Thus began the development of what would become the Behavior Assessment Screening System or BASS.

Because of my legal background and experience in training on racial profiling and bias policing, I knew immediately what the BASS program would *not* be. Whatever program we would create to identify potential terrorists, it would not include racial profiles that target people

of apparent Islamic belief or Arab, Middle Eastern, or South and Central Asian ethnicities. As well as being illegal such profiling could distract security officials from detecting true threats. Moreover, the unconscious bias against these groups would be so strong because of 9/11 that security officials would need training to counter these biases. I began to explore the scientific literature in an effort to quantify the human capacity to detect dangerous people. My research included many disciplines including, physiology, psychology, neuroscience, as well as specific research into suicide bombers. What this literature indicated was that a person who is engaged in a serious deception of consequence or otherwise engaged in an act in which the person has much to lose by being discovered or by failing to succeed will suffer mental stress, fear, or anxiety. Such stress, fear, or anxiety will be manifested through involuntary physical and physiological reactions such as an increase in heart rate, facial displays of emotion, and changes in speed and direction of movement. In developing the program specific behaviors were selected that were *both* supported in the scientific literature and consistent with law enforcement experience. In addition to avoiding the legal prohibition on selective enforcement based on race, ethnicity, or religion¹ the program also had to ensure that police encounters with the public not meeting the standard of reasonable suspicion were voluntary under the U.S. Supreme Court case of *U.S. v. Medenhall*.² In addition to behavior, the program also examines: aspects of appearance unrelated to race, ethnicity, or religion; responses to law enforcement presence and questioning; and, the circumstances surrounding the presence of the person at a specific location. I created a simple method called “A-B-C-D” which means *Analysis of Baseline, addition of a Catalyst, and scan for Deviations*. *Baselines* are merely an evaluation of what was normal for a specific

¹ *Whren v. United States*, 517 U.S. 806 at 813 (1996).

² 446 U.S. 544 at 554 (1980). (“We conclude that a person has been ‘seized’ within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.”)

environment and a *catalyst* is the insertion into the environment of something that would be particularly threatening to a terrorist or criminal to provoke behavioral changes.

In 2002 and 2003 I taught the BASS program to all the troopers, the primary law enforcement agency for Logan Airport, and developed a staff of additional instructors. We also began training other police departments in Massachusetts; in fact we trained the entire Massachusetts Transit Police force and a group of Boston Police officers in preparation for the 2004 Democratic National Convention. Because of the success of the program, I created a derivative program called PASS or the Passenger Assessment Screening System suitable for TSA screeners that eventually became the SPOT program. Over the course of two years I worked with TSA officials at Boston, including the Federal Security Director George Niccara, and officials at TSA headquarters including their Office of Civil Rights, Science and Technology, and Workforce Performance and Training. In 2004 my team of State Police BASS instructors conducted a training program with TSA to create two pilot SPOT programs at Portland International Jetport in Maine and T.F. Green International Airport in Rhode Island.

One of the reasons the BASS program got the interest of TSA headquarters as a model for a behavior detection program was an incident that occurred in the fall of 2003 at Logan Airport while I was training members of the Boston Police in BASS. A middle-age male caught my attention due to an appearance and luggage deviation as well as baseline deviation in movement. When the Boston police officer and I engaged this purported passenger in conversation he immediately produced credentials identifying himself as an official of the Department of Homeland Security Office of Investigations and stated he was on his way to test a screening checkpoint to see if they would discover a concealed weapon he was carrying.

The BASS program went on to be delivered to numerous agencies including the entire Washington DC Metro Transit Police, Amtrak Police, and Atlanta Police officers assigned to the world's busiest airport, Atlanta Hartsfield-Jackson International Airport. In 2006 Two BASS trainers and I spent two weeks in London where we set up a British version of BASS for the British Transport Police as a response to the July 7, 2005 terrorist attacks on the London Underground.

During the course of training police officers around the nation, the State Police BASS instructors discovered four individuals with suspected terrorist ties. In 2004, while conducting BASS training with the New Jersey Transit Police at Newark Penn Station, I observed three males exhibiting suspicious behavior using BASS techniques. One of the subjects was in the United States on a religious visa from a Middle Eastern country and was being escorted to an Amtrak train for a claimed week long trip with no luggage. Another subject presented a non-government ID card that was designed to look like a real government ID. There were three behavior cues that led to the encounter followed by three non-verbal cues during the interview as well as conflicting factual statements that made these individuals highly suspicious. It was later confirmed that the subject on the visa was on a terror watch list. In 2004 at the Metro Center rail station in Washington D.C. a member of the BASS training team, while conducting training with the TSA, observed a suspicious male subject who exhibited five behavioral cues under the BASS program. The subject had a British passport with visa stamps from visits to Iraq and was in the U.S. to learn how to fly planes. It was later confirmed that the subject was under investigation for terrorism. Back in 2002 at Logan Airport, a BASS trainer discovered a suspicious subject exhibiting four BASS behavior cues and three non-verbal cues during an interview who had

failed to report for deportation and was connected to Ahmed Ressam of the 1999 Millennium bombing plot of Los Angeles Airport.

Unfortunately, since the successful pilot programs in 2004 the TSA has chosen not to continue my services despite my strong recommendation that I remain involved in training, particularly with respect to airport police officers in BASS techniques at airports where the SPOT program is implemented. Although I believe the SPOT program is effective at identifying high risk passengers, its effectiveness is limited because proper resolution of highly suspicious people discovered by the TSA Behavior Detection Officers, or BDOs, requires a law enforcement response by police officers trained in the same behavior detection and interview skills. I designed the program so that the most dangerous people would be either removed from the critical infrastructure or arrested by BASS trained police officers. So, no matter how effective the BDOs are, the most dangerous people will tend to slip through the cracks because of a response by non-BASS trained police officers who may discount the validity of SPOT or who may fail to follow-up with BASS techniques. In most cases where denials of access occur or arrests or detentions are made by police, it is because there are warrants for arrest or because contraband is discovered in the screening process. I do not believe the current TSA airport police SPOT *familiarization* training program is enough. The airport police, in my opinion, need to be trained in the same techniques and skill sets which will engender confidence in the program and in their own ability to detect terrorist behavior and prevent additional devastating attacks.

Another issue I see with the SPOT program is that the TSA has created too high an expectation for what it is able to achieve. The original SPOT program I designed was not primarily for the apprehension of suspects but as a means to deny access to critical infrastructure of high risk persons who could be involved in terrorism or other dangerous activity. It was to be

the last and, most importantly, the best chance to prevent a tragedy when other methods such as intelligence and traditional, needle in the haystack, screening have failed. Catching a terrorist through a random encounter in a public place without any prior intelligence is extremely difficult. By way of example, if we use the number of known terrorism suspects who boarded domestic commercial flights at airports with BDOs, as cited in the Government Accountability Office May 2010 report on Aviation Security³, and the approximately 4 billion passenger enplanements at U.S. commercial airports from 2004 to 2009, the base rate of terrorist passengers is about one in every 173 million or .0000006 percent. The expectation that the SPOT program will result in the arrest of all terrorists attempting to board a domestic flight in the United States is unrealistic and threatens its continued support. If, however, it is seen as part of a multi-layered approach with the primary goal of preventing terrorist access to critical infrastructure in conjunction with properly trained law enforcement, the program sets more reasonable and attainable goals.

In 2004 Major Robbins and I, as well as the Massachusetts Port Authority and Massachusetts State Police, were sued by an African-American lawyer for the ACLU who served at the National Coordinator of the American Civil Liberties Union's Campaign Against Racial Profiling. The plaintiff alleged that he was unlawfully detained by the State Police at Logan Airport in October of 2003 and that this unlawful detention was based on BASS training that the troopers received. It was alleged that the BASS training directed the troopers at the airport to detain people without reasonable suspicion of criminal activity and condoned and encouraged racial and ethnic profiling. After a weeklong trial in December 2008 in the Federal District Court

³ GAO-10-763. The report cites 23 suspected terrorists having passed through SPOT airports.

for Massachusetts⁴, the jury found that the plaintiff was, in fact, unlawfully detained by State Police officers but that the BASS program was *not* the cause of the unlawful detention. During the trial the judge asked the plaintiff what provisions of the BASS program on its face violate federal law? The plaintiff responded the following provision was unlawful: a provision that allows police, after reasonable efforts to dispel elevated suspicion have failed to escort away from critical infrastructure persons who refuse to identify themselves. The plaintiff also cited the provision allowing for a running of a records check on such persons. The judge ruled from the bench: “I don’t see this as on its face being unconstitutional. I mean, there is nothing unconstitutional about running a records check of a person, subjecting a person to additional consensual searches or testing [or] *preventing a person from proceeding into the critical infrastructure or escort[ing] the person away from the critical infrastructure.*” (Emphasis added)

One of the key components of the BASS program is its anti-detention policy: to empower police to deny persons access to critical infrastructure such as commercial aircraft who display elevated suspicion after reasonable attempts to dispel the suspicion fail. The *elevated suspicion* is articulable facts and circumstances that do not necessarily have to rise to the level required for a lawful detention under the U.S. Supreme Court case of *Terry v. Ohio*⁵. In keeping with Constitutional mandates, this denial of access in an extremely small number of cases of unresolved suspicion may be the best we can do but it may be enough to prevent a tragedy and it also may provide for the collection of crucial intelligence for an investigation and later arrest. It is important to note that the 9th Circuit U.S. Court of Appeals in the case of *Gilmore v. Gonzales*

⁴ *King Downing v. Massachusetts Port Authority, et al*, Civil Action No. 2004-12513-RBC.

⁵ 392 U.S. 1 (1968).

has ruled that “the Constitution does not guarantee the right to travel by any particular form of transportation.”⁶ The Supreme Court has declined to review this decision.

For SPOT to be effective there has to be a cadre of BASS trained police officers to bring about an appropriate resolution from an initial TSA observation. Based on my extensive law enforcement experience using behavioral analysis and those other police officers who have similar experience, as well as having a basic understanding of psychological, neurological, and physiological processes, I know SPOT and BASS techniques do work in identifying potential terrorists and other dangerous people. If done correctly, the process only takes a couple of minutes and is done openly in public areas minimizing interference with the free flow of the public and, most importantly, without interfering with civil rights. This program specifically trains TSA personnel and police officers to counter the effects of unconscious bias that may otherwise result in undue attention on certain ethnic and religious groups and the failure to detect suspicious behavior by truly dangerous people who do not fit the unstated but subconsciously present religious or ethnic profile. When the next shoe bomber or underwear bomber arrives at one of our airports or train stations to blow up one of our planes or subway trains or if they try to gain access to the Super Bowl or other major sporting event, even when we don't have the constitutional authority to arrest we must have the confidence to deny them access based on the sound principles of BASS and SPOT. This is our last and best chance of preventing another terrorist attack.

Thank you again for this opportunity to address the SPOT program and I am prepared now to answer any questions you may have.

⁶ 435 F. 3d 1125.