BRITISH COLUMBIA HUMAN RIGHTS TRIBUNAL

Case No.: BCHRT Order [redacted]

DECLARATION OF KYLE BOONE, PH.D., ABPP-ABCN

1. The validity of all psychological and neuropsychological test instruments is contingent on the novelty of all test items. The naiveté of patients/plaintiffs concerning the stimulus materials, test procedures, task demands and content of the tests they are being given is crucial to a valid and informative examination. Due to the recognized importance of this issue within our field, this issue has been addressed in several ways that will be described below.

2. The prospect of these highly sensitive, copyright-protected materials being disseminated among non-psychologists threatens the future security and validity of the test instrument. Only individuals with proper training and the applicable professional restraints should have access to the materials in question or harmful effects may result. For example, older pilots undergo neuropsychological exams to ensure their ability to safely pilot aircraft, and individuals in other positions impacting public safety at times undergo fitness for duty evaluations including cognitive testing (e.g., physicians and surgeons, nurses, air traffic controllers, ship captains, etc.). Dissemination of psychological and neuropsychological testing materials would decrease the utility of these important medical tools. The possibility that test materials would be disseminated undermines the medical efficacy of these tools, negatively impacts a clinician's ability to assess a patient, and risks substantial personal and public harm.

3. There are a limited number of standardized psychological and neuropsychological tests that are appropriate for a given purpose. When individuals obtain prior knowledge of test item content and procedures, the validity and utility of the measures can be easily compromised, which defeats the intended purpose of the test. When this occurs, the test is often not easily replaced or substituted. For example, the b Test is a performance validity measure that has been validated to verify whether or not test takers are in fact performing to true ability, or alternatively, whether they are attempting to falsely portray their cognitive function as more impaired than is actually the case. If the test booklet and instructions (which are printed on the answer sheet) were to become available to the general public, thereby allowing future test takers to "study up" on the test, then it would no longer be effective in documenting when individuals are not performing on testing to their actual skill level. This has implications for society in that if individuals learn how to "package" their performance and otherwise "finesse" such tests, they would be able to obtain disability and other benefits to which they are not entitled, they would be incorrectly excused from criminal responsibility and inaccurately judged incompetent to stand trial, they could obtain accommodations for the SAT, ACT, and other such placement tests to which they are not entitled, and they could access medications for which they should not have prescriptions (e.g., medications for ADHD).

4. To the extent that cognitive and psychological tests are placed in the hands of personal injury attorneys, future clients could be coached as to how to take and "pass" performance validity tests, and how to convincingly score lower than their true ability level on standard cognitive tests. Research has in fact shown that attorneys coach clients on how to take psychological tests. Victor and Abeles (2004) reported on survey data from members of the Association of Trial Lawyers which showed that 75% said they spend an average of 25–60 min preparing their clients for neuropsychological exams by providing information about the tests they will take and by suggesting how clients should respond. In a survey conducted by Wetter and Corrigan (1995), approximately half of attorneys and a third of law students believed that their clients should always or usually be informed about validity scales in psychological tests to be given in an assessment. Youngjohn (1995) described a case in which a worker's compensation attorney admitted on the record to the Administrative Law Judge at the Industrial Commission of Arizona that he had coached and

educated his client prior to a neuropsychological exam, and Youngjohn relayed that he was told by another attorney that it would be unethical for an attorney *not* to coach his client prior to a forensic neuropsychological evaluation. An April 2018 Motion for the Appointment of a Special Investigator pertaining to the recent NFL Concussion Settlement stated that "fraud discovered in the Program so far is deep and widespread," including "*a law firm representing more than 100 Settlement Class members coached retired players on how to answer questions during their neuropsychological evaluations," and "text messages and other communications reveal a disturbing pattern of a claims service provider coaching players to 'beat' the neuropsychological tests.*"

5. Other professions have similar test protection concerns and zealously maintain test security. For example, at the October 2018 Conference on Test Security (COTS), representatives of the National Conference of Bar Examiners were in attendance, as well as members of organizations involved in administration of the LSAT, SAT, and GRE, and testing conducted in Kindergarten through 12th grade levels. In this meeting (Albanese, Zhang, & Hill; Test Security: A Meeting of Minds, The Bar Examiner, Winter 2018-2019), test security was defined as "*protecting test materials from being.....compromised long before exam day as well as during and after the exam. Test security also includes ensuring that examinees .....do not bring any impermissible materials and technology devices into the exam to inflate their performances or record the exam questions, and that they do not reproduce or share any exam content at any point even for the benefit of others.*" They concluded: "*the importance of maintaining test security cannot be overemphasized, because cheating, regardless of which form it takes, erodes the validity of the interpretations of test scores and then undermines the legitimacy of decisions based on those scores.*" The same protections that are demanded for academic and professional licensure tests should also be afforded psychological and neuropsychological tests.

6. In light of the threat of considerable public harm posed by the general release of proprietary test information, several governing bodies have adopted formal requirements and issued statements pertaining to the release of test-related materials. This includes the California Board of Psychology and several major professional psychological and neuropsychological organizations.

7. The California Board of Psychology has imposed various restrictions on

psychologists in this state, which are clearly intended to control and limit the distribution of test materials: **1396.3. Test Security, "***A psychologist shall not reproduce or describe in public or in publications subject to general public distribution any psychological tests or other assessment devices, the value of which depends in whole or in part on the naivete of the subject, in ways that might invalidate the techniques; and shall limit access to such tests or devices to persons with professional interests who will safeguard their use.*" **(TITLE 16, From Laws and Regulations Relating to the Practice of Psychology 2009 -California).**

8. Attached hereto as "**Exhibit A**" is a true and correct copy of "Official Position of the American Academy of Clinical Neuropsychology on Test Security (2022)".

9. Attached hereto as "**Exhibit B**" is a true and correct copy of the "Update on Third Party Observers in Neuropsychological Evaluation: An Interorganizational Position Paper," dated 2021.

10. Attached hereto as "**Exhibit C**" is a true and correct copy of the National Academy of Neuropsychology's "Test Security: An Update," dated October 13, 2013.

11. Attached hereto as "**Exhibit D"** is the recently published American Psychological Association "Resolution on Protecting Psychological Test Security, Test Validity, and Public Safety" (February 2025), which concludes:"*... APA's position is that fair and reasonable transparency and access to psychological test data and test materials in legal proceedings is best achieved and scientific validity best preserved when psychologists share test materials and test data with other psychologists and other experts properly trained in test administration and interpretation who have a legal and ethical obligation to protect test data and test materials."*

12. The Standards for Educational and Psychological Testing (2014) is an extensive multi-organizational publication intended to "*promote the sound and ethical use of tests and to provide a basis for evaluating the quality of testing practices.*" The Standards advise against the distribution of mental test instruments to unqualified users (i.e., individuals not trained and licensed to utilize the tests). Standard 9.21 states that "*Test users have the responsibility to protect the*

security of tests, including that of previous editions." The development and refinement of exam materials for individual intelligence, personality, academic achievement, and neuropsychological assessment typically require many years of research, effort, and a considerable capital investment by the test publishers. Unnecessary and/or improper disclosure of test materials can result in damage to those parties who have an ownership interest in the test.

13. Dr. Uttl claimed that test authors and test publishers publish test items "for anyone around the world to see," but this is not accurate. He cites a book published by Butcher, the author who revised the Minnesota Multiphasic Personality Inventory, and while it is true that test items were contained in the book, the book was published in 1990, long before test security was a major concern. For context, in 1990 we had no cell phones and barely had an internet, and it was laborious to access articles and books on psychological/neuropsychological tests because there were no "search engines" aside from biomedical librarians. Currently, major neuropsychological and psychological organizations, as discussed above, strongly demand and advocate for test security, as do test publishers (**Exhibit E**. "WPS Statement re: Test Security"), and test publishers aggressively pursue and remove protected test information from the internet as they become aware of these breaches.

14. Further, neuropsychologists and psychologists protect all neurocognitive tests, even those that are not formally published but have been the subject of extensive peer-reviewed research publications and are used widely by neuropsychologists. In other words, the issue is not copyright but rather test security.

15. At times it is argued that test materials can be adequately protected if they are released under protective order, but it is well understood that protective orders are not adequately protective of psychological/neuropsychological test materials (see **Exhibit F**: Release of Protected Test Information under Protective Order: Viable Solution or Illusory Safeguard? An Interorganizational Position Paper (2024), *Archives of Clinical Neuropsychology.* Nov 8:acae101.),

including:

1) Inability to monitor compliance with protective orders in a digital age in which materials can be rapidly scanned and archived with no oversight (in other words, we would have to rely on the "honor system" that attorneys have abided by protective orders in destroying test materials at the conclusion of a case since there is no way to monitor that they have complied).

2) Attorneys have a clear conflict of interest regarding protective orders, that is, they are required to abide by protective orders regarding psychological testing materials, but surveys show that they also view it as their obligation to inform/coach clients regarding psychological tests and exams (see Boone et al., 2022). They also stand to benefit financially by not abiding by protective orders, in that they can dramatically increase the value of their cases if their client can be coached to successfully feign cognitive/psychological damages. Were protective orders ever intended to govern the behavior of parties who have a financial interest in not complying with the orders?

3) Psychological test information is potentially more vulnerable to damage than other "trade secrets" in a protective order breach; that is, while such a breach may cause financial loss to owners of other types of trade secrets, the methods themselves are typically not "ruined" by exposure. For example, if trade secrets involved methods of DNA analysis, exposure of that information does not destroy the method; i.e., one cannot study up to undergo DNA testing. However, exposure of psychological test content to non-psychologists

compromises the accuracy and usefulness of tests when future test takers have had access to test content.

4) Protective orders are not adequately enforced (Childs, 2007). A related concern is that psychologists/neuropsychologists do not have the legal knowledge to ensure that protective orders are written in an adequately comprehensive manner, and they lack the legal standing to ensure that protective orders are followed; that is, they are not parties to the lawsuit, and the retaining attorneys do not represent them or their tests.

5) Protective orders may be challenged long after the case at issue has been concluded thereby placing protected test materials at continued risk indefinitely (Hotchkiss & Fleming, 2004).

6) If judges begin routinely ordering that test materials be released under protective order, given the extent of forensic neuropsychological practice in the US, we could expect issuance of >8000 protective orders per year. Our tests cannot remain protected with that amount of exposure; protective orders were intended for situations involving one-time release of confidential information of no future use to attorneys involved in the case. Even sporadic, accidental breaches of test security have the potential to substantially harm psychological tests in a digital age in which information can be rapidly uploaded and disseminated.

7) Access to protected test information under protective order extends well beyond attorneys; that is, it includes legal office staff and other expert consultants, and could involve dozens of

individuals per case. Who is to be tasked with monitoring their adherence to a protective order?

8) Sanctions for protective orders breaches are rare and typically minor (Childs, 2007).

16. In the one previous instance in which I turned over protected psychological test data sheets under a protective order as ordered by a judge, the conditions of the protective order included returning the data sheets to me at the conclusion of the trial. Plaintiff counsel never complied with this condition, and I twice contacted defense counsel regarding this lapse, and they issued letters to plaintiff counsel to comply, but he never did. Thus, in my experience, and as documented in Exhibit E, protective orders do not appear to be enforced or enforceable, and I no longer view them as an adequate method to protect psychological tests. Further, since 2013 when I released test data sheets under a protective order, the capability to digitally upload information has rapidly increased, making it even more difficult to monitor and police that parties comply with protective orders regarding protected psychological test information (further discussed in Exhibit F). Therefore, the best, and only reasonable, approach, in the view of my field, is that protected psychological test information remain solely in the possession of licensed psychologists who are under ethical obligations to protect the tests.

17. Further, I do not perceive any benefit to plaintiff counsel in turning over the protected psychological test information to them. They do not have the professional training and experience to evaluate, by viewing the test information, as to whether I administered, scored, and/or interpreted the tests correctly; only a psychologist has the ability to make those determinations. If plaintiff counsel cannot judge the adequacy of the testing completed by me from the released materials, the obvious solution is that I forward the test information to their expert; that expert can then analyze the data and communicate any concerns regarding the testing to plaintiff counsel, which can then be used at trial, while test security remains preserved. Attached hereto as **"Exhibit G"** is a true and correct copy of "Attorney demands for protected psychological test information: Is access necessary for cross examination or does it lead to misinformation? An interorganizational position paper," which

describes the inaccurate information provided to the trier of fact when attorneys attempt to analyze and critique psychological test information themselves.

18. I believe producing protected test materials to plaintiff counsel, when various plaintiff counsel have made no secret of the fact they would like to use the materials to prepare their clients in advance of neuropsychological testing, would destroy the validity of the testing and would be a violation of the ethical standards set for my profession.

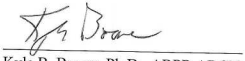
19. Although I request copies of the opposing expert's test information gathered from their exam of plaintiff when doing my own forensic evaluations, I have never, in 35 years of doing this work, advised retaining counsel that they too should possess copies of protected test materials. I am able to sufficiently prepare counsel for discovery deposition and cross examination of the opposing neuropsychologist at trial by my own review of the data, without the need for counsel to possess copies of the protected information themselves. It is the role of expert neuropsychologists, by virtue of their training, to evaluate whether testing was appropriately administered, scored, and interpreted. This information can then be communicated to counsel for use as they see fit.

20. In summary, over the course of more than 35 years of conducting psychological and neuropsychological evaluations in a medical-legal context in California, I have routinely encountered and complied with requests to forward protected test information to other licensed psychologist experts. However, allowing non-psychologists to receive protected psychological test materials, including test questions and test stimuli, poses a serious threat of widespread social harm by compromising test security.

21. On a final note, as of 2024, a recently published nationwide survey of neuropsychologists (**Exhibit H**: "IOPC survey of test security practices and perspectives of licensed psychologists") revealed that "Respondents overwhelmingly favored keeping test materials secure and not divulging information to attorneys (≥98.%). There was near consensus (94.5%) that a protective order issued by a judge is not sufficient to ensure test security." In other words, Dr. Uttl's views in exposing tests to non-psychologists are not shared by the neuropsychological community.

22. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on this _22ND day of July, 2025, at Torrance, California, USA.



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