

# The whole truth and nothing but the truth: assessing response style in trial competency

## Introduction

Competency to stand trial evaluations dominate criminal forensic referrals with approximately 60,000 consultations performed annually.<sup>1</sup> Forensic examiners have made numerous attempts to create assessment tools determining a defendant's ability to competently stand trial. Presently, two instruments have been published that assess legal competency ability that corresponds to the Dusky v. United States<sup>2</sup> standard of competence. The MacArthur Competence Assessment Tool-Criminal Adjudication<sup>3</sup> is a 21-item instrument pertaining to hypothetical legal scenarios. While this instrument has gained acceptance in the field, it is missing, among other things, validity scales designed to detect feigning. A more recently developed trial competency assessment instrument, the Evaluation of Competency to Stand Trial- Revised (ECST-R),<sup>1</sup> was designed to assess psycho-legal abilities, and includes scales that assess response style, including possible feigning of a mental illness. Considering how new this instrument is questions remain regarding its utility. Other than research conducted by the authors, few studies have addressed the usefulness of the ECST-R in forensic practice. The primary purpose of the current study is to investigate the efficacy of the ECST-R Atypical Presentation Scales (ATP) in differentiating honest responders from those who have been coached to feign the presence of a mental illness. Undergraduate students from the Argosy University-Schaumburg campus have been used for this study. Participants were randomly assigned to experimental and control conditions by selecting one of two envelopes, each representing a different study condition that determined their test-taking strategy (see Appendices B and C). In the experimental condition, participants were given instructions to feign a psychiatric condition while taking the test, whereas those in the control group were given standard instructions for the ECST-R and were asked to be honest and forthright in their responding. It is hypothesized that the feigning group will yield significantly higher scores on the ATP scales as compared to the group of honest responders.

**Abbreviations:** ATP, Atypical Presentation Scales; ECST-R, Evaluation of Competency to Stand

Trial-Revised; FRE, Federal Rules of Evidence; GCCT, Georgia Court Competency Test; ATP-N, ATP-Nonpsychotic; ATP-R, ATP-Realistic

## Literature review

The concept of competence to stand trial in criminal courts refers to the notion that a defendant's mental or emotional deficits may interfere with their right to a fair trial.<sup>4</sup> When it appears that these deficits prevent the defendant from being able to aid in the defense of his/her case, the law requires restoration of competency before proceeding to trial. Competency to proceed refers to a criminal defendant's ability to participate productively and make decisions independently while being prosecuted.<sup>5</sup> Therefore, by definition, a competent defendant is one who is an "active participant in the legal process, not a passive observer". Competency and legal sanity have

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very different legal standards and need to be distinguished from one another. In most situations, competency deals with current state of mind.<sup>6</sup> According to Grisso<sup>4</sup>, the number of defendants who were evaluated for competency in the early 1980's was approximately 25,000 per year. This figure more than doubled in 1995, with 60,000 reported cases and 100,000 in 2005.<sup>1</sup> Of these reported cases, only 10-30% is found incompetent to proceed with trial<sup>4</sup> which could further indicate that for the rest of these referrals, there was either not enough evidence to support incompetence or many of them are discarded as a result of feigning. In the criminal setting, it is common for defendants to feign deficits in their mental or emotional state in an effort to improve the outcome of their legal proceedings (i.e. leniency in sentencing) or their sentencing circumstances (i.e. forensic hospital vs. jail or prison).<sup>7</sup> Recent data suggest that the prevalence of malingering varies widely across forensic settings, but is likely to compose approximately one sixth of all forensic cases.<sup>8</sup> Therefore, the assessment of response style is a crucial component in competency assessments that should be considered with each and every referral.

According to Vitacco<sup>9</sup> recent estimates of malingering within forensic evaluations ranged from 15.7% to 17.4%. Furthermore, when comparing the number of competence to stand trial evaluations with base-rate estimates of malingering, "thousands of CST evaluations occur annually in which issues of malingering must be systematically evaluated".<sup>9</sup> According to Rogers & Cruise,<sup>10</sup> often, experienced clinicians rely on their own perceptions in deciding when to assess for feigning which may lead to misdiagnosing and inaccurate information given to the court.<sup>9</sup> Others rely solely on individual instruments.<sup>11</sup> In Lally,<sup>12</sup> 64 diplomats in forensic psychology were surveyed regarding both the frequency with which they use and the opinion they had on a variety of psychological instruments used in forensic practices. For malingering evaluations, majority of the respondents considered the Minnesota Multiphasic Personality Instrument-2 (MMPI-2) and the Structured Interview of Reported Symptoms (SIRS) to be the most acceptable and recommended instruments. However, neither of these instruments is specifically designed to detect feigning in competency to stand trial. Furthermore, when defendants are adjudicated incompetent, either accurately or inaccurately, criminal proceedings are suspended. In some of these cases the defendant is often committed to the public mental health system for treatment. In a study conducted by Chaimowitz & Ferencz<sup>13</sup> it was estimated that the

average daily cost of hospitalization for an adjudicated incompetent defendant at a psychiatric hospital in Canada was \$537. Moreover, it was determined that the majority (74%) of individuals referred for inpatient fitness assessments were found fit to stand trial. Accurate evaluations are not only crucial for the purposes of justice but can, in fact, aid with significant cost savings.

The Evaluation of Competency to Stand Trial- Revised (ECST-R); Rogers et al.,<sup>1</sup> was explicitly designed to address competency evaluations with advantages over current competency measures. These advantages include

- i. congruence with the Dusky standard where the US Supreme Court held that the defendant must be tested on his ability to consult with his lawyer with a reasonable degree of rational understanding, and has a rational as well as factual understanding of the proceedings against him<sup>14</sup>
- ii. established construct validity,
- iii. admissibility under the Daubert standard,<sup>15</sup> which declared that evidentiary reliability will be based on scientific validity and set out the criteria of falsifiability, peer review and publication, error rate, and general acceptance. Finally,
- iv. the ECST-R provides a systematic screening for feigned incompetency to stand trial, with questions probing implied impairment and symptomology specifically related to competency issues.<sup>1</sup> Other than the Georgia Court Competency Test which includes a very brief screening section, no other competency measure assesses the possibility of feigning. The ECST-R evaluates two different areas of feigning (i.e. psychotic and non-psychotic) and relies on multiple detection approaches such as atypical presentation and symptom severity.

### Early history

The earliest established groundwork of the legal development of competence to stand trial may be the common law prohibition against trials where the defendant is not present.<sup>16</sup> Just as the defendant has the fundamental right to be physically present at trial to confront his or her accusers, the defendant must also be mentally present to confront his or her accusers in a meaningful way. Melton et al.,<sup>17</sup> traced the legal roots of trial competency and discussed the practice of seventeenth-century English courts where they determined whether defendants who stood mute in court and did not enter a plea at their trial were considered “mute of malice” or “mute by visitation of God.” The latter included the deaf, mute, and later the lunatic whom were not expected to make a plea. The “mute of malice” were subjected to wearing increasingly heavy weights on their chest until a plea was made. The idea of the defendant being mentally aware of the legal situation was further evolved in the eighteenth century.

The development of American criminal law, including the concept of competency, has been influenced by English common law.<sup>17</sup> Trial competency was first linked to the U.S. Constitution with the 1899 Court of Appeals case of *Youtsey v. United States*.<sup>18</sup> Youtsey was convicted of embezzlement after a several month delay due to epilepsy. The court denied his attorney’s motion for an additional continuance based on expert testimony that the epilepsy caused him severe memory impairment. The Sixth Circuit Court of Appeals reversed the conviction and remanded the case for retrial and for a competency hearing. This finding was based on evidence that the

defendant’s memory was impaired prior and during his trial and since epilepsy is progressive it was doubtful if the defendant would ever be able to fully understand and defend his situation.

### The dusky standard

According to the *Dusky vs. United States* case in 1960,<sup>15</sup> Milton Dusky was a 33-year-old male who, along with his two teenage friends, was charged with interstate kidnapping and sexually assaulting a 15-year-old girl from Missouri. Once arrested, Dusky asked the FBI agent if his charge was serious and then went on to deny that the girl was kidnapped since she got in the car voluntarily. Mr. Dusky’s attorney claimed it was difficult to consult with his client and requested a competency evaluation. The psychiatrist assigned to the case evaluated Mr. Dusky and testified that Mr. Dusky was diagnosed with a “schizophrenic reaction, chronic undifferentiated type” but that his mental status was not grossly impaired if carefully medicated. He, therefore, further testified that Mr. Dusky understood the courtroom proceedings as well as the meaning behind the charges against him but was unable to assist his attorney in his own defense. Given this information, Mr. Dusky was considered competent to stand trial. After unsuccessful attempts to raise an insanity plea, Mr. Dusky was convicted of his crime and sentenced to 45 years in prison.

After an unsuccessful appeal claiming Mr. Dusky was, in fact, incompetent to stand trial, his attorney further appealed to the United States Supreme Court. Upon reviewing the evidence, the court granted the appeal. The court ruled that in order for a defendant to be considered competent to stand trial he or she must have “sufficient present ability to consult with lawyer with a reasonable degree of rational and factual understanding of proceedings against him.” The court also clarified that a brief mental status exam was insufficient. Therefore, Mr. Dusky’s case was remanded for retrial at which time his sentence was reduced to 20 years in prison. In conducting evaluations of competency, it is important for forensic clinicians to not only understand the Dusky standard for competency to stand trial but also be aware of the legal requirements for the admissibility of expert evidence. The following case examines the Daubert standard regarding what is considered expert witness testimony so as to exclude the presentation of unqualified evidence to the jury.

### The daubert standard

*Dusky vs. United States* case in 1960,<sup>15</sup> was a toxic exposure lawsuit case. Jason Daubert and Eric Schuller had been born with birth defects. Along with their parents they sued Merrel Dow Pharmaceuticals Inc. in a California state court, claiming that the drug Bendectin used during their mothers’ pregnancy to alleviate nausea had been responsible for the defects. Merrel Dow moved the case to federal court, and then moved for summary judgment because their expert documents showed that no published scientific study demonstrated a link between Bendectin and birth defects. Daubert and Schuller submitted their own expert evidence that Bendectin could, in fact, cause birth defects. However, their evidence was based on studies using animals as their subjects, pharmacological studies, and reanalysis of previous studies which all had not yet gained general acceptance within the scientific community. After the district court granted summary judgment for Merrel Dow, Daubert and Schuller appealed to the Ninth Court. The Ninth Court, however, agreed with the summary judgment granted by the district court citing *Frye v. United States*<sup>19</sup> (54 App. D.C. 46, 47, 293 F. 1013, 1014) that the

plaintiff's evidence had not yet been accepted as a reliable technique by scientists and was, therefore, inadmissible. Due to the division of several lower courts regarding the proper approach to admitting expert evidence, the U.S. Supreme Court granted certiorari (certification that it will hear the case).

### The frye decision

In the 1923 case of *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), the D.C. Circuit held that evidence could be admitted in court only if "the thing from which the deduction is made" is "sufficiently established to have gained general acceptance in the particular field in which it belongs".<sup>20</sup> The test that was dealt with in the *Frye* case was a precursor to what is today known as the polygraph, a systolic blood pressure deception test. This test was not generally accepted by scientists in 1923 and was, therefore, ruled by the *Frye* court as inadmissible evidence. The proper scope and application of the *Frye* test was disputed by scholars over the years. The plaintiffs in the *Daubert* case argued that *Frye* was no longer the governing standard for admitting scientific evidence in federal court trials since the Congress implemented the Federal Rules of Evidence in 1975. The Supreme Court agreed and since the text of the Rules did not suggest that Congress had intentions to keep the *Frye* rule, the Court reasoned that *Frye* was no longer the rule.

### Federal Rules of Evidence (FRE)

The following is a description of three FREs that are pertinent to expert testimony by psychologists and other scientists:<sup>21</sup>

#### Rule 701: Opinion testimony by lay witnesses

"If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are

- i. rationally based on the perception of the witness, and
- ii. Helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and
- iii. Not based on scientific, technical, or other specialized knowledge within the scope of Rule 702."

#### Rule 702: testimony by experts

"If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if

- i. the testimony is based upon sufficient facts or data,
- ii. the testimony is the product of reliable principles and methods, and
- iii. the witness has applied the principles and methods reliably to the facts of the case."

#### Rule 703: Bases of opinion testimony by experts

"The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or

inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect."

In addition, a Court majority also made it clear that district court judges should evaluate the admissibility of expert testimony or evidence to assure that it contains three crucial elements:

- i. relevancy,
- ii. legal sufficiency, and
- iii. reliability.<sup>5</sup>

Relevancy refers to the expectation that the scientific results must be directly related to the specific case being presented. If the relationship between the scientific evidence and the facts of the case is not properly established, the evidence is not admissible. Legal sufficiency refers to the expectation that the expert evidence must provide proof to the issues of the case rather than misleading the jury. An example given in *Bartol & Bartol*<sup>21</sup> describes situations where the courts prevent the expert from using the term "rape trauma syndrome" while preferring a more neutral term such as "posttraumatic stress disorder" because the former may give the impression that rape has occurred, which is considered prejudicial and misleading. The third criterion articulated by *Daubert* refers to the issue of reliability. Their decision expanded the range of scientific opinion evidence in court in that evidentiary reliability will be based on scientific validity.<sup>22</sup> In order to establish scientific validity, four criteria were outlined by the majority opinion in *Daubert* that must be considered:

- a) Falsifiability. The Supreme Court stated that in order to determine whether a theory or technique can be accurately considered scientific knowledge would depend on whether or not it can be and has been tested.<sup>20</sup>
- b) Peer review and publication. The Court emphasized the importance of publications that have been peer reviewed considering there is a higher likelihood that weaknesses in the methodology will be detected.<sup>1</sup>
- c) Known or potential error rate. The Court affirmed the need to keep the rate or error in mind when considering scientific admissibility. However, an unacceptable level of error rate has not been established.<sup>1</sup>
- d) General acceptance. Although this criterion is not required, the Court recognized that general acceptance is an important factor when considering admissible evidence.<sup>1</sup>

The Court further clarified *Daubert* in two succeeding cases known as, *General Electric Co. v. Joiner*<sup>23</sup> and *Kumho Tire Co. v. Carmichael*.<sup>24</sup> According to Cornell University Law School online, the *Joiner* case involved a city electrician who was diagnosed with lung cancer and filed a lawsuit against the manufacturer of polychlorinated biphenyls, electrical transformers and dielectric fluid, claiming through expert testimony that exposure caused his condition. The district court judge considered the plaintiff's expert testimony to be "unsupported speculation" and, therefore, excluded it. *Joiner* appealed and the 11<sup>th</sup> Circuit Appellate Court reversed the trial court claiming that the judge's decision to exclude the expert testimony

was an error. The U.S. Supreme Court intervened in order to reverse the 11<sup>th</sup> Circuit and directed the appellate courts not to review a trial judge's decision in regards to expert testimony unless the judge was clearly careless in the judgment. In the case of *Kumho Tire*, a vehicle passenger was killed and others were injured when a tire blew out causing the vehicle to overturn (Wikipedia). The plaintiffs' expert testimony of a tire failure analyst claimed that tire failure must have been caused by a defect in its manufacturing. The defendant sought to exclude the tire analyst testimony stating that the methodology did not satisfy the requirements of the Federal Rules of Evidence 702. After the trial court applied *Daubert*, the judge excluded the testimony considering the methodology unreliable. Carmichael appealed and the 11<sup>th</sup> Circuit affirmed that the trial court made a mistake in applying *Daubert*, assuming that it only pertained to scientific testimony. The U.S. Supreme Court intervened and reversed the 11<sup>th</sup> Circuit by clarifying that *Daubert* applies to all expert testimony whether scientific, technical, or other specialized knowledge. In light of these various cases, the U.S. Supreme Court presently holds that defendants are competent to stand trial if they have "sufficient present ability to consult with their lawyer with a reasonable degree of rational understanding... and a rational as well as factual understanding of the proceedings".<sup>21</sup> Furthermore, competency requires that defendants are able to assist their attorney in the preparation of their defense. In addition, it is important to emphasize that a mental disorder does not render incompetence to stand trial.

### Raising the issue of competence

In *Pate v. Robinson*,<sup>25</sup> the US Supreme Court affirmed that the issue of competence must be raised by a trial judge either by evidence in the court or evidence presented by the defense and/or the prosecution. In a later case of *Drope v. Missouri*,<sup>26</sup> the Court clarified that further inquiry regarding a defendant's competence requires evidence of irrational behavior, demeanor in court, and any prior medical opinions relevant to competence to stand trial.

### Competence in a guilty plea

According to *Otto*,<sup>27</sup> over 90% of criminal cases in the United States end up as pleas of guilty which are often resolved through plea bargaining. In the case of *Sieling v. Eyman*,<sup>28</sup> the US Court of Appeals distinguished a difference between competency to plead guilty and competency to stand trial claiming that there are higher standards in pleading guilty than there are in competency to stand trial considering the wave of constitutional rights. Therefore, the court held that a defendant is not competent to plead guilty if he or she does not understand the nature of the consequences of the plea. Majority of courts, however, have adopted the standard of incompetence to plead guilty as being the same as the standard of competence to stand trial.

### Competence in cases of amnesia

In *Wilson v. United States*,<sup>29</sup> the defendant sustained head injuries in an accident during a high speed chase with police officers who caused him amnesia and inability to recall his offenses. Six factors were considered to assist the court in determining whether or not to abolish the conviction:

- i. The extent to which the amnesia affected the defendant in communicating with his or her attorney regarding the case.
- ii. The extent to which amnesia affected the defendant in testifying for his behalf

- iii. The extent to which the evidence could be recreated due to the defendant's amnesia. This would include evidence regarding details of the crime as well as a possible alibi.
- iv. The extent to which the government assisted the defendant with his or her recreation of events.
- v. The strength of the prosecution's case, especially when all reasonable propositions of innocence are rejected.
- vi. Any other circumstances or facts that would support that the defendant had a fair trial (Powers Stafford, 2002).

### Mental retardation and competence

In the case of *United States v. Duhon*,<sup>30</sup> the court emphasized the ability to make decisions in rejecting the opinion of forensic examiners who claimed that a hospitalized mentally retarded defendant was competent to stand trial. That court held that the defendant's factual understanding of the court proceedings was insufficient evidence of competence. This decision was not only based on the fact that hospital staff taught the defendant to memorize some information but rather on the defendant's inability to consult with counsel with a reasonable amount of rational understanding as well as to have rational understanding of the court proceedings regarding the case. In an early study conducted by Bonnie,<sup>31</sup> it was reported that mentally retarded defendants comprise 2% to 7% of competence evaluation referrals, but as many as half of these defendants are not referred for competence evaluations. In a study conducted by Cochrane et al.,<sup>32</sup> the authors collected data from 1436 defendants who were referred for competency evaluation to a federal medical center. They reported that of the 33 mentally retarded defendants evaluated, 30% were considered incompetent to stand trial. In another study by Ericson & Perlman,<sup>33</sup> the authors compared mentally retarded adults with non-disabled adults on their knowledge of 34 legal terms. The mentally retarded adults scored significantly lower than their counterparts on conceptual understanding of all terms except police officer. The term "guilty" was not understood by 45% of the disabled group and only 8 out of the 34 terms were reasonably understood by about 75%. Furthermore, there was a discrepancy for 20% of the disabled adults between their report of being familiar with concepts and their actual understanding of the concepts. Disabled subjects often reported familiarity with a term when they clearly did not understand what it meant. This study illustrates how mentally retarded individuals are less likely to report that they do not know information, especially to authority figures. The authors suggest evaluating these individuals through open-ended rather than yes-no questions regarding their competence.

While incompetency due to mental illness may vary over time and can often be treated, incompetency due to mental retardation is more so a permanent concern.<sup>34</sup> Although these defendants may appear restored after being educated on the trial proceedings, they are still unable to make intelligent legal decisions. In addition, mentally retarded defendants are often vulnerable to suggestion. Since the U.S. Supreme Court noticed the drastic differences between mental illness and mental retardation, a decision against the execution of mentally retarded defendants was established.<sup>34</sup> Due to this rule, the evaluation of competency in cases of mental retardation is based on two different models. In the more recent model, courts are merely trying to establish whether or not the defendant is mentally retarded under the definition of the jurisdiction in which the defendant is being prosecuted. In the competency to stand trial model, the courts try to decide whether the

defendant is mentally retarded and if so, does the mental retardation meet the legal standards that prove incompetency. Regardless of the definition, the approach to this type of assessment is certainly much different than assessing for mental illness in reference to legal competency.<sup>34</sup> Frequently in competency proceedings involving a potentially mentally retarded defendant, the focus is mainly on the defendant's level of IQ as opposed to the other two criteria necessary for the diagnosis (i.e. deficits in present adaptive functioning and onset of symptoms prior to the age of 18). The defendant must meet all three criteria and exhibit competency related deficits that are attributable to mental retardation. Despite the drastic differences between mental illness and mental retardation, there is currently only one competency measure that specifically assesses the competency of mentally retarded defendants. This instrument is the Competence Assessment for Standing Trial for Defendants with Mental Retardation-CAST-MR.<sup>35</sup>

### Treating the incompetent defendant

In the 1972 case of *Jackson v. Indiana*, the U.S. Supreme Court evaluated the commitment of a deaf and mute incompetent defendant who had two charges of robbery. He was ordered to be hospitalized until his competency was restored although the hospital staff did not believe he would ever obtain the necessary communication skills to competently stand trial. Therefore, the Court ruled that incompetent defendants should be committed for a "reasonable" amount of time until a decision can be made whether or not the defendant can be restored competent in the near future. The court also held that commitment can be extended if the defendant is making steady progress towards competency restoration. If these conditions could not be met, the Court considered either releasing the defendant or initiating civil commitment arrangements. In a study conducted by Morris & Meloy,<sup>36</sup> data on permanently incompetent criminal defendants confined in California hospitals was summarized for the purposes of reviewing the legal options for implementing the limitation on competency restoration commitment established by *Jackson v. Indiana*.<sup>37</sup> These defendants had been hospitalized for over four years since they were adjudicated permanently incompetent and were not to be released due to dangerousness by reason of a mental disorder. Ninety-three percent of the sample studied was diagnosed with either schizophrenia or schizoaffective disorder, and 64% of them had a history of substance abuse. Seven percent were diagnosed with personality disorders. The statute provided that these defendants could be "held under conservatorship only if they presented substantial danger of physical harm to others beyond a reasonable doubt". The authors concluded that the *Jackson v. Indiana*<sup>37</sup> case has been circumvented in many jurisdictions by legal requirements that allow civil commitment of permanently incompetent defendants using different criteria from the ones applied to other civil patients.

Although obvious discrepancies in knowledge and reasoning about one's legal situation raises concern about competence, the issue of competence is not only functional, but an ability issue as well. Some apparent issues of competence could merely be due to lack of information, failure of an attorney to spend a reasonable amount of time with their client, or malingering.<sup>16</sup> To render a defendant incompetent to proceed with the case requires a thorough assessment of pertinent psychological conditions. Some of the most commonly used competence instruments according to Lally,<sup>12</sup> include

- a) the MacArthur Competence Assessment Tool-Criminal Adjudication-MacCAT-CA<sup>17</sup>
- b) the Georgia Court Competency Test-GCCT<sup>38</sup>
- c) the Competency to Stand Trial Assessment Instrument-CAI<sup>39</sup>
- d) the Competency Screening Test-CST<sup>40</sup>
- e) the Interdisciplinary Fitness Interview-Revised-IFI-R.<sup>41</sup>

With the exception of the Georgia Court Competency Test (GCCT), these competency assessment instruments have not been designed to measure response style and they commonly have face validity which makes them vulnerable to malingering. According to Powers Stafford,<sup>16</sup> evaluation of competence to stand trial requires two levels of assessment. First, the psychologist evaluates the defendant's understanding of the legal proceedings in his or her case and their ability to make decisions about it. This assessment is made through clinical interviews, use of competency assessment instruments, information provided by the prosecutor, and input of the defense counsel regarding their doubts on competence. Second, pertinent psychological conditions are evaluated through self-report, clinical observation, information provided by third parties, and psychological testing of cognitive functioning, psychopathology, and response style. Given that, competency evaluations rely heavily on not only the validity of psychological measures but also the honesty and accuracy of defendants' self-reporting, distortions, either intentional or unintentional; present various complications in the assessment process.

### Definition of response styles

Weiner, Freedheim & Goldstein<sup>42</sup> summarized different definitions describing response style:

- a) Malingering is used to describe the "deliberate fabrication or gross exaggeration of psychological or physical symptoms for the fulfillment of an external goal" (p. 109-110).
- b) Defensiveness is used to describe the intentional denial or gross minimization of symptoms for the fulfillment of an external goal.
- c) Irrelevant responding occurs when the examinee responds to questions inconsistently.
- d) Feigning is the intentional fabrication or vast exaggeration of psychological or physical symptoms without assumptions about its goals.
- e) Secondary gain is used to describe the "perpetuation and possible augmentation of symptoms based on unintentional responses to internal (i.e. psychodynamic models) and external (i.e. behavioral-medicine models) forces" (p. 110). The authors suggest that this term should be avoided in forensic evaluations as it is considered imprecise.
- f) Suboptimal effort is used to describe the absence of maximum effort given by the examinee.
- g) Dissimulation is a term that describes an inaccurate portrayal of symptoms. It is mainly used when there is not enough information to classify the response in more precise terms (i.e. malingering).

### Comprehensive definition of malingering

According to the DSM-IV-TR,<sup>43</sup> malingering is described as the combination of the following:

1. Medicolegal context of presentation (e.g., the person is referred by an attorney to the clinician for examination)
2. Marked discrepancy between the person's claimed stress or disability and the objective findings
3. Lack of cooperation during the diagnostic evaluation and in complying with the prescribed treatment regimen
4. The presence of Antisocial Personality Disorder

Furthermore, the DSM-IV-TR depicts malingering individuals as intentional producers of false or grossly exaggerated physical or psychological symptoms, motivated by external incentives such as obtaining financial compensation, avoiding work, avoiding military duty, obtaining drugs, or escaping criminal prosecution (p. 739). However, the use of these indices as determinants of malingering could lead to many errors considering they have never been validated.<sup>7</sup> The DSM-IV-TR criteria for malingering were intended as a threshold model for establishing when malingering should be evaluated further.

### Malingering and the law

In *United States v. Greer*,<sup>44</sup> the 5th Circuit Court of Appeals announced a decision that emphasized the significance of criminal defendants feigning mental illness. Charles Greer was charged with kidnapping and several firearms violations. He had a long criminal history and had been committed several times in inpatient psychiatric facilities. He had been repeatedly found incompetent to proceed with trial on his previous charges and his competency was also questioned in relation to the state aspect of these charges. Richard Frederick, Ph.D. performed an inpatient competency evaluation and testified that Greer was not only competent to stand trial but was, in fact, feigning psychotic illness. After the defense expert testimony, the court ruled Greer competent to stand trial.

Greer's attorney felt that his client continued to exhibit bizarre behavior and filed another motion to evaluate competency. After being examined by a psychiatrist from the Texas Department of Criminal Justice, Greer was found incompetent. The government did not contest the opinion and Greer continued to be considered incompetent for trial. Therefore, he was referred to an inpatient mental health facility to restore his competency. The mental health staff at the facility observed Greer for a period of 2 months and reported to have had difficulty finding any active psychotic process or serious mental illness. Another psychologist, Mary Alice Conroy, Ph.D., also testified later on that in her opinion Greer was malingering. Consequently, the court found that Greer was feigning mental illness and that he was competent to stand trial. However, on the first day of trial he took all of his clothes off and attempted to flush them down his cell toilet and also spit up several splotches of blood which prompted staff to take him to a local hospital. The jail's director of infirmary services testified that a cut found in Greer's mouth caused the bleeding and that such an injury is commonly caused by self-inflicted scratches. She also went on to say that it appeared Greer was gagging himself with the blood rather than vomiting. The U.S. District Judge told Greer, with the absence of the jury, that he believed he was a malingerer

and that if he disrupted the courtroom proceedings he would simply be removed from court and his trial would proceed without him. Greer continued to exhibit disorderly behavior and was consequently removed from court.

The jury convicted Greer despite his absence and bizarre behavior. Furthermore, at sentencing, the court granted the government's argument that Greer receive an enhanced sentence for obstructing justice since he continuously feigned mental illness prior to and during trial. Greer would have normally received a 185-month sentence but with the enhancement it turned out to be a 210-month sentence. The court's decision to enhance Greer's sentence due to malingering was affirmed on appeal.

### Explanatory models of malingering

Rogers<sup>45</sup> talked about the possibility of three explanatory models of malingering. "...dissimulation occurs because malingerers are

- i. mentally disordered (pathogenic),
- ii. bad (criminological), and
- iii. Attempting to meet their objectives in adversarial circumstances (adaptational)" (p. 9).

The pathogenic model assumes that malingering is underlined by a mental disorder in which malingerers deceive due to some intrapsychic pathology. In their "attempts to gain control over emerging symptoms, the patient creates the symptoms and portrays them as genuine" (p. 9). Once the mental disorder emerges, the patient loses control of the symptoms they simulated. Subsequently, the mental disorder worsens and true symptoms appear. However, this model's predictions have not been supported and since perceptions of malingering have also changed through the past few decades, this model is no longer favored. In contrast to the pathogenic model, the criminological model emphasizes the inclination for antisocial and psychopathic personalities to lie, cheat, and steal. However, the association between antisocial personality and malingering is likely misleading. Although people evaluated in forensic settings can often appear uncooperative, it is unfair to assume they are likely to malingering. Moreover, malingerers can frequently appear highly cooperative. Rogers<sup>45</sup> proposed the adaptational model where malingering individuals are basically considered to be normal people who are simply attempting to meet their needs in adversarial circumstances. These individuals perform a cost-benefit analysis when confronted with an assessment perceived as indifferent to or in opposition to their needs. Research seems to support this finding with higher prevalence rates reported when personal stakes are high such as military combat or personal injury suits, and in adversarial settings such as forensic versus non-forensic. The model is supported through a study conducted by Walters<sup>44</sup> where federal inmates showed a tendency to feign for a highly desired goal (i.e. single cell) but not under neutral circumstances.

### Detection strategies for malingering

The presentation of malingering can occur in one of three ways: feigned psychopathology (e.g. schizophrenia), cognitive impairment (e.g. mental retardation), or both. According to Rogers<sup>46</sup> who asked 221 experienced forensic experts to identify which domain most of their malingering cases fell into, majority (53.4%) of the cases centered on feigned psychopathology. Measures and detection strategies are not the

same for all three categories. In the case of feigned psychopathology for instance, defendants tend to create various psychiatric symptoms while defendants who feign cognitive impairment simply make more errors while exhibiting a sincere effort.<sup>7</sup> For the purposes of this study, the focus will remain on psychopathological feigning. Methods for the detection of malingering in criminal defendants often highlight the following facts:

- a) scores on standardized malingering detection assessments,
- b) atypical presentations in clinical interviews, and
- c) Information from collateral interviews or assessment indicating inconsistencies.<sup>35</sup>

According to Rogers & Shuman,<sup>7</sup> there are six different detection strategies that have been tested in multiple malingering studies. They are as follows:

- i. Rare symptoms refer to symptoms that portray impairment but are rarely experienced by clinical populations.
- ii. Improbable and absurd symptoms refer to symptoms that are bizarre in nature and unlikely to be experienced by true clinical populations.
- iii. Indiscriminant symptom endorsement refers to individuals who endorse a high number of symptoms typically unusual in clinical populations. However, due to the possibility that high symptom endorsement can be genuine in certain cases (i.e. a depressed individual endorses most of the depressive symptoms), the evaluator must make certain that the interview covers a wide range of psychopathology.
- iv. Symptom combinations refer to symptoms that are rarely experienced simultaneously (e.g. periods of loss appetite for food accompanied by racing thoughts).
- v. Contradictory symptoms refer to incompatible symptoms such as depression and mania symptoms endorsed at the same time.
- vi. Symptom severity reviews symptoms to see what proportion the defendant considers extremely severe. Although true clinical patients may often endorse severity of their symptoms, the endorsement of majority of symptoms in the extreme range is unusual.

Slick, Sherman & Iverson,<sup>47</sup> proposed a set of diagnostic criteria that define possible, probable, and definite malingering of neurocognitive dysfunction (MND). They are summarized as follows:

- a) Definite MND is indicated when there is clear evidence of purposeful exaggeration of cognitive dysfunction such as the presence of an external incentive and a definite below chance performance on a cognitive function measure and the absence of reasonable explanations.
- b) Probable MND is indicated when there is strong evidence suggesting volitional exaggeration of cognitive dysfunction such as the presence of an external incentive and two or more types of evidence in neuropsychological testing, excluding definite below chance performance and the absence of reasonable alternative explanations.
- c) Possible MND is indicated by the presence of evidence suggestive of volitional exaggeration of cognitive dysfunction such as the

presence of an external incentive as well as evidence from a self-report and the absence of practical alternative explanations.

### Structured malingering assessments

The most useful approach for determining malingering is to use an instrument designed for detection of malingering. Rogers & Shuman,<sup>7</sup> recommend the use of at least two standardized measures for the evaluation of feigned mental disorders. Some personality assessment instruments, such as

- a) the Minnesota Multiphasic Personality Inventory-2-MMPI-2<sup>48</sup>
- b) the Millon Clinical Multiaxial Inventory-MCMI-III<sup>49</sup>
- c) the Revised NEO Personality Assessment Inventory,<sup>50</sup> have indices built in to assess malingering.

Other assessments, such as the M-Test<sup>51</sup> or the SIRS, Structured Interview of Reported Symptoms,<sup>52</sup> are designed to detect malingered psychopathological symptoms.<sup>35</sup> Clinical interviews are of equal importance because they can focus on case specific issues.<sup>7</sup> However, clinical interviews alone cannot systematically evaluate detection strategies. Consequently, attention to the possibility of malingering and other “response biases” in pretrial competence evaluations has been discussed and strongly recommended by commentators on forensic examinations.<sup>53</sup> Due to the prevalence of malingering in forensic evaluations, instruments that address psycho-legal knowledge while also providing some assessment of feigning are highly useful. The most recently developed competency instrument, the Evaluation of Competency to Stand Trial- Revised (ECST-R) was designed in such a manner. The ECST-R is appropriate to use with adults, 18 years of age and older who are involved in adult court proceedings and have a minimum IQ of 60. The instrument contains 18 items and three individual scales that assess separate measures of competency to stand trial (Factual Understanding of Courtroom proceedings, Rational Understanding of Courtroom Proceedings, and Consult with Counsel). The ECST-R also includes 28 items and five scales for Atypical Presentation [Realistic, Psychotic, Nonpsychotic, Impairment, and Both (Psychotic and Nonpsychotic)]. Factual Understanding is composed of 15 questions with 13 criteria that address the role of key figures in courtroom proceedings. Rational Understanding is composed of ten questions with six criteria that address the capacity to make relatively unimpaired decisions and logical judgments about the case. The Consult-with-Counsel scale is composed of ten questions with five criteria that evaluate the nature of the defendant-attorney relationship addressing

1. perceptions of the relationship,
2. defendant’s expectations of the attorney,
3. defendant’s understanding of the attorney’s expectations,
4. resolving disagreements, and
5. Special means of communicating with the attorney.

Within these parameters, the clinician rates psychotic interference or other impairments that may compromise the defendant’s trust, understanding, and communication with his/her defense counsel.

The Atypical Presentation scales are divided into three content-based domains: ATP-P (10 items), ATP-N (8 items), and ATP-R (9 items). All items address symptoms and/or problems within the context of the pending trial. The ATP-P and ATP-N combined are

referred to as the ATP-Both (ATP-B). Items on these four scales are scored on a 3-point scale (0=no, 1=sometimes or a qualified yes, and 2=yes). The ATP-I involves an additional set of inquiries for ATP-B items. Defendants are asked whether this item impairs their ability to go to trial, which is recorded on a 2-point scale (0=no, 1=yes).<sup>1</sup> As described in Rogers et al.,<sup>1</sup> the Atypical Presentation (ATP) scales were developed to include five content areas.

1. The ATP-Psychotic (ATP-P) scale includes atypical items with evident psychotic content. The psychotic symptoms are classified in four categories
  - i. delusions (e.g. delusions of being controlled),
  - ii. ideas of reference,
  - iii. formal thought disorder (e.g. illogical thinking, neologisms), and
  - iv. Bizarre perceptual experiences (e.g. auditory and visual hallucinations).
2. The ATP-Nonpsychotic (ATP-N) scale includes atypical items without psychotic content (e.g. depressed, upset, anxious). The nonpsychotic symptoms are classified in two categories
  - i. changes in physical symptoms and mental status which are rarely observed in these types of symptoms and
  - ii. atypical suicidal thoughts due to discontented states.
3. The ATP-Both (ATP-B) scale includes the raw scores for both the ATP-P and ATP-N scales.
4. The ATP-Impairment (ATP-I) scale includes the follow up questions asked after each of the ATP questions that describe the intensity of the items endorsed in how they will affect the defendant's presence in court.
5. The ATP-Realistic (ATP-R) scale evaluates concerns that are common in criminal defendants. The initial purpose of these items was to obscure the nature of the other ATP items. Many of these items are typically endorsed by most defendants. Thus, they serve as a preliminary screen for defensiveness. These items are classified in two categories
  - i. the desire for greater participation in the trial and
  - ii. common feelings, desires and concerns related to the pending trial.

In the standardization of the ECST-R, there were a total of 833 individuals of both genders involved in the criminal justice system. Males overrepresented the sample considering majority of the national criminal justice population is comprised by males. There was a mix of ethnic groups, with standardization data obtained separately for Caucasian, African American, and Hispanic.<sup>20</sup> As noted by the test authors, reliability is especially concerning with tests such as the ECST-R considering many defendants have fluctuating symptoms secondary to their unstable psychiatric state, affecting their competency from one time to another. The authors report that internal consistency reliability was high, with alpha coefficients from .83 to .89 for the Competency Scales, and .70 to .87 for the ATP scales. The manual provides tables of alpha reliability coefficients as follows: FAC (.87), RAC (.89), CWC (.83), Rational (.93), ATP-R (.63), ATP-P (.79), ATP-N (.70), ATP-I (.87), and ATP-B (.86) based upon a sample of 411.<sup>20</sup> Interrater reliability was even higher, ranging from .88 to

1.00 for the Competency Scales, and .98 for the ATP Scales. Test-retest reliability was slightly constrained by the educational component of the instrument (the examiner is to instruct the defendant on the correct response if the defendant does not know a factual answer) but greater than 90% of competency results were identical between examiners of the test about one week apart.

Regarding the validity of the ECST-R, five forensic experts, along with trial judges, assisted in documenting content validity. It is noted that criterion-related validity is difficult to determine considering there is no true independent standard for determining legal competency. However, the authors used the judgments by expert clinicians as the criterion against which to measure ECST-R findings which resulted in an overall mean hit rate of .82.<sup>19</sup> Convergent and discriminant validity evidence were also obtained against measures of related concepts. They also used confirmatory factor analysis with models pertaining to the three prongs of the Dusky standard of competence in order to understand construct validity. Forensic examiners have a wide range of methods for assessing psychological characteristics and diagnostic conditions that might address questions in functional deficits. Among these are intellectual assessments, mental status exams, instruments that determine personality traits, psychopathological conditions, and behavioral predispositions. However, only a few studies, and even less assessment instruments, have focused on establishing relations between psychological constructs and functional abilities in competence to stand trial cases.<sup>4</sup> The ECST-R is one of the few instruments published which aims to assess competence-related abilities set forth in *Dusky v. United States*.<sup>2</sup>

Research conducted by Rogers et al.,<sup>54</sup> using the ECST-R ATP scales on jail detainees found significantly higher scores on all ATP scales (d score range from .73-1.36) when the SIRS was used as a measure to classify malingerers. The scales displayed excellent sensitivity (.86) and NPP (.94) with a cut score of >5, when 96 detainees were assessed in a simulation study design and 56 clinical patients going through competency evaluations.<sup>1</sup> Another study conducted by Vitacco et al.,<sup>9</sup> assessed the effectiveness of the ECST-R ATP scales along with the M-FAST and SIMS, using, once again the SIRS as the external criterion. The authors reported that the ATP scales yielded good estimates of scale homogeneity. The lowest alpha was for the ATP-Realistic scale (.72), which primarily serves as filler items and is not used for screening feigning. In addition, all of the ATP scales demonstrated good internal consistency with an alpha range from .72-.90. Given the significant potential for deception and the implications for the validity of their findings, mental health professionals should develop a low threshold for suspecting less than candid responding. Simultaneously, given the limitations of science, and the weight that labels used to describe response styles (i.e. "maligner" or "faker") carry with makers of legal decisions, conclusions about an examinee's response style should not be offered hastily. Therefore, the forensic examiner's low threshold for suspecting dissimulation should certainly be accompanied by a conservative stance with respect to reaching conclusions on that issue. In addition to addressing three relevant competence-related abilities, the ECST-R includes scales designed to detect feigning of a mental illness. The ATP of the ECST-R is composed of rationally constructed scales with close agreement among independent evaluators. The objective of the current study is to evaluate the psychometric properties of the ATP scales and its effectiveness on detecting feigning through a simulation design.

## Method

### Participants

Participants were primarily recruited from undergraduate psychology classes at the Argosy University- Schaumburg campus. Participants attended the experiment on a voluntary basis, in exchange for extra credit points in their psychology classes. In accordance with Institutional Review Board requirements, all participants gave written informed consent (Appendix A). Ethical and HIPPA guidelines defined by the American Psychological Association with regard to human participant research, manipulation and data handling, and the proper reporting of data results was strictly applied. The sample was composed of thirty individuals, 12 (40%) male and 18 (60%) female. About half (50%) of the participants were between the ages of 25 and 29, 23% were younger than 25, and 26% were older than 29. The majority of subjects were Caucasian (77%), 10% were Asian, and 10% were Hispanic. There was one African American participant.

### Design

The study is a multivariate analysis of variance (MANOVA) design which was computed to test for overall differences between the study groups on the Atypical Presentation (ATP) scores. Participants were randomly assigned to experimental and control conditions by selecting a piece of paper from a bag which had either the letter “A” or letter “B” on it, each representing a different study condition that determined their test-taking strategy. In the experimental condition (instruction “A”), participants were given instructions to feign a psychiatric condition while taking the test. The author created the instructions and they were as follows:

Imagine that you were arrested for driving under the influence of alcohol and drugs which caused you to accidentally kill a pedestrian. Given the evidence against you there is no way that you can beat the charges. The court psychologist will administer a psychological test to you. Answer the questions in a manner that will make you look mentally ill. It would be to your advantage to look crazy.

Participants in the control group were given standard instructions for the ECST-R (instruction “B”) and were asked to be honest and forthright in their responding. Their instructions were:

Imagine that you were arrested for driving under the influence of alcohol and drugs which caused you to accidentally kill a pedestrian. Given the evidence against you there is no way that you can beat the charges. The court psychologist will administer a psychological test to you. Answer the questions as honestly as you can. It would be to your advantage to be honest. The hypothesis of this study was that the feigning group would yield significantly higher scores on the ATP scales as compared to the group of honest responders.

### Results

It was hypothesized that the ATP scales would yield larger scores for the group of feigners in comparison to the group of honest responders. This hypothesis was supported since the group differences was statistically significant:  $F(5/24) = 8.31, p < 0.000$ . A set of follow-up t-tests were computed to explore the exact nature of the differences between the study groups on the ATP scores. Means and standard deviations on these measures, along with the results of the t-tests are shown in the table below. All group differences except for the ATP-R were statistically significant. However, the ATP-R scale is primarily

intended to provide filler items and thus, should not be considered. This scale gives a preliminary interpretation of defensiveness based on the absence of item endorsements. A detailed analysis can be viewed in the tables included in Appendix B (Table1).

Group		N	Mean	SD	t	p <
ATP-R (T-Score)	Malingering	15	44.93	10.131	1.721	0.096
	Not Malingering	15	50.80	8.470		
ATP-P (T-Score)	Malingering	15	62.40	13.648	5.041	0.000
	Not Malingering	15	44.40	2.230		
ATP-N (T-Score)	Malingering	15	77.13	22.016	3.817	0.001
	Not Malingering	15	53.53	9.418		
ATP-I (T-Score)	Malingering	15	74.53	18.928	4.569	0.000
	Not Malingering	15	50.53	7.463		
ATP-B (T-Score)	Malingering	15	70.33	16.530	5.018	0.000
	Not Malingering	15	48.00	4.884		
CWC Score	Malingering	15	61.60	11.758	4.737	0.000
	Not Malingering	15	46.67	3.288		
FAC Score	Malingering	15	56.33	10.567	3.875	0.001
	Not Malingering	15	44.87	4.438		
RAC Score	Malingering	15	63.67	12.608	5.498	0.000
	Not Malingering	15	45.33	2.795		
Rational (RAC+CWC)	Malingering	15	63.80	11.239	6.019	0.000
	Not Malingering	15	45.60	2.613		

Table 1

The malingering and not malingering groups were also compared on the Impairment classifications. The cross tabulations and associated Chi-square test results are shown in the table. These tests were all statistically significant: there was more impairment in the malingering group, as compared to the non-malingering group (Table 2).

Group		Malingering	Not Malingering	Total
CWC Impairment	Normal	3 (21.4%)	11 (78.6%)	14 (47%)
	Mild	4 (50%)	4 (50%)	8 (27%)
	Moderate	5 (100%)	0 (0%)	5 (17%)
	Severe	1 (100%)	0 (0%)	1 (3%)
	Extreme	2 (100%)	0 (0%)	2 (7%)
Chi-Sq.=12.571; p < 0.014				

Table continued..

Group				
FAC Impairment	Normal	6 (31.6%)	13 (68.4%)	19 (63%)
	Mild	3 (60%)	2 (40%)	5 (17%)
	Moderate	3 (100%)	0 (0%)	3 (10%)
	Severe	3 (100%)	0 (0%)	3 (10%)
Chi-Sq.=8.779; p < 0.032				
RAC Impairment	Normal	2 (12.5%)	14 (87.5%)	16 (53%)
	Mild	6 (85.7%)	1 (14.3%)	7 (23%)
	Moderate	2 (100%)	0 (0%)	2 (7%)
	Severe	3 (100%)	0 (0%)	3 (10%)
	Extreme	2 (100%)	0 (0%)	2 (7%)
Chi-Sq.=19.571; p < 0.001				
RAC+CWC Impairment	Normal	2 (13.3%)	13 (86.7%)	15 (50%)
	Mild	5 (71.4%)	2 (28.6%)	7 (23%)
	Moderate	3 (100%)	0 (0%)	3 (10%)
	Severe	4 (100%)	0 (0%)	4 (13%)
	Extreme	1 (100%)	0 (0%)	1 (3%)
Chi-Sq.=17.352; p < 0.002				

Table 2

Because there were so many cells in the cross-tabulation with small numbers, the impairment scores were recorded into dichotomized variables: normal or impaired, and the Chi-Square tests were repeated. All were statistically significant with more impairment in the malingering group than in the non-malingering group. The results are shown in the Table 3.

Group				
		Malingering	Not Malingering	Total
CWC Impairment, Recoded	Normal	3 (21.4%)	11 (78.6%)	14 (47%)
	Impaired	12 (75%)	4 (25%)	16 (53%)
Chi. Sq.=8.571; p < 0.003				
FAC Impairment, Recoded	Normal	6 (31.6%)	13 (68.4%)	19 (63%)
	Impaired	9 (81.8%)	2 (18.2%)	11 (37%)
Chi. Sq.=7.033; p < 0.008				
RAC Impairment, Recoded	Normal	2 (12.5%)	14 (87.5%)	16 (53%)
	Impaired	13 (92.9%)	1 (7.1%)	14 (47%)
Chi. Sq.=19.286; p < 0.000				
Rational Impairment, Recoded	Normal	2 (13.3%)	13 (86.7%)	15 (50%)
	Impaired	13 (86.7%)	2 (13.3%)	15 (50%)
Chi. Sq.=16.133; p < 0.000				

Table 3

The malingering group feigning was detected using unrestricted rules specified in the test manual, which includes participants categorized as “probable malingerers” and participants who have potential for little impairment. The purpose was to provide a low threshold for the detection of feigning. Looking at the scales individually, the success rate in accurately identifying feigners for the ATP-P and ATP-N scales was 93.3%, the ATP-I scale had a success rate of 86.6% and the ATP-B identified 100% of the feigners. Although two out of the 15 simulated feigners were undetected by a couple scales, the rest of the scales successfully identified over reporting of symptoms which produced an overall likely feigned protocol. Conversely, restricted rules were used in the control group, which excludes participants categorized as “probable malingerers” since those individuals were classified as competent or questionably competent and were not expected to be identified as possible feigners. This, however, was not the case. Comparing raw data to the cut-scores, all scales produced false positive results. The ATP-P scale classified 20% of honest responders as possible feigners, 73.3% in the ATP-N scale, 40% in the ATP-I scale, and 60% in the ATP-B scale.

### Discussion

The misclassification of malingering can have overwhelming costs in forensic evaluations. Undetected cases of malingering allow for crimes to go unpunished while the devastation to defendants or plaintiffs of being falsely accused of malingering by forensic experts is indescribable. It is recommended that measures of malingering be validated with a combination of simulation designs and known-groups comparison. This approach offers the strongest evidence of accurate determinations due to the respective strengths of each design: internal validity is strength of simulation designs while known-groups comparisons offer good external validity. There is concern regarding over-reliance on simulation designs and their generalizability to clinical settings and actual malingerers. Rogers & Cavanaugh<sup>55</sup> describe these studies as putting subjects in situations where they are asked to comply with instructions to fake in order to study those who fake when asked to comply. Therefore, the external validity of the study is in jeopardy considering that participants do not understand nor are they concerned how the results will affect them and their families. Consequently, the differences found in this study are, by themselves, inapplicable to actual clinical settings. Future research could focus on comparing the results of this study to known-group comparisons. However, being that this was a simulation design study there was strong internal validity since the type of feigning was carefully controlled.

The sample size for this study is particularly small. A small sample size has a greater probability that the results happened by chance alone. For this reason, these findings cannot be generalized to the broader community based solely on this study. The study’s sample characteristics may also be a limitation to this study due to the sample being graduate students from one university. In addition, the study consisted of primarily Caucasian participants. Future studies of this topic need to be expanded to different racial and education backgrounds as well as geographic locations to ensure more generalizable representation. Moreover, in an extension of this study, the type of incentive could produce different results. In order to compare more closely to clinical samples, facing a mild negative incentive, such as the loss of a small monetary compensation, may motivate simulators to become more focused on their presentation.

Additionally, while the scales for the detection of feigning is a useful advantage for the ECST-R, the scales as designed identify a large number of participants as possible feigners, including those who were instructed to answer the questions in an honest forthcoming fashion. The authors of the instrument agree that they established high sensitivities so that “very few malingerers would elude the screening followed by a more comprehensive evaluation”.<sup>20</sup> Considering the instrument’s low threshold for feigning, a combination with other assessments may be a more effective way to detecting malingering. Furthermore, it is important to consider that the ECST-R attempts to distinguish feigners who exaggerate psychopathology while excluding those who attempt cognitive malingering.

In conclusion, other caveats to competency evaluations are also important. Given the limitations of existing competency assessments, it is important for examiners to be cautious in examinees response styles and recognize the potential for error. Assuming that evidence of symptom exaggeration indicates an absence of genuine impairment is a major error since people who overstate or fabricate difficulties can still have significant impairment. On the other hand, although an incompetent defendant tends to have some mental impairment, not all mentally ill individuals are considered to be incompetent. In *Wieter v. Settle*,<sup>56</sup> a psychiatrist testified that the defendant was not competent to stand trial and that he needed more time to be treated. However, the court considered the defendant competent although he was mentally ill. In order to define the difference between mental illness and competency to stand trial, the *Wieter* court made the following distinction between expert opinion and findings of the court: “At that time, in criminal procedures, such a person is not in the position of being evaluated as capable, or incapable, of knowing right from wrong; or as being ‘mentally ill’ or afflicted with ‘mental disease’ from psychiatric standards so that he may, psychiatrically, be concluded as mentally unable to rationally understand the proceedings against him and cooperate with counsel in his own defense. Any such psychiatric conclusion, if arrived at, is not and cannot be legally binding. At most, it is merely opinion testimony, to be resolved by the legal finder of fact, in the same manner as is the testimony of all expert expressed conclusions”.<sup>5</sup> Therefore, from this perspective one could consider that most mentally ill defendants would not be considered incompetent to stand trial as their mental illness does not necessarily classify them as incompetent. Prior to evaluating a defendant, it is imperative that the forensic examiner is well informed on his or her background information such as police reports, past psychiatric records, witness statements, defendant statements, family consultations, and observations made by correctional staff. Finally, an important focus of attention in trial competency is youths’ capacities as trial defendants. Currently, there are few studies on the performance of youths on competency measures. Research directed toward the evaluation of youths’ performance on competency to stand trial instruments could be of great use. In addition, careful research should be applied to determine possible relations between youth deficits on competency and their cognitive or emotional immaturity.<sup>57–59</sup>

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## Conflict of interest

The author declares that there is no conflict of interest.

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