Establishing the accuracy of the 'FTP' (fitness to plead) tool in identifying malingering

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Abstract

It is essential that a defendant's fitness to plead be accurately assessed In order to ensure that those who are unable to effectively participate in their trial are not required to do so. With a mandate from the Law Commission, a new measure, the 'FTP' has been developed; this measure is designed to assess fitness to plead in terms of the defendant's decision-making capacity. What has not been determined to date is whether this new measure is vulnerable to attempts at malingering. The current study is an investigation of the FTP's effectiveness in detecting malingering, as well as an exploration of the sample's understanding of fitness to plead and how this could potentially be malingered.

This study employed a between- subjects, double-blind, mixed-methods design, involving two groups: simulated malingerers group and a control group. Sixty-four students were recruited to this study, primarily via a research credit participation scheme. All participants completed the FTP measure and the Ravens Standard Progressive Matrices (RSPM). The RSPM was used as a criterion measure of malingering. Participants also answered qualitative questions regarding their understanding of fitness to plead and their simulated profile of unfitness.

Results indicated that the FTP's malingering items were not sensitive to attempts at malingering; Content Analysis revealed that participants primarily indicated mental health problems, and to a lesser extent, cognitive difficulties as the reasons someone would be found unfit to plead; the most commonly attempted means of malingering was that of malingered cognitive impairment. Recommendations are offered to assist clinicians in detecting malingering while using the FTP, and the clinical and theoretical implications of the current study's results are described.

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Chapter 1: Introduction

1.1. Introduction to Research

The Criminal Justice system of England and Wales comprises various agencies, including the police, the prosecution service, the courts, the probation service and prisons. Collectively, their central purpose is to deliver justice, by means of convicting and punishing the guilty, preventing re-offending, while protecting innocent parties and ensuring fairness (Office for Criminal Justice Reform, 2007).

There are two primary types of courts within the Criminal Justice system, namely the Magistrates Courts (comprising Adult and Youth Courts) and the Crown Court. Magistrates Courts typically deal with less serious criminal offences, such as theft, whereas the Crown Court deals with the most serious or 'indictable' offences, such as murder or rape; a jury is present in a Crown Court trial only (Judiciary, 2016).

The present research is concerned specifically with one aspect of Crown Court trials[1], and that is the determination of whether or not a defendant is 'fit to plead'. If a defendant's fitness is questioned pre-trial, by either the prosecution, defence or the Judge, a fitness to plead hearing takes place; within this hearing, the Judge will consider expert evidence from two or more registered medical practitioners regarding the defendant's fitness to plead

[1] There are no specific procedures for determining fitness to plead in the Magistrates Courts at present (Bevan, 2014).

before making their decision as to whether the defendant is unfit or not (Crown Prosecution Service, 2012). As one or more of the registered practitioners must be ‘duly approved’ as having special experience in the diagnosis/treatment of mental disorder, currently, such evidence is typically provided by psychiatrists (Law Commission, 2010).

A registered medical practitioner providing this expert evidence is expected to rely upon specific criteria in order to come to their decision regarding fitness to plead. However, as the Introduction will explore, the area of fitness to plead assessment is one which is currently in flux, as not only are these criteria currently being re-defined, specifically in terms of the defendant’s decision-making capacity, but the question of whether or not a psychologist can be formally approved to provide evidence relating to fitness to plead alongside psychiatrists is also receiving considerable attention (Law Commission, 2012).

One aspect of the fitness to plead assessment process which has often been neglected in the literature is the possibility of a defendant malingering unfitness. As a finding of unfitness to plead precludes a prison sentence, with the possible outcomes for the defendant comprising absolute discharge, a supervision order or a treatment order, a defendant may be motivated to malinger by the likelihood of potentially receiving a more ‘lenient’ sentence. As will be explored below, the British Psychological Society (BPS) identified malingering as one of the central areas to be considered when carrying out an assessment relating to fitness to plead (BPS, 2006), and countless others have observed that malingering is commonplace in forensic Psychology/

Psychiatric assessments (Mittenberg, Patton, Canyock & Condit, 2002; Eastman, Green, Latham & Lyall, 2013).

The current study involved an investigation of how well a new measure of fitness to plead detects attempts at malingering, as well as exploring the literature and theory around malingering profiles and decision-making, with reference to the current data. In Part One of the Introduction, fitness to plead and its measurement are explored in detail, including discussion of decision-making theory and assessment; in Part Two, the malingering literature is addressed, before focusing on malingering in relation to fitness to plead specifically. Finally, the new fitness to plead measure, the 'FTP', is introduced and the specific research questions for this study are described.

Part One

1.2. What is Fitness to Plead?

Fitness to plead is a fundamental legal concept in England and Wales, and relates to the defendant's ability to participate meaningfully in their trial; it is roughly analogous with the American concept of 'competence to stand trial'. The concept of fitness to plead applies solely to defendants within the criminal justice system and every defendant is presumed fit to plead unless evidence is presented to the contrary. Whether or not a defendant is fit to plead is determined by the court judge, on the basis of expert evidence presented to the court by psychiatrists (Eastman, Adshead, Fox, Latham & Whyte, 2012). Expert clinicians are required to apply specific criteria in assessing whether a

defendant is fit to plead; in England and Wales, these criteria are the "Pritchard Criteria" and are founded in case law that dates back to 1836. The exact wording has changed relatively recently, with the judge from *R v M* (2003) restating the criteria as follows:

"A finding of unfitness to plead involves demonstrating, on the balance of probabilities that the defendant is incapable of one or more of:

(i) Understanding the charge or charges

(ii) Deciding whether to plead guilty or not

(iii) Exercising his right to challenge jurors

(iv) Instructing solicitors and counsel

(v) Following the course of proceedings, or

(vi) Giving evidence in his own defence" (Eastman et al., 2012, p 475).

The Pritchard test of fitness to plead has been described as a test primarily of cognitive ability, that takes into account the degree to which this cognitive ability is affected by "psychotic or other mental symptoms, neurological disorder or learning disability" (Eastman et al., 2012, p 474). Elsewhere, it has been stated that the reasons someone might be found unfit to plead include experiencing: difficulties resulting from mental illness, either longstanding or temporary, a developmental disorder, a Learning Disability/ cognitive impairment, communication impairment or some other relevant cause (Law Commission, 2016).

It is important to note here that what is being assessed is the impact a defendant's mental condition has on their ability to comprehend trial proceedings: the mere existence of a psychological, neurological or neurodevelopmental disorder in and of itself is insufficient for a finding of unfitness (Exworthy, 2006). Memory difficulties for the alleged offence, for example, either organic or functional, might not necessarily lead to a finding of unfitness, with unfitness depending rather on the extent to which the difficulties impacted upon the defendant's ability to understand and engage with the trial (Exworthy, 2006). Likewise, an individual might have a formal diagnosis of schizophrenia, a symptom of which is thought disorder, but that particular symptom might not be present to a degree that would preclude that individual comprehending the trial process to an adequate level under the Pritchard criteria (BPS, 2011).

In terms of court processes, if a defendant is determined by a judge to be unfit to plead, they will not participate in a criminal trial; rather, a "trial of the facts" will proceed, which tasks a jury with determining whether the defendant "did the act or made the omission" of which they are accused (Compton, 2012). No conviction can result from such a trial, and if someone is found unfit to plead but also to have committed the act they were charged with, there are three outcomes or disposals available to the court: absolute discharge, a supervision order or a treatment order (the same disposals available if someone were found not guilty by reason of insanity) (Compton, 2012).

Finally, it is worth clarifying that unfitness to plead is distinct from insanity or diminished responsibility defences as unfitness is not a legal defence against the criminal charge, and pertains solely to whether a trial can proceed with the defendant's *current* mental state; insanity and diminished responsibility relate to a defendant's mental state at the time of the alleged act (Bowden, 2001).

1.3. Why is fitness to plead important?

1.3.1. Fair trial

The legal concept of fitness to plead is predicated on the assumption that everyone is entitled to a fair trial; everyone is entitled to have real and effective access to the court process and to have a real opportunity to present his or her case and challenge the case against them, with these rights being protected under article 6 of both the Human Rights Act (1998) and the European Convention on Human Rights (ECHR) (Human Rights Act, 1998; European Convention on Human Rights). For a trial to proceed with an unfit defendant, it could be argued, would likely be *unfair,* as the defendant cannot be said to have a real opportunity to adequately present their defence case (Howard, 2011).

1.3.2. Protecting vulnerable defendants

A term frequently used in the literature and relevant here is that of a "vulnerable defendant". A vulnerable defendant has been defined as a defendant that is either under the age of 18, or in the case of an adult, one who suffers from a mental disorder (as defined within Mental Health Act,

1983), or who has any other significant impairment of intelligence and/or social function (Ministry of Justice, 2013).

As explored previously, the finding that a defendant is vulnerable as defined in these terms, is not sufficient to deem them unfit to plead, as it would depend on the impact that their disorder or impairment has on their ability to comprehend the trial process. However, a large proportion of defendants could apparently be accurately deemed to be vulnerable and have particular support needs which, if left unaddressed, could affect their ability to effectively participate in their trial, thereby compromising their right to a fair trial (Talbot, 2012). Vulnerable defendants do not have statutory protection and it is at the discretion of the court as to whether these particular support needs[2] are addressed (Talbot, 2012).

This relates to fitness to plead as some authors, such as Gerry, and Talbot on behalf of the Prison Reform Trust, have argued that in order to ensure that as many defendants as possible receive a fair trial, the focus should be on supporting vulnerable defendants to participate with the trial process in the first instance, rather than finding them unfit to plead, thereby removing them from the process (Gerry, 2012; Talbot, 2012). The argument that a defendant should only be found unfit 'in extremis' appears to be put forth by Gerry, with the reasoning that being found unfit to plead denies the defendant the opportunity to put forward any defence or provide any reasons for their

[2] Specific support needs can be addressed by the use of special measures or reasonable adjustments to the trial process, including use of pre-recorded evidence, intermediaries, visual communication aids to name but a few (Talbot, 2012; Gerry, 2012).

actions (as the ‘truth’ is determined by a trial of the facts in their absence), which amounts to inequitable treatment; rather, every effort should be made to adapt the way in which the trial is heard so as to accommodate the vulnerable defendant’s participation (Gerry, 2012).

On the other hand, if someone lacks fitness to a degree that supports cannot or would likely not render them able to engage with the trial process, it could be argued that a finding of unfitness affords them the protection of removal from the trial process (Law Commission, 2016), which due to their inability to engage with the process and defend themselves, may otherwise have resulted in an unjust outcome e.g. a conviction on the basis of an unfair trial.

One way forward might involve providing supports and special measures at the point of assessing fitness to plead, whereby every effort is made to ensure that the defendant can best represent their abilities to engage with the trial process at this pre-trial stage; if deemed fit, these supports could be provided at trial for the defendant who continues to require them, and if deemed unfit, the decision will have been taken in light of the defendant’s abilities as assessed under ‘fair’ and accommodating conditions (Howard, 2011).

1.4. Findings of unfitness to plead

The foregoing serves to highlight the importance of clinicians and judges ‘getting it right’ when it comes to making decisions around a defendant’s fitness to plead. Attention will now be turned to situations in which a defendant

has been found unfit, considering the nature or profile of the unfitness and the frequency with which such judgements are made.

1.4.1. Profiles of unfitness to plead

There have been few studies which have assessed which profiles of impairment tend to be most associated with a finding of unfitness; Mackay and colleagues have suggested that, despite the legal criteria being primarily concerned with cognitive ability (i.e. ability to comprehend the trial proceedings), fewer than a third of those found unfit to plead actually have a learning disability (Mackay, Mitchell & Howe, 2007). Elsewhere, drawing on a sample of 479 court referrals for Psychiatric evaluation of fitness, it has been demonstrated that the finding of unfitness was most significantly associated with the presence of positive psychotic symptoms, in particular, the symptoms of conceptual disorganisation and delusional thinking (James, Duffield, Blizard & Hamiltion, 2001). In this same study, it was demonstrated that 73% of those found unfit to plead failed on 3 or more of the Pritchard criteria, indicating that the majority of those found unfit to plead are likely to have considerable impairment to their ability to engage with a trial (James et al., 2001).

1.4.2. Frequency of unfitness to plead

Of course, one of the difficulties in assessing the foregoing is in determining the extent to which the mental condition can impact the defendant's ability to comprehend a trial before the defendant is deemed unfit (Exworthy, 2006). There has been considerable concern for some time that this threshold for

being found unfit is likely too high, and that vulnerable individuals are wrongly being found to be fit to plead, considering how few people are actually found to be unfit in England and Wales (Rogers, Blackwood, Farnham, Pickup & Watts, 2009; Peay, 2009).

Very little is known about the overall number of cases in which the issue of fitness to plead is raised in England and Wales, or the types of cases in which the issue of unfitness is raised before being rejected by the judge (Peay, 2009). Between 1976 and 1988, an average of 25 defendants per year were found to be unfit to plead. Since a 1991 Act amending the disposal options available to the judge, findings of unfitness have gradually been increasing and between 1997 and 2001, an average of 66 people were found unfit to plead each year (Mackay et al., 2007). Current estimates are that approximately 100 defendants are found unfit per year (Compton, 2012). Although we do not know how these figures relate to the overall numbers of cases in which fitness to plead is raised, the numbers have been noted to be extremely low when taken in context of high rates of mental disorder in prison populations (Brewer, 2013); it has been stated, for example, that 1 in 7 prisoners has either a psychotic illness or major depression, and that 1 in 2 male prisoners has a personality disorder (Fazel & Danesh, 2002). Furthermore, in the USA, approximately 12,000 defendants are found to be incompetent to stand trial annually; the fact that the population of the USA is approximately 5 times greater than that of England & Wales notwithstanding, this remains a huge disparity and highlights the fact that to be found unfit to plead is comparatively extremely rare (Rogers et al., 2009; Brewer, 2013).

Indeed, a qualitative study carried out amongst experienced barristers involved in cases where fitness to plead had been questioned revealed significant concerns. The majority of participants concurred that the threshold for unfitness under Pritchard criteria is too high, resulting in "mentally disordered defendants (who, although found fit to plead)…remained significantly prejudiced in relation to trial" (Rogers et al., 2009, p.822). The study also highlighted the need to distinguish between someone's ability to enter a plea from their ability to adequately participate in their trial, with many supporting the idea of a 'stage-specific' assessment of fitness, rather than one global judgement (Rogers et al., 2009). Elsewhere, Forensic Psychiatrists have referred to the Pritchard criteria as being no longer appropriate in light of modern understanding of complex mental disorders, and described them as "shamefully archaic" (Shah, 2012, p.176) and unfit for the 21st century (Morris, Elcock, Hardy & Mackay, 2006).

1.4.3 Application of the Pritchard criteria

In addition to the threshold for unfitness under the Pritchard criteria being deemed too high or the criteria themselves inappropriate, clinicians have apparently been found to apply these criteria inconsistently; for example, Grubin carried out an analysis of all cases of unfitness to plead between 1976 and 1988 and reported that as well as disagreement between psychiatrists as to fitness status in over 15% of the cases, criteria seemed to have been applied "idiosyncratically and arbitrarily" (Grubin, 1991, p. 7). Mackay and Kearns (2000) examined 197 psychiatric reports and found that only 21

considered all of the Pritchard criteria, while 28 ignored all of the Pritchard criteria, referring only to diagnostic criteria. More recently, Mackay and colleagues considered pre-trial reports and found that out of 641 such reports, only 11 reports considered all of the Pritchard criteria in their assessment and that in 89 of the reports, a decision around fitness was made without considering any of the Pritchard criteria (Mackay, Mitchell & Howe, 2007, as cited in Brewer, 2013).

1.5 Recent thinking about the concept and measurement of fitness to plead

Perhaps unsurprisingly, recent thinking has indicated that the measurement of fitness to plead likely requires an overhaul, so as to better protect vulnerable defendants who are 'slipping through the net' and unjustly expected to face trial, with a large-scale Law Commission consultation process revealing almost unilateral agreement that the current fitness to plead criteria are inadequate (Law Commission, 2013).

The Law Commission's consultation (2010) with a wide-ranging group of experts has looked at re-formulating fitness to plead and has focussed on the utility of the Mental Capacity Act (MCA) (2005) in this regard. Within civil law, the MCA is used to determine an individual's ability to make decisions, namely their ability to understand, retain, use and weigh, and communicate information relating to their decision (Law Commission, 2010). Experts have argued that fitness to plead could reasonably be assessed in a similar way;

the Pritchard criteria place a ‘disproportionate emphasis’ on intellectual capacity, and neglect the decision-making abilities essential to the defendant being able to effectively participate in their trial. A fitness to plead test based on decision-making capacity should be broad enough to cover reasoning difficulties which are caused by reasons other than cognitive impairment (such as psychological or emotional difficulties) (Law Commission, 2010). Crucially, the new test, in line with the functional approach of the MCA, would address the person’s time- and context-specific decision-making abilities, as opposed to the abstract, static requirements of the Pritchard criteria. It is important to note that in an assessment of decision-making capacity, the *quality* of the decision being made is quite independent of the ability of the individual to make it (Jonassen, 2012) and, therefore, should the defendant show decision-making capacity by evidence of applying all elements of the decision-making process while completing their fitness to plead assessment, it would seem that the clinician cannot and should not conclude that someone is unfit merely by arriving at a non-optimal decision.

Formulating fitness to plead in line with the Mental Capacity Act (2005) would ensure that the task of appearing in court and all that that entails is operationalised “in terms of its specific demands and that the cognitive and/or psychological capacities required to fulfil those demands are clearly outlined” (Rogers, Blackwood, Farnham, Pickup & Watts, 2008, p. 584).

The Law Commission’s proposed re-formulation has not been met with unanimous approval within the field, however. Some have commented that

this new approach, of moving away from the defendant's intellectual ability to understand court proceedings in the abstract, towards their functional ability to make the decisions required to participate in their trial, is unwarranted and will require additional court time and resources, with little apparent benefit (Mudathikundan, Chao & Forrester, 2014). The authors argue that in fact the problems with fitness to plead under Pritchard criteria relate primarily to the lack of consistent application by clinicians, rather than to an inherent conceptual failing (Mudathikundan et al., 2014).

Some have indicated that the criteria are flexible enough to identify defendants who were unfit to plead for a variety of reasons (including psychosis and learning disabilities) (MacKay, Mitchell, & Howe, 2007), and that a more fruitful route may be better training for clinicians in the application of the criteria as they currently exist (Mudathikundan et al., 2014).

Indeed, the Law Commission describe several points of disagreement amongst the respondents to its proposal paper (a group comprising members of the judiciary, psychiatrists and psychologists); for example, the issue of whether the primary competence that a new fitness to plead test would measure would be decision-making capacity or the ability to participate effectively in proceedings was disputed, and remains unresolved (Law Commission, 2013). Additionally, the question was raised as to whether a fitness to plead test should assess a unitary construct of fitness, i.e. whether a defendant has the decision-making capacity in relation to all aspects of a trial, or a disaggregated construct, whereby the trial would be broken down into

sections which would each require a decision-making capacity judgement (Law Commission, 2010). The latter approach apparently has considerable support amongst legal and medical professionals, but would however, create a problematic precedent whereby a defendant could be found fit to enter a guilty plea yet simultaneously be unfit to effectively participate in other aspects of their trial (Law Commission, 2010).

It is also important to mention that while the above discussion reflects the live debates surrounding the Law Commission's push for re-formulating fitness to plead, and is often primarily concerned with the associated legal implications of such a change, elsewhere, psychologists have concerned themselves with delineating the specific psychological and behavioural processes involved and how these can be measured using existing psychometric measures. For example, the BPS have drawn up guidelines for specific areas (in addition to the Pritchard criteria) that may be considered by a clinician in making fitness to plead assessments, as follows: comprehension; reasoning ability; consistency; memory; concentration and attention; suggestibility; inappropriateness; impulsivity; insight; affect; passivity; and the dangers of 'faking bad' or malingering (BPS, 2006). Similarly, a recent study analysing the reports of those found unfit to stand trial under Australian law (employing "Presser" criteria, very similar to Pritchard criteria), found that attention and memory play a particularly important role in influencing fitness to stand trial, yet they were assessed in only 60% of cases; likewise, approximately 60% of clinicians used no objective measure of effort or malingering, despite guidelines to the contrary (White, Batchelor, Pulman & Howard, 2012). It is

worth considering the possibility that the elements and tools necessary for a comprehensive and valid test of fitness to plead have already been described, and the problem concerns the lack of widespread adherence to this evidence-based model.

1.6 Decision-making capacity

Considering the centrality of decision-making capacity to the newly proposed fitness to plead test, it is worthwhile attending to this complex construct and disentangling its various components. Generally speaking, theories concerning decision-making and choice fall into one of two categories: normative or descriptive. Normative theories relate to how we as humans "should" reason or make decisions (i.e. using a purely rational model) and descriptive theories aim to describe how people actually think when they are making decisions (i.e. acknowledging that humans operate with limited rationality due to cognitive limitations) (Hanson, 2005; Dillon, 1998). Theories falling into the latter category have unsurprisingly received more attention in the Psychology literature, attempting as they do to explain the real-world patterns of and constraints on human decision-making, with much reference to heuristics and cognitive biases (Beresford & Sloper, 2008; Oliveira, 2007). It is beyond the scope of this study to explore in detail the multitude of decision-making theories that exist; rather, some attention will be given to the literature around factors that influence an individual's functional ability to make decisions as will be implicated in an assessment of a defendant's fitness to plead.

1.6.1. Factors influencing decision-making capacity

Firstly, unsurprisingly, considerable evidence exists to demonstrate that poor cognitive ability tends to impact upon decision-making capacity, specifically as it often prevents individuals from being able to retain and weigh all of the consequences of different options before deciding (Smith & Bell, 2006).

Elsewhere, a recent study has argued that there are certain temporal abilities which are central to one's decision-making capacity, and that it is these same abilities which are compromised amongst severely depressed patients (Owen, Freyenhagen, Hotopf & Martin, 2015). These same authors note that in the case of legal probing of decision-making capacity, assessors will likely need to devise avenues of questioning which can elicit the temporal abilities of the patient, specifically their ability to project themselves onto 'yet-to-be-realised' futures significantly different from their current reality (Owen et al., 2015).

Researchers have identified that the impulsivity characteristic of Borderline Personality Disorder (BPD) is a critical impairment in the decision-making process, and that specifically, BPD patients tended not to integrate feedback information to improve their decisions (Schuermann, Kathmann, Stiglmayr, Renneberg & Endrass, 2011). In line with the James et al. (2001) study mentioned previously, indicating that psychosis was the mental disorder most likely to accompany a finding of unfitness to plead, it has been demonstrated that psychotic symptoms were the strongest predictor of impaired decision-making capacity amongst a Psychiatric sample (Candia & Barba, 2011).

Some research has focused on age as a factor that may influence one's decision-making capacity, specifically in relation to younger adults and fitness to plead, indicating that the degree of maturity of cognitive abilities, as well as social-emotional capacities, are relevant factors in this population (Rogers et al., 2008; Cowden & McKee, 1995). Amongst younger people, the ability to use information accurately as a basis for their decisions, might, as a result of cognitive immaturity, be of greater concern than their factual understanding (Baird & Fugelsang, 2004).

It is important to acknowledge that there are also potential situational factors to consider in terms of how they might influence decision-making, particularly in the case of unfamiliar or stressful situations. It has been found that when faced with a decision for which one does not have a precedent (such as whether or not to plead guilty, or any number of decisions involved in standing

trial), it is unsurprisingly more difficult to apply rationality and method to one's decision-making, and thus creativity and intuition may play a more prominent role in these decisions (Al-Tarawneh, 2012; Khatri & Ng, 2000).

In the case of the effect of stress on decision-making, a comprehensive review has outlined the various routes by which stress can have an impact; firstly, on a neural level, the regions of the brain that are associated with optimal decision-making are vulnerable to stress-induced changes (Starcke & Brand, 2012). It seems that, under stressful conditions, an individual is more likely to employ a dysfunctional or non-optimal decision-making strategy, and show both heightened reward sensitivity and lowered punishment sensitivity (Baradell & Klein, 1993; Gray, 1999). It is thought that the cognitive resources required for making decisions, such as working memory and set-shifting, are compromised by the presence of stress, and furthermore, that the impact of stress may be compounded for those who experience any of a wide range of disorders in which stress plays a role, such as Generalised Anxiety Disorder and Post-Traumatic Stress Disorder (Starcke & Brand, 2012).

Finally, it is important to mention here the role of malingering in influencing someone's portrayal of their decision-making capacity. It has been said that malingering an impairment can be viewed as a "manifestation of wilful choice for personal advantage" (Halligan, Bass & Oakley, 2003, p 13), and that anyone is capable of choosing to malinger upon conducting a 'cost-benefit' analysis of their options within an assessment they perceive as inimical to their needs (Rogers, 1997).

A comprehensive assessment of fitness to plead will require that the clinician be alert to the multitude of factors, either fixed or situational, which may be influencing the defendant's decision-making capacity at that time.

1.7.Standardised assessments of Fitness to Plead (UK) and Competence to Stand Trial (USA)

One of the key recommendations from the Law Commission Consultation has been that a standardised psychiatric instrument be developed that measures this newly defined concept of fitness to plead (emphasising decision-making capacity and/ or effective participation in one's trial); this recommendation, perhaps unsurprisingly, has been met with extremely varying degrees of approval, and it is to this issue of standardised testing of fitness to plead which we will now turn.

A systematic review has identified 19 relevant assessment tools, 18 of which have been developed to measure "Competence to Stand Trial" amongst American defendants. In the United States, screening/ assessment tools for Competence to Stand trial have been reported to be used relatively routinely and successfully (Rogers et al., 2008).

It is important to note here that no one measure of competence to stand trial or fitness to plead can be used in isolation to determine whether an individual

is competent or incompetent; all assessment tools are used in the context of a wider clinical assessment. Furthermore, the nature of these assessment measures varies considerably from one to the next. For example, some could be considered structured professional judgement tools and are, in essence, a checklist to guide the clinician in ensuring that all competence-related abilities are considered, compared with other measures which are much more psychometric in nature, and have been standardised and normed on various populations (Otto, 2006).

The most widely used of these measures include the Fitness Interview Test (FIT) (Roesch, Zapf, Eaves & Webster, 1998), the Evaluation of Competency to Stand Trial- Revised (ECST-R) (Rogers, Tillbrook & Sewell, 2004) and the MacArthur Competence Assessment Tool- Criminal Adjudication MacCAT-CA (Hoge, Bonnie, Poythress & Monahan, 1999), the FIT falling into the category of Structured Professional Judgement tool and the other two being standardised measures (Otto, 2006). These measures vary with reference to their theoretical underpinnings and the focus of their items; for example, the FIT is a semi-structured interview, consisting of 16 items which cover the defendant's ability to understand the nature and object of criminal proceedings, the consequences of such proceedings, and their ability to communicate with counsel, with items being generic and unrelated to a specific case (Zapf & Roesch, 2005). The ECST-R is similarly a semi-structured interview, covering "Factual Understanding of the Courtroom Proceedings", "Rational Understanding of the Courtroom" and "Consult with

Counsel" abilities[3]; crucially, the ECST-R addresses a noted weakness in previous measures by building in a "feigning/ malingering incompetence" scale (Vitaco, Rogers & Gabel, 2009). Both have been shown to have good inter-rater reliability and good predictive validity (in distinguishing between incompetent and competent respondents, with court rulings as the external criterion) (Zapf & Roesch, 2005; Vitaco et al., 2009).

Given the marked differences in the American and UK legal systems, however, the most relevant measure for the current study is the MacCAT-CA which is the only measure which has been amended to specifically reflect the UK criminal justice system. Referred to as the "queen of competency instruments" (Acklin, 2012), the MacCAT-CA is informed by findings of a comprehensive field study, and consists of 22 items based on a vignette of a hypothetical fight between two men; the items relate to the same three factors as the ECST-R, namely factual understanding, rational understanding and the ability to consult with counsel (Rogers et al., 2008). Its amendment for use with British defendants involved the removal of reference to jury sentencing (not applicable in the UK) and the renaming of offences; this new version, the MacArthur Competence Assessment Tool- Fitness to Plead (MacCAT-FP) has been found to have good internal consistency and inter-rater reliability, with a correlation of scores with clinicians judgements of 0.77 (Akinkunmi, 2002). However, this inaugural UK-specific Fitness to Plead measure appears

[3] These abilities relate to the "Dusky" Standard in U.S. Supreme Court Competency to Stand Trial; the defendant must possess factual understanding of court proceedings, as well as a "rational" understanding, which in this context, means "non-delusional and non-psychotic" understanding of the proceedings (Felthous, 2011).

to have received negligible attention in the literature and has not entered into routine use amongst clinicians (Brewer, 2013; Rogers et a.l, 2008); some reasons offered to explain this lack of popularity include the fact that it still relies on some subjectivity and deals primarily with one type of fitness issue (learning disability) (Rogers, 2013), the limited clinical utility when the vignette is too far removed from the actual case (Rogers et al., 2008) as well as its omission of a malingering scale (Mankad, Brakel & Wilson, 2002).

Additionally, some have criticised this approach, of attempting to import an American measure with all of its established psychometric properties, with minimal conceptual amendment to address the specifics of fitness to plead and with no standardisation to a UK population (Mullen, 2002).

Relevant here is the fact that while many in the literature have called for a long overdue standardised instrument for the UK, there is a noted reluctance on the part of clinicians themselves to rely on such an instrument in helping them to make fitness to plead judgements. A recent paper from the Royal College of Psychiatrists highlights this reluctance among many to rely on a standardised test in making fitness to plead judgements; although the consensus of the feedback was that clinicians agreed that the Pritchard criteria need to be overhauled, it seems that many do not want a specific measure to be imposed. To quote, “we would argue that (the absence of a measure for fitness to plead) rather than leaving psychiatrists unequipped, allows them the freedom to tailor their professionalism to each individual unique case….introducing any defined psychiatric test…would appear to run

the risk of creating a burden of rigid and perhaps unnecessary testing", and may also give a false sense of scientific validity (Royal College of Psychiatrists, 2011, p. 17). They also raised concerns about there not being a baseline against which to calibrate the test, and difficulties in determining the accuracy of any such test. An influential writer in this area, Grubin has also made the point that evaluations under the Mental Capacity Act proceed without recourse to such a test, and that fitness to plead is unlikely to lend itself well to a standardised test (Grubin, 2011).

Fighting the corner for the widespread introduction of a standardised assessment measure are those who argue that the biggest problem in modernising fitness to plead assessments is the lack of consistency between clinicians and that the addition of a suitable standardised measure of fitness to plead would reduce the unacceptable level of subjectivity in such judgements (Akinkunmi, 2002) as well as reducing the level of disagreement that currently exists amongst clinicians regarding fitness to plead assessments (Brewer, 2013).

Elsewhere, some have suggested that while psychologists may be comfortable with standardised measures, the use of such testing (by psychiatrists) in the clinical setting could be akin to the abandonment of the clinical foundations on which the profession of forensic psychiatry is based, and expressed doubt that such tools would ever enhance let alone replace the clinical interview in making these judgements (Mankad, Brakel & Wilson, 2002).

1.7.1 A note on the role of psychologists in assessing Fitness to Plead

Many of the responses to the original Law Commission paper highlighted the fact that psychologists (typically clinical or forensic) currently carry out many of the assessments related to fitness to plead judgements, with specialist training in administering psychometric measures relevant to fitness to plead, as well as the fact that psychologists already qualify as a "Responsible Clinician" under the Mental Health Act 2007 (Law Commission, 2013). The BPS have published guidelines for psychologists in carrying out capacity assessments as well as how to address the Pritchard test within a framework of 'best practice', adding such dimensions as concentration/attention span and suggestibility (BPS, 2006). Some have noted that, as it stands, psychologists are often responsible for carrying out cognitive assessments and report-writing and psychiatrists have sometimes merely been "rubber-stamping" the psychologist's assessment (Law Commission, 2013). To this end, many have suggested that it is time-wasting and economically ill-advised to require two medical practitioners, rather than have a psychologist fulfil the role of one of the two required experts (Law Commission, 2013); furthermore, psychologists' training provide them with more expertise (than psychiatrists) in considering how best to support defendants to participate effectively in the trial process (Law Commission, 2016).

1.7.2 New measure of Fitness to Plead: the 'FTP'

The foregoing debate around standardised testing notwithstanding, researchers in Kings College London have now attempted to answer this call from the Law Commission and develop an updated measure of fitness to plead that will tap into the decision-making capacity of an individual, using context-specific items (Blackwood, Brown, Brewer, Appiah-Kusi, Peay & Watts, in preparation). The measure, called the FTP, involves a video vignette, and questions the defendant about the roles of different court personnel, as well as reasoning behind different pleas and courses of action; in common with many of the established measures for use in North America, the FTP also includes items designed to measure malingering.

It is important to note that this measure is intended to be used within a clinical assessment of fitness to plead and that the researchers do not intend that decisions around fitness to plead be based solely upon the defendant's performance on this tool. To this end, the measure will not employ 'cut-off' scores for fitness or unfitness; an individual's score can be compared against established base rates within the defendant's I.Q. range, but the clinician's judgement around fitness or not will not be determined by the specific score alone, i.e. it is not intended that the measure will replace clinical judgement, as feared by some psychiatrists, but rather that it will complement and inform it.

Following on from the distinction between a standardised, psychometric measure, and a structured professional judgement tool, it is envisaged that the FTP will fall in line with structured professional judgement, as a tool designed to cover the primary competencies of fitness to plead and highlighting areas which may need further investigation by the clinician; as above, there is no intention that the FTP will be a psychometric tool from which cut-off scores might be applied in order to indicate fitness or otherwise. The FTP is currently being trialled in various settings as a means of establishing its sensitivity as an assessment tool across different groups. The malingering items contained within the FTP will similarly be used as a means of highlighting potential malingering for the clinician, which can then be followed up on where required.

Part Two

1.8. Malingering in the psycholegal context

Malingering has been defined as “the intentional production of false or grossly exaggerated physical or psychological symptoms motivated by external incentives” (APA, 2000). It should apparently always be considered a possibility whenever the outcome of the evaluation may be “related to an opportunity for financial or legal gain for the patient” (American Psychiatric Association, 1994, as cited in Borckardt, Engum, Lambert, Nash, Bracy & Ray, 2003). One study has indicated that over 18% of patients who were found incompetent to stand trial had been malingering their psychiatric

symptoms on admission to an inpatient facility for restoration (McDermott, Dualan & Scott, 2013). Elsewhere, 54% of cases in criminal/ forensic field were reported as probable/definite malingerers, although clearly, considering the covert nature of malingering, base rates are difficult to estimate with confidence (Ardolf, Denny & Houston, 2007; BPS, 2009).

McDermott and her colleagues have indicated that malingering in the context of the criminal justice system is generally for one of two purposes: either to present as incompetent to stand trial or to plead not guilty by reason of insanity; in both cases, malingering a psychotic disorder has been deemed the most likely method of successfully evading trial, and to a lesser extent, feigning intellectual deficits (McDermott et al., 2013).

1.8.1 Malingering and fitness to plead

Of course, as has been explored above, U.K. findings of fitness to plead under the current Pritchard criteria are, unlike findings of incompetence to stand trial, extremely rare. As the threshold for unfitness is so high, it has been noted that fitness to plead usually only becomes an issue in cases of quite severe psychiatric disorder and/or learning disability (Bowden, 2001). This is not to say that defendants do not attempt to maligner unfitness, although data are sparse; Eastman and colleagues have noted that attempting to be found unfit to plead is a common motivation for malingering a mental disorder (Eastman et al., 2012). Several theories have been put forward to provide an explanation for the potential motivations for malingering,

with Rogers' adaptational model being the most widely-accepted. Quite simply, according to this model, the malingerer is faced with an adverse situation (such as an arrest). The model suggests that under these circumstances, the individual weighs up their options and determines that malingering mental illness/deficit is the only viable means of avoiding trial/conviction (Rogers, 2008 as cited in McDermott et al., 2013).

Relevant here is the 'cost-benefit' analysis mentioned previously in the context of decision-making, in that anyone could apparently be capable of malingering if the benefits of doing so outweigh the costs; indeed that malingering is itself a form of rational behaviour governed primarily by cost-benefit analyses (Merckelbach & Collaris, 2012) . An individual is unlikely to malinger, for example, as a means to evade an offence punishable only by a relatively minor fine, as the benefits do not outweigh the potential costs of being 'found out' (Rogers & Neumann, 2003). Of course, there are also numerous personal factors implicated in a decision to malinger, such as the value one places on honesty, which introduces the issue of morality; it has been suggested that malingerers be viewed simply as lacking the 'moral faculties' that most of us take for granted (Halligan et al., 2003). However, this view of the malingerer as 'amoral' is likely to be an oversimplified one, as many studies have highlighted an array of situations in which departures from one's values around honesty and truth-telling appear to be normative; for example, one Australian study indicating that approximately 80% of undergraduates surveyed admitted to having engaged in some form of cheating (Halligan et al., 2003) and, closer to home, some 70% of the British Social Attitudes survey sample considered VAT evasion for a home repair bill

to be wrong, while 71% of the same sample were nonetheless prepared to engage in similar tax evasion in a comparable situation (Park, Curtice, Thompson, Jarvis & Bromley, 2001, as cited in Halligan et al., 2003). It is clear that the interplay between one's values and the degree to which this influences one's decision to act honestly or otherwise is complex and likely to depend on the specific cost-benefit ratio of a specific decision.

In the case of fitness to plead, one could infer that an individual may be motivated to incur the cost of malingering due to the considerable benefits perceived in receiving a subjectively more lenient sentence by means of one of the court disposals. It is important to mention however that prior to making one of the orders, the court can remand the defendant to hospital for treatment, with a view to the defendant becoming fit and a second fitness to plead hearing being arranged (Crown Prosecution Service, 2016).

There is limited information regarding the demographics or risk factors for malingering, with one study indicating that suspected malingerers may be described, on average, as having lower levels of education and cognitive functioning in the low average range (Haines & Norris, 2001).

If a newly defined measure of fitness to plead, focusing on decision-making capacity, is indeed implemented, the desired outcome is, naturally, that more vulnerable individuals will be protected from facing trial inappropriately; however, in order to preserve the integrity of fitness to plead judgements, one must allow that a lower threshold for unfitness may inevitably be accompanied

by increased rates of malingering of unfitness in an attempt to avoid a criminal conviction and/or a prison sentence.

1.8.2 Different profiles of malingering

Much debate exists in the literature around the specific nature of the construct of malingering. One study, involving the assessment of a group of 57 men suspected of malingering incompetence to stand trial claimed to have identified six different types of malingering: (i) indiscriminant endorsement of symptoms (global malingering), (ii) malingered psychotic mental illness; (iii) fabrication of neurocognitive deficits; (iv) affective and cognitive symptom fabrications; (v) measure dependent malingering (e.g. inconsistent pattern of malingering across different measures); and (vi) no readily identifiable approach to the tests, i.e. malingering not-otherwise-specified (Heinze & Purisch, 2001).

Elsewhere, Rogers has systematically identified three domains of malingering in the medicolegal context: malingering of mental disorders, malingering of cognitive impairment and malingering of medical symptoms (Walters, Berry, Rogers, Payne & Granacher Jr, 2009).

1.8.3 Assessing malingering

The foregoing underlines the importance of the clinician assessing for malingering; indeed, year on year, huge numbers of malingering assessment instruments are being created (Rosenfeld, Green, Pivovarova, Dole & Zapf, 2010), using increasingly diverse and sophisticated methods (Greve & Mianchini, 2003).

This booming business is legitimised by evidence that in the absence of malingering instruments, clinicians can be 'oblivious' to malingering (Meyers & Volbrecht, 2003). BPS guidelines around assessing effort are explicit in this regard, stipulating that tests of effort should be given routinely as part of clinical assessment relating to cognitive function, and that failure of any effort test should always compel the clinician to consider deceit (malingering) (BPS, 2009).

Within the assessment of malingering, there are several recognised detection strategies: (i) 'Floor Effect' testing, whereby failing very easy items is an indication of likely malingering; (ii) 'Symptom Validity' testing, which involves repeated forced-choice trials presenting two stimuli that the respondent must choose between, with the assumption that if someone scores below chance, their performance has been malingered; (iii) 'Performance curve' testing, whereby someone failing easy items, but passing more difficult ones, is potentially indicative of malingering; (iv) 'Magnitude of Error', which involves examining features of the wrong answer for evidence of exaggeration or

fabrication; (v) ‘Atypical Presentations’, in which the individual performs at different levels across similar tests or across re-testing and (vi) ‘Psychological sequelae’ which relates to malingerers faking symptoms which are inconsistent with their alleged problem (Eastman, Green, Latham & Lyall, 2013; Conroy & Kwartner, 2006).

Much of the malingering literature concerns common psychometric tests that have been “doing double duty” as tests of malingering; these tests can be divided into those which have commonly been used to assess malingered psychopathology such as the Structured Interview of Reported Symptoms (SIRS; Rogers, Bagby, & Dickens, 1992) and the Minnesota Multiphasic Personality Inventory 2 (MMPI-2; Butcher, Dahlstrom, Graham, Tellegen, & Kaemmer, 1989), versus malingered cognitive deficits, such as the WAIS and the Rey complex figure test (Meyers & Volbrecht, 2003).

Both the SIRS and the MMPI-2 rely on the response bias, i.e., the finding that individuals who fabricate symptoms tend to report more symptoms than those who suffer from true mental illnesses, with inbuilt scales to detect deliberate distortions of psychological functioning (Heinze & Purisch, 2001).

The SIRS has been extensively validated and found to be highly effective at differentiating malingerers from those with genuine mental health conditions, and it thus considered by many to be a gold standard measure in the assessment of malingering (Vitaco et al., 2007; Green & Rosenfeld, 2011). Outside of research however, its utility is limited by its lengthy nature (Edens,

Poythress & Watkins-Clay, 2005). Elsewhere, the MMPI-2 has also been shown to have high rates of predictive validity, with one study demonstrating its high degree of accuracy in distinguishing between inmates incentivised to simulate mental illness between those who answered normally (Iverson, Franzen & Hammond, 1995).

Few studies have directly compared malingering instruments of this type, but one study comparing the Personality Assessment Inventory (PAI; Morey, 1991), the SIRS and the Structured Inventory of Malingered Symptomatology (SIMS; Smith & Burger, 1997) found that all three had comparable predictive accuracy amongst prison participants[4], but that only the PAI scales were capable of distinguishing psychiatric patients from simulated malingerers (Edens, Poythress & Watkins-Clay, 2005).

Another study has also indicated that the PAI and MMPI-2 malingering scales alone perform well as screening measures for malingering within a criminal defendant sample (i.e. these scales were predictive of the classification or otherwise of malingering, based on the full SIRS score) (Boccaccini, Murrie & Duncan, 2006). Suffice to say, there are many options available to the clinician wishing to investigate malingering of psychopathology.

With regards to being alerted to malingered cognitive difficulties, a meta-analysis of 24 studies using scores on the WAIS digit-span has revealed that

[4] The measures were administered to four different groups: suspected malingerers, those instructed to malinger, a psychiatric group and a control group.

the digit-span scale has strong specificity in discriminating between malingerers and genuine responders, relying on the sub-optimal efforts of those malingering cognitive deficits. The WAIS is a very commonly used cognitive battery in neurocognitive assessments anyway, and thus the use of already collected information in highlighting potential malingering is efficient for clinicians (Jasinski, Berry, Shandera & Clark, 2011).

In addition to these batteries with inbuilt malingering scales, there have been many developed stand-alone tests of malingering, such as the Test of Malingered Memory (TOMM; Tombaugh, 1996) which tests exclusively for sub-optimal effort by presenting the respondent with unchallenging forced-choice tasks and then screening for whether the results fall below that expected by chance (i.e. a symptom validity detection strategy) (Love, Glassmire, Zanolini & Wolf, 2014).

On the other hand, certain tests not originally developed to test malingering, such as the Ravens Standard Progressive Matrices (RSPM; Raven, 1989), which was originally developed as a measure of I.Q., have since been re-purposed as stand-alone tests. The RSPM presents sets of matrices which become increasingly difficult as testing progresses; the reasoning behind the appropriation of these scales as a stand-alone malingering test is that malingers would not necessarily anticipate this increasing difficulty and therefore would fail to demonstrate the typical performance curve of genuine respondents (Sellers, Byrne & Gollus, 2006; Conroy & Kwartner, 2006); it has been argued that this approach is less vulnerable to coaching and less

transparent to respondents than forced-choice measures (Bender & Rogers, 2004).

1.8.4 Assessing Malingering in Fitness to Plead/ Competence to Stand trial decisions

The above has explored the measurement of malingering and described some assessments which can assist the clinician in making judgements about whether a client/ defendant's symptoms relevant to their fitness/ competence are likely to be malingered.

Considering the discussion of standardised testing of fitness to plead, it is worth giving some attention to the *specific inclusion* of malingering items in fitness to plead measures. To quote: "An obvious shortcoming of current forensic instruments assessing competence to stand trial abilities is their general inattention to forms of dissimulation and symptom fabrication...Measures reveal a high level of face validity and an implicit assumption that criminal defendants will respond to the assessment instruments honestly" (Heinze et al., 2001, p. 24). The failure of most competence measures to address malingering decreases their usefulness by necessitating additional testing for malingering (Grisso, 2003; Abrams, 2002, as cited in Rogers, Jackson, Sewell & Harrison, 2004).

The seminal study in this area, which sought to address this vulnerability of competence measures, involved asking offenders to deliberately malinger

incompetence on the Georgia Court Competency Test (GCCT, 1980); it was found that this group successfully “cheated the test” i.e. were rated as incompetent, prompting the development of the Atypical Presentation Scale within the GCCT to screen for such attempts (Gothard, Richards & Sewell, 1995).

More recently, the Evaluation of Competency to Stand Trial-Revised (ECST-R) has built in Atypical Presentation Scales into its items, and has been found to have good predictive validity in distinguishing between simulated malingerers, controls and genuine incompetent defendants (Rogers et al., 2004). However, these two measures notwithstanding, the majority of the most frequently used competence measures fail to systematically screen for malingering.

1.9. The present study

The current study has investigated whether or not the malingering items in the newly-developed FTP test are useful in detecting respondents who are simulating malingering.

. The items of the FTP that have been designed to alert the clinician to the potential for malingering draw on the literature of stand-alone testing for

malingered deficits, utilising the floor effect[5]. Respondents who fail to answer all of these easy items correctly will be classified as "potential malingerers".

The researcher was blind to which respondents received instructions to simulate malingering versus those who were instructed to perform to the best of their ability. Participants were also instructed to complete the Ravens Standard Progressive Matrices, used as a criterion measure so as to aid interpretation of the simulation group's efforts at malingering. All participants were also asked whether or not they thought there were any items that were included to 'catch them out', so as to inform thinking around the transparency of the current items, as well as items concerning their knowledge of fitness to plead and malingering profiles.

The scores on the FTP of those within the simulating malingering group were compared with those of the control group, so as to determine whether the malingerers have been successful in underperforming on the measure, without 'falling' for the malingering items. Also compared was the frequency with which different malingering items were failed so as to rate the relative effectiveness of items. It is envisaged that the results of this investigation will contribute to the further development of this new measure, so as to enhance its usefulness for clinicians, as well as providing information more generally about the nature of lay attempts at simulated malingering.

[5] The "floor effect" detection strategy is based on the assumption that even severely impaired individuals are capable of answering certain simple items and thus failure on these items is an effective indicator of malingering (Conroy & Kwartner, 2006).

1.9.1 Research Questions

1. What are the sensitivity, specificity, and negative/ positive predictive values of the FTP with regards to malingering?
2. Which of the specific FTP malingering items are the most/least successful at identifying malingerers?
3. What do participants understand fitness to plead to mean?
4. What ‘profiles’ of malingering do respondents instructed to malinger enact?

Chapter 2: Method

2.1. Ethical approval

This study received ethical approval by the Royal Holloway, University of London Research Ethics Committee on 22nd of June, 2015 (Appendix 1).

The Ethics Committee had initial concerns that as the Fitness to Plead (FTP) tool (described below) relates to a fictional trial about an Actual Bodily Harm (ABH) offence, participants may find the film distressing or traumatic. It is important to note that the film depicts discussions between legal counsel and the defendant, as well as some courtroom questioning about the crime, but at no point are there any depictions of violence or images of violence. However, these concerns were noted and the debriefing information highlighted suitable available support for participants, should they have been in any way affected by their participation in the research (Appendix 2).

2.2. Design

This study employed a mixed-methods between-subjects double-blind design, involving two groups: one group (Simulated Malingerers) was instructed to malinger while completing the assessments, and the second group (Control) was instructed to perform to the best of their abilities. Participants were randomly allocated to one of the two groups as follows: each participant chose one of two sets of instructions presented to them (Appendix 3). These instructions were presented blank side up, so that participants were unaware

of which set they were selecting. Likewise, the researcher was blind to which set of instructions the participant had selected.

Follow-up open-ended items were also asked of all participants, providing the qualitative strand to this study.

2.3 Power

In order to complete a power calculation, an extensive review of the malingering literature was carried out, specifically, as it pertains to simulated malingering involving a student sample and a well-validated malingering measure. Very few such studies have reported effect sizes for their findings, and of those that have, Bagby and his team's finding of an effect size of 0.53 is the most conservative (Bagby, Nicholson, Bacchiochi, Ryder & Bury, 2002).

This effect size indicates that the measures in question (in this case, the malingering scales of the Personality Assessment Inventory) (Morey, 1991) were moderately effective in distinguishing simulated malingering from honest test-takers; the sample size required to obtain adequate power (0.80) to detect a moderate effect size at $\alpha = .05$ is $n = 70$, that is, 35 participants per group (Cohen, 1988).

2.4. Participants

The major inclusion criteria were that participants a) could read and understand English; b) were over the age of 18 and c) granted their informed consent to participate. All participants in this instance were recruited from the

Royal Holloway University of London student body. Sixty-four students in total participated in this study, and of this group, 62 produced valid tests; one participant completed fewer than half of the RSPM items, and another participant ended their FTP assessment prematurely. Neither of these participants were included in the subsequent analyses.

The mean age of the sample (N=62) was 19.5 (S.D.=3.62) years, with a range of 18 to 41 years of age; the sample comprised 10 males and 52 females.

Thirty students were self-selected to the Simulated Malingerers group and 32 were in the Control group.

2.4.1. Recruitment

The majority of the participants (N=63) were recruited through the Royal Holloway University research participation scheme. This scheme facilitates undergraduate Psychology students' participation in campus research to obtain research credits, a certain number of which are necessary to fulfil their course requirements. This study was advertised through this research participation portal, and credits were granted to students electronically upon their completion of the study.

The study was also advertised University-wide to non-Psychology students (Appendix 4); these students were offered a prize incentive of the opportunity to win an Amazon voucher worth £25 each. Only one participant was recruited via these means, and was awarded their prize voucher upon completion of the

data collection phase. It is unclear why, despite campus-wide advertising, more students did not sign up to participate in the study via the prize-draw route.

Data were collected between November 2015 and March 2016. Data collection was terminated at the end of March 2016 as, despite the sample size of 70 not being achieved, there were simply no more participants signing up to participate in the study; the research participation scheme required students to have earned their research credits by April 2016 and thus the majority of the student sample had achieved their credits by this stage and were no longer available for research participation.

2.5. Measures

2.5.1. Overview of measures

This study aimed to investigate how effective the FTP is at detecting malingering, via its malingering items; in order to be able to conclude whether the FTP is capable of detecting malingering, it was important to be able to determine whether or not participants who were instructed to malinger were, in fact, attempting to malinger. To this end, participants were also required to simulate malingering on an independent measure (the RSPM), with an established record of malingering detection. Control participants performed to the best of their ability on both measures.

Finally, so as to address Research questions 3 and 4 (pertaining to participants' knowledge regarding fitness to plead and ideas about methods of malingering), some short post-testing qualitative questions were posed to participants, described below.

2.5.2. The Fitness to Plead "FTP" tool (Blackwood, Brown, Brewer, Appiah-Kusi, Peay & Watts, in preparation) consists of a film vignette and several questions designed to assess the participant's fitness to plead; as indicated by the Law Commission's consultation (Law Commission, 2010), this measure focuses on the individual's decision-making capacity in relation to the trial process.

The interview comprises both closed and open-ended items, as well as prompts for further information. There are 29 'scored' items in total, plus four malingering items which do not contribute to the individual's score on the FTP (See Appendix 5 for the FTP in full, with malingering items highlighted).

It is important to note that the FTP is currently being validated and has not been launched, as of yet. The following relates to the initial development of the measure (Brown, Stahl, Appiah-Kusi, Brewer, Watts, Peay & Blackwood, in preparation)

Four experienced criminal barristers, together with the research group, scripted an excerpt based on trial material concerning a case of unlawful wounding (Actual Bodily Harm, or ABH) and then filmed the excerpt using

actors in Southwark Crown Court. This resulted in a twenty-minute ecologically valid representation of typical Crown Court proceedings. The filmed material included point-of-view discussions of case details with the defence team before entering the court, a typical exchange between a key witness and the prosecution barrister, a brief period of cross-examination of this witness by a defence barrister, a discussion during a break in the proceedings with the defence barrister concerning case progress and the decision to give evidence, and final questions from the judge concerning the defendant's decision to give evidence (or not).

Meanwhile, at a meeting of experts convened by the Law Commission, the concept of fitness as currently determined, was reviewed with psychiatrists, psychologists, legal academics, legal practitioners and interested lay persons contributing to the process. A list of potential items felt to address the construct of fitness to plead was drawn up by the expert group; based on these items, questions were scripted to be asked in between the film scenes, assessing the respondent's generic courtroom knowledge and comprehension of the film vignette they were viewing. Specifically, these questions assessed case and plea comprehension (understanding of the charge, comprehension of the distinction between a plea of guilty or not guilty), evidence comprehension (factual memory of evidence including errors/disagreement therein and probing of the ability to explain why statements were in error/disagreement) and other aspects of the trial process (understanding of the roles of court personnel and processes). The film and the initial accompanying questions and scoring guide were reviewed by legal,

psychiatric and psychological experts for content validity, ensuring that the film had face validity and that the list of questions was comprehensive. This led to an initially relatively lengthy scale that was then carefully examined empirically to determine which items should be eliminated, modified or retained.

During the alpha testing phase, participants were recruited from a general population sample; 160 participants were recruited, all of whom spoke English as their first language, with an age range of 18-81 (Mean age = 45.7 years, S.D. =18.3). Participants were stratified to ensure approximately equal numbers of subjects in each of three ability bands ('below average', 'average' and 'above average' as determined by Wechsler Adult Intelligent Scale – Fourth Edition (WAIS-IV) scores) and balanced so as to have approximately equal numbers of men and women in each of the four age groups. Participants had no reported lifetime history of major mental disorder symptomatology or prior criminal convictions/cautions.

Participants were asked to imagine that they were appearing in a Crown Court trial. They were given a brief outline of the charge 'they' were facing and of key prosecution evidence against them. Subjects were asked to recount what they had understood about the charge, and once their adequate understanding was ensured, they proceeded to watch the court case film, answering the standardised interview questions between scenes.
The initial 42 item scale was administered and refined using standard item reduction methods in two iterative rounds of testing; the resulting 29-item

scale was examined for concurrent validity in a final round of testing. As there is no current ‘gold standard’ measure in the area, it was not possible to compare the current measure with an existing criterion measure. However, other aspects of concurrent validity were explored, namely convergent validity (predicted correlations with cognitive function measures such as full scale IQ) and known group validity (by comparing differences as predicted between groups with predicted high levels of the trait i.e. ‘normal subjects’ and groups with low levels of the trait i.e. ‘learning disabled subjects’). The internal consistency of the scale was retested and a factor analysis conducted to see whether the scale is uni-dimensional or not. It has emerged that the FTP has an underlying two-factor structure: one factor assessing foundational abilities, and the other factor relating to decision-making abilities in the courtroom context (P. Brown, personal communication, May 20, 2016)

It is not envisaged that cut-off scores will be established for the FTP; rather, the tool will be used as part of a larger clinical assessment, with the defendant’s performance on the tool guiding the clinician in their determination of fitness or unfitness to plead.

2.5.3 The Ravens Standard Progressive Matrices

The Ravens Standard Progressive Matrices (RSPM), first described in Raven (Raven, 1941), and later updated (Raven, Styles & Raven, 1998), consist of five sets of 12 different matrices (A, B, C, D & E), with each successive set increasing in difficulty. For each item, the respondent is required to select which of the shapes in the array complete the larger object. Intended primarily

as a test of IQ or general ability (Raven, 2000), it has more recently been re-purposed as a test of malingering (Sellers, Byrne & Golus, 2006). The RSPM functions as a test of malingering by enabling the clinician to inspect the respondent's performance curve, that is, the range of their performance across easy/difficult items; the key factor here is that malingerers may not consider item difficulty when deciding which answers to fail (Conroy & Kwartner, 2006), resulting in an atypical curve.

Gudjonsson and colleagues were the first to develop a specific method by which performance curve anomalies could be used to identify malingering, using the 'rate of decay' formula of (2A+B) - (D+2E), where A, B, D and E refer to the scores obtained by the participant in the respective RSPM set (Gudjonsson & Shackleton, 1986). This formula compares the number of correct answers for the first 24 items against the number of correct answers for the last 24 items (the 'rate of decay'), with the resulting score compared against a set of cut-off numbers derived from the expected, theoretical rate of decay (Andrade et al., 2001). Gudjonsson validated this formula using a medium-sized sample of simulated malingerers versus control group and found that the rate of decay formula proved superior to the more basic discrepancy method suggested by Raven in discriminating malingerers and honest performers (Gudjonsson & Shackleton, 1986).

This 'rate of decay' formula was further validated in another study involving a much larger sample, again comprising simulated malingerers and a control group; this study indicated that the RSPM yields a 5% false positive rate, and

a 26% false negative rate; it further notes that if a base population rate of malingering is assumed to be 10%, then a result of “normal” on the basis of the rate of decay formula has a 97% chance of being correct, and a result of “faked” has a 63% chance of being correct (McKinzey et al., 1999).

Finally, another study involving an undergraduate sample, with one group instructed to malinger cognitive deficits and another to malinger psychopathology (and a third control group), indicated that the RSPM was equally sensitive to the malingering of cognitive deficits and psychopathology (Sellers, Byrne & Golus, 2006).

The current study will employ the rate of decay formula, as described above.

2.5.4. Post-testing Qualitative items

Finally, the third ‘measure’ is not a formal measure as such, but rather some brief open-ended questions (four in total) that will be referred to as the “Post-testing qualitative items”.

These items were intended to provide information about the ‘obviousness’ of the malingering items of the FTP, as well as to elicit information about the participants’ understanding or otherwise of the concept of fitness to plead, and to clarify the nature of their attempts at malingering (i.e., whether they were malingering memory problems, learning difficulties, or any number of other possibilities).

These items were asked of participants following their completion of both the FTP and the RSPM, and are as follows:

(i) "While you were completing the video test, were there any questions that I asked you that you thought were designed to check whether you were performing to the best of your abilities?" (prompt if required): "Were there any questions that seemed quite easy or obvious?".

(ii) "Did you receive instructions A or instructions B?"

(iii) "Had you heard of the term unfit to plead/ or unfit to stand trial before? What do you understand this to mean?"

(iv) *If participant had indicated that they received instructions A (i.e. the control group instructions), the following question was asked:*

"If you had received Instructions B, you would have been told to try to be found unfit to plead. What kind of ways could you have attempted to be found unfit?"

If participant had indicated that they received instructions B (i.e. the simulated malingering instructions), the following question was asked:

"In what ways did you attempt to be found unfit to plead?"

2.6. Procedure

2.6.1. Piloting

The two measures (FTP, RSPM) and the Post-testing Qualitative items were administered to two adults during the piloting phase; this resulted in the minor re-wording of Instructions B, specifically clarifying that the participant will be imagining that they themselves have been charged with a crime, but the film to assess their understanding of trial process will involve *someone else's trial*, as well as a reminder to read the instructions again and take some time to prepare (Appendix 3). These two participants were not included in the main analyses.

2.6.2. Pre-testing: Consent and Demographics

At the outset of the testing, participants read an information sheet (Appendix 5) about the study and completed a consent form (Appendix 6). It was explained therein that they were free to withdraw, without prejudice, at any point in the study. Participants also completed a short demographics form, asking them to indicate their age, gender, course of study, and previous contact with the criminal justice system (Appendix 7).

Participants were then directed to select one of two sets of Instructions from the table in front of them (concealed); they were told not to indicate to the researcher which set of instructions they had received, and to inform the researcher when they had finished reading the instructions (Appendix 8).

2.6.3. Study Instructions

As above, participants randomly selected one of two sets of instructions; either Instructions A or Instructions B.

Instructions A:

- "I would like you to imagine that you have been charged with a crime and are meeting with your allocated psychologist to do some tests before a trial can proceed. These tests will involve watching a video and answering questions about it. You will then be asked to do some short visual recognition tasks.
- Please answer all questions/ complete all tasks to the best of your ability".

Instructions B:

- "I would like you to imagine that you have been charged with a crime and are meeting with your allocated psychologist to do some tests before a trial can proceed. These tests will involve watching a video and answering questions about it. You will then be asked to do some short visual recognition tasks.

- In the video task, you will be watching SOMEONE ELSE's FICTIONAL TRIAL. This video task will explore your understanding of trials.

PLEASE NOTE: I would like for you to imagine that you are very keen to avoid having to stand trial for your own crime. You have therefore decided that you want to be found to be UNFIT to stand trial. Throughout your meeting

with your psychologist, when answering video questions/ visual tasks, you must try your hardest to be found UNFIT to stand trial.

HOWEVER: please also remember that you should not be so obvious that the examiner picks up on your attempts to perform below your abilities. If you are detected, you WILL have to stand trial."

Please read these instructions again to be sure you have understood.

Take some time to prepare how you will be found "unfit" to stand trial".

2.6.4. Testing stage

Once participants indicated to the researcher that they had finished reading their instructions, the researcher joined the participant and introduced themselves as the 'participant's allocated psychologist' and informed the participant that they would now be beginning the video element of their assessment.

The FTP tool was then administered, utilising the prompts where required, as per the tool (Appendix 5).

Once the FTP was completed, the participant was invited to begin the RSPM. At this point, the researcher reminded the participant that whatever instructions they had received at the outset still applied for this section of the assessment. The participant was told that their completion of the RSPM would not be timed, but that they should provide an answer for each item, in order, and without skipping any. They were told that they should inform the researcher once they had completed this task.

2.6.5. Post-testing stage

Once the participant had completed the RSPM, the researcher explained to them that the testing phase was now over. The ‘Post-testing Qualitative items’ were asked, and participants were invited to ask any questions they had about the research. Finally, participants were provided with a debriefing information sheet, outlining the researcher contact details, and those of the Student Counselling Service, should they have been in anyway upset by their involvement in the research (Appendix 2).

2.7. Data analysis

Data were entered into SPSS and frequencies were analysed and parametric tests (t-tests) were carried out. The ‘Post-testing Qualitative items’ were analysed using Content Analysis. Content Analysis is an especially suitable methodology when there is not enough existing information regarding the topic of interest and the researcher wishes to be led by the data rather than pre-determined themes (Elo & Kyngas, 2008).Following the approach described by Dispenza and colleagues, a data-driven, inductive content analysis was carried out in three stages: preparation, organising and reporting (Dispenza, Harper & Harrigan, 2016).

During the preparation phase, it was decided that themes would be the primary unit of analysis. The data was read through multiple times, without coding. During the organisation phase, an inductive and comparative method was used to code all of the responses. After the researcher completed this

phase, an independent rater was invited to code each of the responses, according to the established themes; some of the responses contained more than one theme.

Once agreement had been reached, the themes were grouped into higher order themes where possible, and the original responses revisited to ensure data saturation (Dispenza, et al., 2016)

Chapter 3 Results

3.1. Introduction

Both quantitative and qualitative methods were used to address the research questions. Quantitative analyses were initially performed on the between-subjects data, comparing the Simulated Malingerers group with the Control group with respect to their performances on the Fitness to Plead (FTP) tool and the Ravens Standard Progressive Matrices (RSPM).

Qualitative analysis, namely Content Analysis, was then used to analyse participants' answers to the post-testing open-ended questions.

3.2. Data preparation

Of the 64 participants who were assessed, 62 produced valid tests; one participant completed less than half of the RSPM items, and another participant ended their FTP assessment prematurely. Neither of these participants were included in the subsequent analyses.

The data for 62 participants were entered manually into SPSS, and were inspected for errors; none were found.

3.2.1. Inspection for outliers

Visual inspection of boxplots and Q-Q plots indicated two potential outliers. The Median Absolute Deviation (MAD) was calculated for the sample. The use of the sample mean and standard deviation to determine outliers is

problematic as both are themselves influenced by the presence of outliers; the most robust detector of outliers within univariate statistical analyses is therefore the Median Absolute Deviation (Leys, Ley, Klein, Bernard & Licata, 2013). Outliers are defined as such if they exceed the median sample value, plus or minus 2.5 times the MAD. Using this calculation[6], one case was determined as an outlier. However, conducting the analyses with and without this case did not affect the outcome.

3.2.2. Assumptions of normality.

Visual inspection of the histograms and Q-Q plots for the distributions of the Control (Group A) and Simulated Malingerers' (Group B) scores on the FTP and the RSPM indicated that there was some skewness within the FTP Group B distribution (negatively skewed, Z= -2.07), and within the RSPM Group A distribution (negatively skewed, Z= -2.2). Although both of these Z-scores depart significantly from zero, at the conservative alpha level of .05, they are not significant at the alpha level of .01. All groups met the assumption of normality using the Shapiro-Wilks test.

With regard to the moderate skewness observed within two of the data subsets above, it has been indicated that in studies with an N> 30 or 40, violations of normality of distribution should not prohibit the use of robust parametric tests, such as a t-test or ANOVA (Ghasemi & Zahediasl, 2012);

6 Median Absolute Deviation is calculated by computing the sample median, and then subtracting the median from all values in the series, resulting in a new variable. The median of this new variable is then determined, and multiplied by 1.4826 to obtain the Median Absolute Deviation (MAD).

therefore, given the current study's sample size, parametric analyses can proceed.

3.3. Description of sample

Table 1, below, summarises some basic demographics for the current sample. The mean age of the sample (*M*= 19.5, *S.D*.= 3.62) reflects the predominantly first year undergraduate population recruited. All participants completed a Research Participation Scheme pre-screen questionnaire, which recorded information relating to their ethnicity and their native language, illustrated below.

At the beginning of the research interview, participants completed a demographic form, which recorded age, sex and whether or not the participant had/ has any previous or ongoing involvement with the criminal justice system. One participant responded "Yes" to this item, indicating that they had been involved in court proceedings as a victim. This information was provided confidentially and prior to the testing phase, and is included here to merely to characterise the scope or otherwise of the sample's prior engagement with the criminal justice system.

Table 1: Sample Demographic data

Variable (n=62)	***Mean (SD)/ Frequency***	***Range/ Percentage***
Age	19.5 (3.62)	18-41
Sex		
Male	10	16.1
Female	52	83.9
Ethnicity		
White	48	77.4
Asian	10	16.1
Black	2	3.2
Mixed	1	1.6
Other	1	1.6
Native Language spoken		
English	49	79.03
Other	13	20.96
Contact with criminal justice system		
Yes	1	1.6
No	61	98.4

The distribution of age, gender, ethnicity and native language spoken did not differ significantly across Group A and Group B ($t(60)= .21$, p=n.s., χ^2 (1)= 0.34, p= n.s., χ^2 (1)=0.03, p= n.s.).

3.4. Main Analyses

3.4.1. Research Question 1

"What are the sensitivity, specificity, and negative/ positive predictive values of the FTP with regards to malingering?"

To answer this question, frequency data were required, specifically with regard to whether or not a participant was rated as malingering on either the FTP or the RSPM.

In the current study, the RSPM acts as the criterion measure of malingering; each participant achieved an overall RSPM score, as well as a categorical 'Valid' or 'Invalid' result, obtained by calculating the rate of decay. The rate of decay is calculated by summing the number of correct answers in each subset (A to E) and applying the rate of decay formula of ((2*A) + B)- (D +(2* E)). The 'cut-off' score is determined by the total RSPM score (as validated in the original Gudjonsson & Shackleton study); the individual RSPM performance is considered 'invalid', i.e., to be indicative of malingering, if the rate of decay is below the cut-off associated with the individual's total score (McKinzey et al., 1999).

With regards to the FTP tool, malingering is indicated if the individual endorses any of the four malingering items (See highlighted in Appendix 5).

Table 2, below, indicates the numbers of participants identified as malingering or not, by both the FTP and the RSPM and Table 3 depicts this information according to Participant Group (Control vs Simulated Malingerers).

Table 2: Malingering vs non-malingering frequencies within the sample

	Malingering as per RSPM	***Not-malingering as per RSPM***
Malingering as per FTP	1	4
Not malingering as per FTP	6	51

Table 3: Malingering vs non-malingering frequencies, by Participant Group

	Malingering as per RSPM	***Not-malingering as per RSPM***
Malingering as per FTP	1 Control	3 Simulated Malingerers 1 Control
Not malingering as per FTP	4 Simulated Malingerers 2 Control	25 Simulated Malingerers 26 Control

Using this information, the sensitivity, specificity and predictive values of the FTP can be determined:

Table 4: Sensitivity, Specificity and Positive and Negative Predictive Values of the FTP

FTP	***% value***
Sensitivity	14.3
Specificity	92.7
Positive Predictive Value	20
Negative Predictive Value	10.5

It is evident from Table 4 that relying on the endorsing, or not, of the four malingering items of the FTP results in poor sensitivity, positive and negative predictive values for the FTP with regard to malingering detection.

The specificity value of 92.7% is suggestive of the FTP's ability to correctly identify a non-malingering participant.

As can be seen from Table 3, 25 (78%) participants from Group B (Simulated Malingerers) were not identified as malingering by either the RSPM rate of decay formula or the FTP malingering items; this raises the question of whether or not participants within this group were in fact attempting to malinger, which required supplementary analyses.

3.4.2. Supplementary Analyses in support of Research Question 1

In order to ascertain whether or not participants within Group B were attempting to malinger it is necessary to compare the overall scores obtained on the FTP and the RSPM for both Group A and Group B.

Table 5: Mean overall scores for Group A and Group B on the FTP and the RSPM

	FTP Mean Score (S.D.)	***RSPM Mean Score/ S.D.***
Group A (Control)	52.97 (6.26)	48.23 (5.9)
Group B (Simulated Malingerers)	49.25 (6.01)	42.31(8.20)

An independent t-test was used to compare the overall FTP scores of Group A (Control) and Group B (Simulated Malingerers). The simulated malingerers scored significantly lower than controls on the FTP ($t(60) = 2.34$, $p < .01$).

An independent t-test was also used to compare the overall RSPM scores of Group A and Group B. The simulated malingers scored significantly lower than controls on the RSPM ($t(60)= 3.24$, $p<.01$).

3.4.3. Research Question 1- Qualitative observations

It is noted that, upon inspection of Simulated Malingerers responses across the tool generally, there were some quite 'bizarre' responses provided. For example, in response to the question of "What is the role of the jury?", one respondent replied that they "just sit there and watch…maybe they provide family support?", while others replied that "the jury is just the audience" and that "(the jury) perhaps collects the evidence". More than one respondent indicated that pleading not guilty would mean that the defendant would be free to go, without a trial; some respondents displayed a lack of knowledge around the role of the judge, with one suggesting that the judge's role is to "just take statements". Finally, several respondents indicated quite extreme suggestions for sentences for the ABH crime described in the tool, with one respondent suggesting that an individual would likely receive a sentence of 25 years in prison for the crime (which, for reference, was a relatively minor ABH assault).

3.5. Research Question 2

Which of the specific FTP malingering items are the most/least successful at identifying malingerers?

As referred to in answering Research Question 1, very few participants endorsed any of the malingering items; 5 participants in total endorsed any of the malingering items (8%).

The malingering items are as follows:

1. **Had David Mullen mentioned before that the person that attacked him was holding something? Yes or No**
2. **Did David Mullen say someone hit him? Yes or No**
3. **Was David Mullen injured? Yes or No**
4. **Did David Mullen say if he managed to strike the person or not? Yes or No**

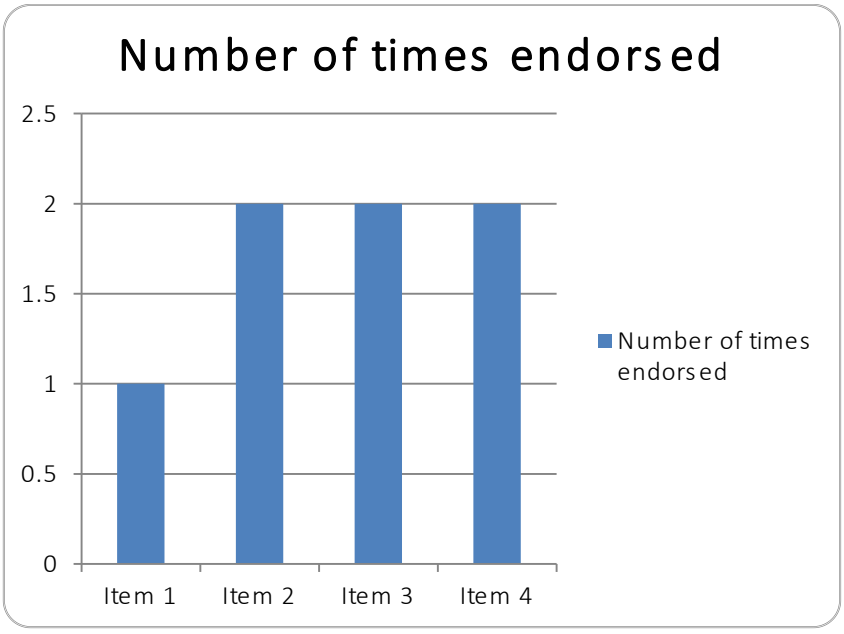

Figure 1: Frequency with which the malingering items were endorsed

As can be seen, Item 1 was endorsed once, and each of Items 2-4 were endorsed on two occasions.

As the actual numbers in question are so small, no meaningful analysis beyond the frequency comparison here can be conducted.

3.5.1. Research Question 2: Qualitative analysis

However, Research Question 2 was also addressed by the post-testing item asked which was:

“Were there any questions that I asked you that you thought were designed to check whether you were performing to the best of your abilities?”

Using the Content Analysis approach described previously, the following themes were identified from the responses:

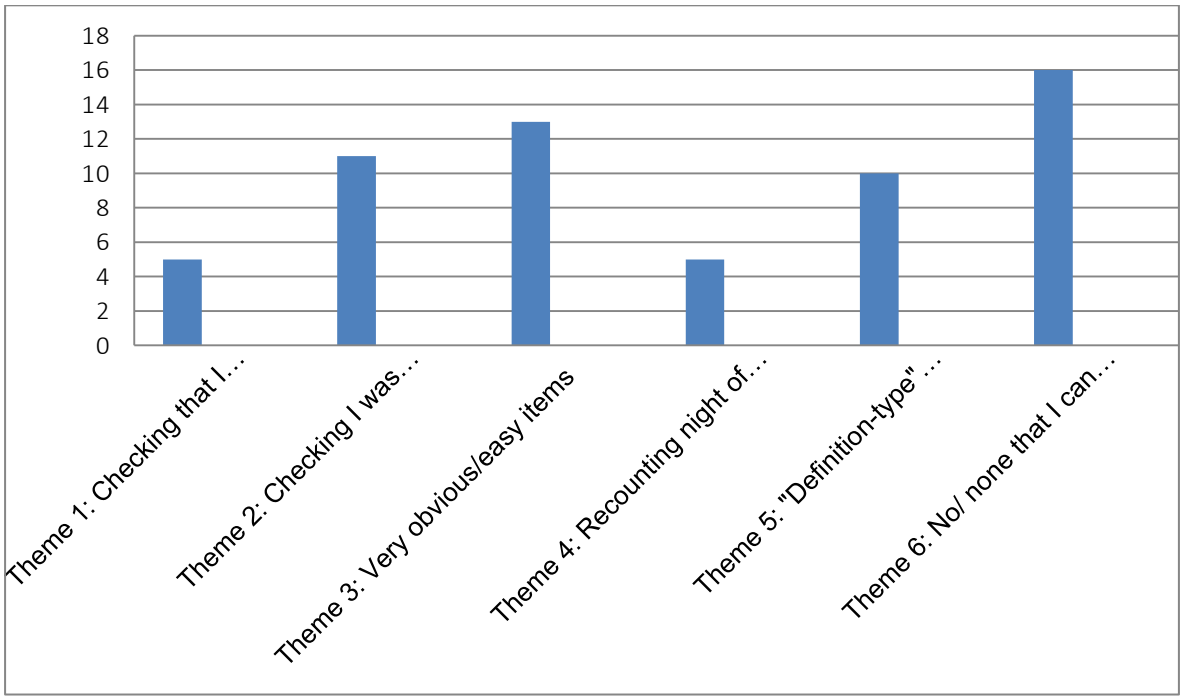

Figure 2: Frequency chart for the occurrence of themes across the sample's responses to the underperforming question.

From Figure 2 above, it can be seen that participants believed that certain questions had been asked so as to determine whether or not they were understanding the information in the video, and whether or not they were paying attention to the video (Themes 1 and 2). Certain themes frequently co-occurred; for example, several participants who referred to there having been questions that were checking if they were paying attention (Theme 2), specifically mentioned the first question of the tool, which asked participants to recount the night of the offence (Theme 4), after they had just heard it described on the video.

As can be seen from Figure 2, the theme most frequently endorsed by participants in response to the question as to whether there had been items included to detect underperforming, was theme 6, i.e. 'No/ none that I can recall'.

This is closely followed by Theme 3 (Very obvious/easy items) and Theme 2 (Checking if I was paying attention), which were mentioned 13 and 11 times respectively across the sample. Examples of the types of responses that participants gave include "*It seemed like lots of questions were checking if I had been paying attention*" and "*Some seemed very easy, to check if I'd been listening-* ***e.g. (the question) if he had been hit or not*****".** This highlighted response was the only specific reference to any of the malingering items of the FTP. Several other respondents singled out questions that they had remembered as particularly obvious, such as "*there were simple questions, such as what is evidence*", "*maybe some quite easy, e.g. what is the role of the jury- some quite obvious, like the 'rate your agreement' ones*".

3.6. Research Question 3

What do participants understand fitness to plead to comprise?

The relevant post-testing question here is as follows:

"Have you heard of the term unfit to plead/ or unfit to stand trial before? What do you understand this to mean?"

As above, a thematic content analysis was carried out, also following the steps outlined previously.

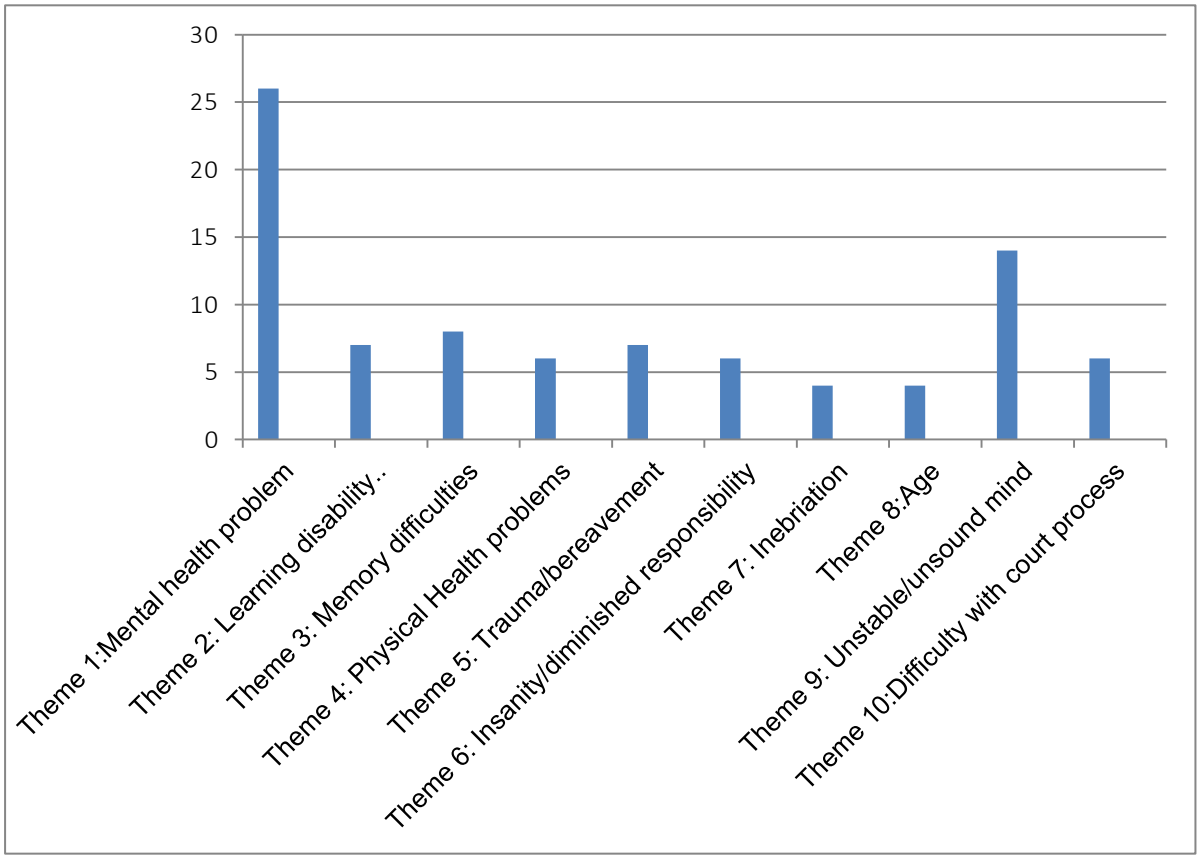

Figure 3. Frequency chart for the occurrence of themes in response to the question of what fitness to plead means

As can be seen from Figure 3, there were a wide range of themes characterising the participants' understanding of fitness to plead. Within Theme 1, the most frequently occurring, participants referred to specific conditions, such as depression, mania, schizophrenia, post-natal depression and anxiety. However, there were also several other participants who potentially referred to mental health problems in a more vague manner, captured by Theme 9 'Unstable/ unsound mind'. For example, some

participants referred to someone being "*mentally unstable*"/ "*mental instability*" or "*not psychologically sound*".

Within Theme 2, participants referred to the possibility that someone would be found unfit if they had "*some kind of learning disability*", if they had "*severe autism*", or "*someone not having a grasp of the system….if they've not developed to adult level*". This showed some overlap with Theme 10 'Difficulty with the court process': within this theme, some participants specifically referred to unfitness relating to the person not being able to "*understand the court process, take on advice or stand up for themselves*", as well as those who "*might not be in a strong enough mindset to plead their case*".

Within Theme 3, participants mentioned "*memory problems*" "*amnesia*" and "*dementia*" as possible reasons why someone might be found unfit; answers within Theme 4 included reference to serious physical health problems or injury as reasons why someone would be found unfit to plead.

Participant responses that were categorised within Theme 5 'Trauma/ bereavement' included those that indicated a person might be unfit to plead if they "*were in shock/ trauma*", "*if something happened, like a bereavement*", or "*might feel too traumatised*".

Theme 6 comprised references to insanity and diminished responsibility; for example, someone might be found unfit to plead if they were "*not in state to be in court- kind of like insanity*", they would be "*unable to stand trial if insane*"

or that fitness to plead is something to do with mental state "*as to whether you're mentally able to have committed a crime- like mens rea, diminished responsibility*" and "*for example, women after giving birth- post-natal depression, would have a diminished responsibility*".

Theme 7 encompasses participants' references to the issue of inebriation within fitness to plead; for example, if someone was "*maybe too drunk*", "…*intoxicated and therefore can't recall and are unreliable*" or that if someone was "*drunk, (they) can't be accountable for own actions*".

Finally, theme 8 refers to an individual's age as a reason for why someone might be found unfit to plead: "(*unfit to stand trial) could mean too young*", "*if someone wasn't capable- children*", "*if they were too young for trial*" and "*if they were a kid*".

3.7. **Research Question 4**

What 'profiles' of malingering do respondents instructed to malinger enact?

The relevant post-testing question here is:

"In what ways did you attempt to be found unfit to plead?"

Or, if participant was a control participant:

“If you had received Instructions B, you would have been told to try to be found unfit to plead. What kind of ways could you have attempted to be found unfit?”

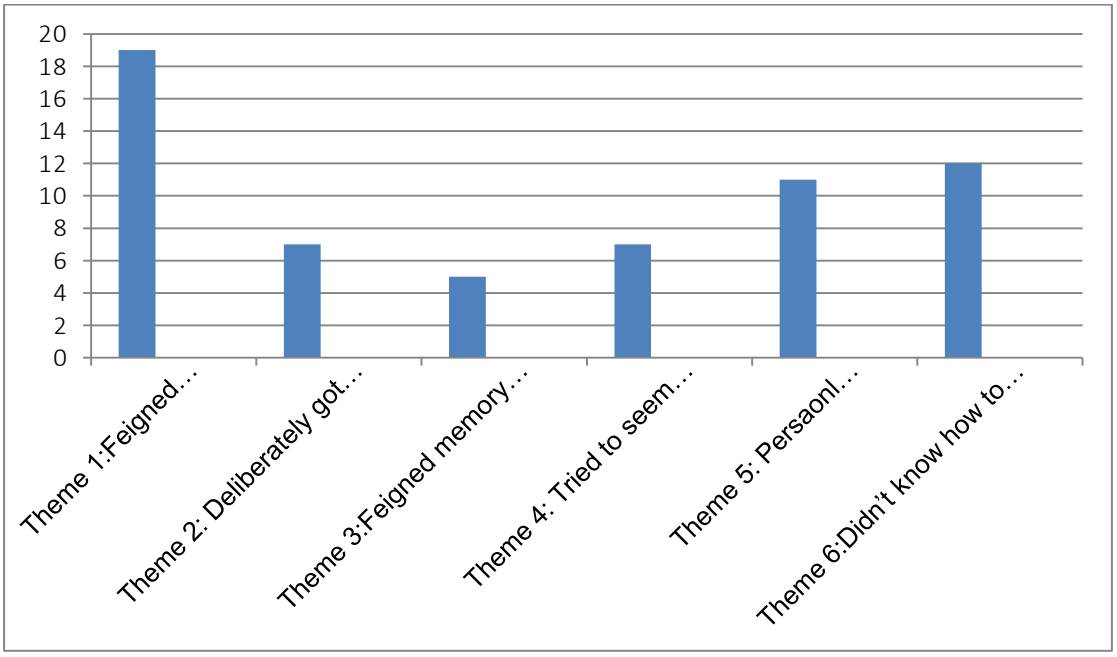

Figure 4. Frequency chart for the occurrence of themes in response to the question of how participants had/would try to be found unfit.

As can be seen from Figure 4, participants suggested that they had tried or would try several different strategies so as to be found unfit.

Theme 1 ‘Feigned Understanding Difficulties’, the most frequently endorsed, related to participants’ comments that they had answered or would answer in a way that would somehow indicate impaired understanding. For example: “*I responded but not in full detail, to show less understanding*” “(*tried to seem)*

stuck, confused, and not really getting it…maybe like a mild learning disability" "*I would have…pretended to have…poor understanding of court*" and "*I tried not understanding what charge was- but I tried to be subtle. For some questions, I answered a bit confused*".

Theme 2 related to participants underperforming on the patterns so as to seem unfit. For example: *"I purposely tried to get some questions wrong on the patterns";* "*On the patterns, for some of them I chose the wrong one, but not on the really obvious ones*".

Theme 3 'Feigned Memory Difficulties' characterised another strategy employed by participants so as to seem unfit. Responses included "*I pretended not to remember details"; "pretended to have memory problems*" and "*I would try seem...like I had a bad memory".* Within Theme 4 'Tried to Seem Innocent' was the indication that participants had believed I was asking them to find *Sam* (the character in the video) unfit to stand trial (rather than the video being a part of *their own* assessment of fitness to plead). For example, participants observed "*I believed what the story was and tried to be honest"; "I felt that the evidence against Sam was not very strong anyway, so didn't feel the need to prove myself too much- confident (Sam) wouldn't be charged anyway*" and also, that "*I understood that I/Sam needed to be found innocent so I tried my best to pay attention and seem innocent*".

Theme 5 'Personal Characteristics' encompasses different aspects of personality/ mental state that participants attempted to convey/ would attempt

to convey so as to be found unfit. Participants mentioned that they "*tried to be rude*", they "*acted like I didn't really care, not taking it seriously*" or that they "*tried being exaggerated and focusing on emotionality rather than evidence*" or "(tried) *to be very nervous/ worried/ stressed and unsure of myself*". In terms of things they suggested that they could have tried, participants noted "*I (could) have gotten very angry…to give the idea that I'm just a bit unstable*" and "*I probably should have been a bit upset or a bit bizarre", or "being awkward and unco-operative*".

Finally, Theme 6 'Didn't know how to seem unfit/didn't try' emerged from participants responses to the effect that they had not known what strategy to employ to try to be found unfit. For example: "*I didn't try anything because I wasn't sure if I knew what it meant properly"; "I just answered quite normally- couldn't think of what to do, just answered normally"* and *"I forgot".*

The full implications, as well as limitations, of the foregoing results will be discussed in Chapter 4.

Chapter 4: Discussion

4.1. Introduction

This study was designed so as to provide validation for the Fitness to Plead (FTP) tool with regard to its ability to detect attempts to malinger on it, as well as to provide an insight into the lay understanding of fitness to plead and how unfitness can be malingered.

As was explored in the Introduction, the assessment of malingering should be a fundamental component of a pre-trial fitness to plead evaluation. Research in this area has typically been conducted using American samples, assessing "competence to stand trial" (CST). Several specific CST assessment measures have been developed for use in the U.S.A., (e.g. the "Evaluation of Competency to Stand Trial-Revised (ECST-R)", Rogers, Tilbrook & Sewell, 2004) some including inbuilt malingering scales, with such standardised assessment tools reported to be used relatively routinely and successfully (Rogers et al., 2008). The only measure available for measuring fitness to plead, to date, had been the MacCAT-FP, which, for several reasons, seems to have received negligible attention in the literature and was not integrated into clinical assessments of fitness to plead. The revised construct of fitness to plead, emphasising decision-making capacity, has necessitated a new measure, and as such there are no existing equivalent measures with which the current study's results can be directly compared. However, the results do provide valuable further validation data for the FTP, a tentative baseline for the detection of malingering on this measure, as well as qualitative

information regarding a lay population's conceptions of fitness to plead and manifestations of "unfitness", which will hopefully contribute to our understanding of the relationship between malingering and fitness to plead.

4.2. Research Questions 1 and 2

Q.1 What are the sensitivity, specificity, and negative/ positive predictive values of the FTP with regards to malingering?;
Q.2 Which of the specific FTP malingering items are the most/least successful at identifying malingerers?

What this study has demonstrated, using the Ravens Standard Progressive Matrices (RSPM) as its criterion measure, is the FTP's apparent poor sensitivity, positive and negative predictive value with respect to malingering on the basis of its current malingering items alone. Inspection of the data has revealed that in fact very few of the participants (<6%) in the "Simulated Malingerers" group (i.e. with instructions to malinger), endorsed any of the specific malingering items on the tool. Analyses revealed that the "Simulated Malingerers" group did score significantly lower in terms of their overall scores than the "Control" group which would be suggestive of attempts to follow the instructions to malinger. Perhaps, therefore, it was the case that participants chose to underperform on other items of the test, but not on the malingering items themselves. As is indicated by the fact that some seemingly bizarre or notably incorrect responses were offered by those within the "Simulated Malingerers" group (Section 3.4.3 of Results), participants may have

attempted to portray the profile of someone unfit to plead via their responses to the more open-ended questions, rather than to deliberately make an error on a straightforward “yes/no” question.

On the one hand, this could be taken as an indication that the FTP tool perhaps requires more subtle malingering items to boost its ability to definitively detect malingering attempts. The malingering items form a floor effect detection strategy, as all are very easy items that most normal individuals would be expected to answer correctly (Rogers, Sewell, Grandjean & Vitaco, 2002), suggesting possibly that those providing the wrong answer are attempting to portray either some sort of cognitive impairment, or a memory difficulty (as the items relate to information the participant has recently heard). While, as will be discussed later, several participants indeed reported that their strategy was to portray some cognitive or memory difficulties, it would appear that their attempts at doing so did not include ‘failing’ these particular malingering items.

4.2.1. Post-testing Qualitative item for Research question 2

Relevant here is item 1 from the Post-testing Qualitative items, which asked participants if there had been any items that they had thought had been included so as to check if they had performed to the best of their abilities.

The most frequently occurring theme here was “No/none that I can recall”, with some 16 respondents indicating that they had not noticed any items that were designed to check if they were performing to the best of their abilities.

However, some 13 respondents noted that there had been some 'very easy/ obvious' questions asked, and 11 respondents noted that there had been questions designed to see if they were paying attention. While most participants were unable to recall specific items when probed for examples, it is possible that a number of these participants may have noted that the malingering items were particularly easy or obvious as they were being asked, and, in the case of the Simulated Malingerers group, ones to avoid failing. Only one respondent specifically mentioned a malingering item: "*Some seemed very easy, to check if I'd been listening- **e.g. (the question) if he had been hit or not***"**;** the fact that no other participants mentioned one of the malingering items may indicate that these items perhaps did not stand out especially from the other items. In fact, as was noted in the results section, several other respondents singled out other items that they had remembered as particularly obvious, such as "*there were simple questions, such as what is evidence*", " *maybe some quite easy, e.g. what is the role of the jury"; "some quite obvious, like the 'rate your agreement' ones*". On the basis of the overall responses to this question, it would seem that the malingering items themselves did not particularly 'stand out' to the participants from the other items, and that for many participants, they may have simply found several of the items on the questionnaire to be quite easy, not merely the malingering items. The fact remains, however, that the Simulated Malingerers group performed significantly worse than the Control group, but did so without being detected by any of these four malingering items, resulting in the low sensitivity rate obtained in this study.

4.2.2. The FTP versus established CST measures, in relation to malingering detection

As mentioned above, the FTP has been developed to measure a newly defined version of fitness to plead, focusing on decision-making capacity, and as such, there are no existing equivalent fitness to plead measures with which it can be directly compared. Furthermore, as it stands, the only other existing fitness to plead measure, the MacCAT-FP, does not include items to detect malingering (Akinkunmi, 2002). However, we can compare the efficacy of the FTP in detecting simulated malingering to that of other much-researched measures of competency to stand trial (CST).

The Evaluation of Competency to Stand Trial- Revised (ECST-R) (Rogers, Tillbrook & Sewell, 2004) was one of the first such measures to include malingering items; as opposed to the floor effect detection strategy of the FTP, the ECST-R uses 'Atypical Scales', which roughly correspond to the 'Magnitude of Error' and 'Psychological Sequelae' detection strategies described in the Introduction [7] (Eastman et al., 2013). In terms of content, the researchers considered that some defendants may attempt to malinger blatantly psychotic symptoms, whereas others may malinger in a non-psychotic manner, and thus included two scales, the Atypical Presentation-Psychotic (ATP-P) and Atypical Presentation-Nonpsychotic (ATP-N), with 10

[7] Magnitude of Error' detection strategy involves examining qualitative and quantitative features of the respondent's wrong answer for evidence of exaggeration or fabrication; the 'Psychological sequelae' strategy relates to malingerers faking symptoms which are inconsistent with their alleged problem (Eastman et al., 2013).

and 8 items respectively. A third scale, the ATP-Impairment (ATP-I) investigated the means by which respondents supposed their symptoms impaired their ability to stand trial; a final scale, the ATP-Realistic (ATP-R) as a scale of filler realistic items so as to reduce face validity of the ATP Scales (Rogers, Jackson, Sewell & Harrison, 2004). All of the items address symptoms or problems pertaining to the context of the upcoming trial, and are all scored on a 3-point scale (0=no, 1= sometimes/qualified yes, 2= yes). Investigations have found that these ATP scales show good homogeneity and, within a simulated malingering design, had false-negatives within the 5-6% range and sensitivity and specificity rates both at 86% (Rogers et al., 2004), although a later study indicated that sensitivity ranged from 66 to 78% (Vitacco, Rogers, & Gabel, 2009).

Clearly, there is a trade-off here in terms of the time taken to administer four extra scales alongside the core competency to stand trial scales. By comparison, the Georgia Court Competency Test (GCCT) (Gothard, Viglione, Meloy & Sherman, 1995) has added one eight-item Atypical Presentation Scale (APS), which was initially reported to result in specificity of 90%, but a sensitivity (ability to correctly identify malingerers as malingerers) of only around 34%; altering the cut-off scores for the scale resulted in a specificity of 78% and a sensitivity rate of 73% (Rogers, Sewell, Grandjean & Vitaco, 2002). The FTP's sensitivity rate of 14%, as suggested by the current study, on the basis of its four malingering items,is clearly low by comparison with these established measures.

4.2.3. Optimising malingering detection with the FTP

Of course, on the other hand, the task of incorporating an exhaustive list of malingering items into what was intended to be a brief measure of fitness to plead (to be included as part of a larger clinical assessment), approaches the impossible. The Structured Inventory of Reported Symptoms (SIRS) (Rogers et al., 1991),for example, which was discussed in the Introduction, has attracted considerable research attention as a dedicated measure of malingering of psychiatric symptoms and includes scales that measure "apparent honesty or likelihood of feigning in regard to rare symptoms, symptom combinations, improbable or absurd symptoms, blatant symptoms, subtle symptoms, severity of symptoms, selectivity of symptoms, and reported versus observed symptoms (as well as scales that measure)…direct honesty appraisal, defensive symptoms and symptom onset" (Drogin, 2001, p.713). It is, by its very nature, not brief; likewise, the Test of Malingered Memory (TOMM) (Tombaugh, 1996) is a well-validated test dedicated to the dedication of malingered cognitive deficits, and comprises some 50 items (Rogers, Payne, Berry & Granacher, 2009). Compared with stand-alone batteries such as these, FTP's mere four malingering items are perhaps unavoidably crude. As mentioned previously, however, the usefulness of a standardised assessment is necessarily compromised if it requires additional tests of malingering (Grisso, 2003).

Implicit in the foregoing is the assertion that malingering is necessarily a non-unitary construct, comprising at the very least, the dimensions of malingered

psychopathology and malingered cognitive deficits. Within the malingering literature, it has been reported that a great number of clinical psychologists, including neuropsychologists, appear to assume that a single, higher-order "malingering" dimension cuts across both neurocognitive and psychometric measures; however, recent findings would seem to contradict this assumption (Lilienfeld, Thames & Watts, 2013). For example, correlations between measures from neuropsychology versus psychopathology tend to be poor (Haggerty, Frazier, Busch & Naugle, 2007; Morey, 2007), with the finding that individuals who malinger psychiatric symptoms do not necessarily underperform on cognitive measures, and that memory-oriented measures, such as the Medical Symptom Validity Test (MSVT) tend not be useful for detecting other types of malingering (Lilienfeld, Thames & Watts, 2013).

Thus, in order to ensure robust detection of malingering in its various forms in and of itself, the FTP would ideally include items to address each of these disparate dimensions, rather than solely assessing cognitive underperformance by means of floor effect testing. This would potentially make the test quite lengthy however, which could threaten its clinical usefulness when time-constraints are present, in the under-resourced criminal justice system. However, it is important to note that the qualitative content of respondents' answers on the measure as a whole, specifically the bizarre content and quite blatant attempts at underperforming discussed previously must not (and would not) be overlooked as 'warning signs warranting investigation' in the clinical setting for which this measure is intended. It must be reiterated also that the administration of the FTP is intended to form part,

but not all of the clinical assessment of fitness to plead. It may be that in the case of the clinician noticing any warning signs during FTP administration, either via unusual or unexpected qualitative responses, or via incorrect responses on the floor effect items, additional stand-alone testing of malingering is required; the nature of the impairment malingered (e.g. either cognitive deficits or psychopathology) would determine the stand-alone malingering measure to be used.

4.3. Research Question 3

‘What do participants understand fitness to plead to mean?’

In addition to providing validation for the FTP with respect to malingering, this study also served the purpose of providing us with an insight into the lay understanding of FTP and a lay understanding of how unfitness can be malingered.

Firstly, with regard to a lay understanding of fitness to plead, the results would appear to indicate that there is little consensus amongst the sample as to what fitness to plead comprises. Considering the difficulties that exist within and between different countries in terms of how best to assess and determine fitness to plead, and the ongoing debates that exist amongst professionals from the fields of Psychology, Psychiatry and Law, as outlined in the Introduction, it is perhaps unsurprising that a lay sample lacks a clear understanding of what exactly fitness to plead is.

The two most frequently endorsed themes resulting from analysis of this item were those of ‘Mental health problem/ disorder’ and ‘Unstable/unsound mind’. Within the latter, many participants offered quite vague responses, seemingly unable to pin down what ‘unstable’ or ‘unsound’ might constitute in practice. Those responding that someone with a ‘Mental health problem/ disorder’ might be classified as unfit provided a wide range of examples of qualifying conditions, such as depression, mania, schizophrenia, post-natal depression and anxiety. Other themes make reference to learning disabilities, memory difficulties, physical health problems and insanity, amongst others, as potential reasons why someone may be found unfit to plead.

As discussed in the Introduction, the test of unfitness to plead as it currently stands relates to whether or not the defendant is ‘under a disability’, caused by a physical impairment or a mental disorder (Law Commission, 2010); relevant here is the extent to which this disability will impact upon the defendant’s ability to comprehend proceedings, rather than the mere existence of the condition itself (Exworthy, 2006). Several of the themes emerging from the current study, under this broad definition of disability, could reasonably be described as grounds for unfitness to plead. However, participants did not describe an understanding that the themes they posited must directly influence an individual’s ability to comprehend and engage with their trial. One quote stands out, from a participant who suggested that unfitness to plead might relate to a learning disability and an individual’s not being able to “*understand the court process, take on advice or stand up for themselves”,* suggesting an understanding that a judgement of unfitness

specifically relates to one's inability to engage with the trial process. However, such references were infrequent in the data, with the majority of participants appearing to endorse the idea that certain conditions in and of themselves would render someone unfit to plead.

Given the fact that formal findings of unfitness to plead under the Pritchard criteria are extremely rare, it is difficult to conclude specifically as to which of these themes feature most prominently in 'real-life' cases of unfitness to plead (Rogers, Blackwood, Farnham, Pickup & Watts, 2008). However, based on the few studies that have been conducted in this area, it has been noted that Learning Disability (a theme mentioned 7 times in the current study) tends to feature in about a third of unfitness to plead judgements (Mackay et al., 2007), and that in fact psychosis and psychotic symptoms are the most positively associated with findings of unfitness (Mackay et al., 2007; James et al., 2001). The two most endorsed themes in response to this research question were 'Mental health problem/ disorder' and 'Unstable/unsound mind', and no respondents referred to the term psychosis specifically; however, there were 10 references to schizophrenia, and while the interview did not probe the respondents for their understanding of what schizophrenia meant and how it would affect someone's fitness to plead, it is clear that the importance of psychosis, specifically schizophrenia, in relation to fitness to plead is relatively known amongst this sample.

While respondents by and large did not recognise the importance of the condition or impairment needing to impact on the individual's understanding

and ability to engage with the trial as necessary for a finding of unfitness, there was some recognition of the fact that the impairment would likely need to be considerable so as to qualify as unfit to plead. For example, some participants noted someone might be found unfit if they were in "*in a period of severe mania or depression", "maybe (had) severe autism"*; that mental illness would be a legitimate reason for unfitness if it was "*severe depression, schizophrenia, something very serious*" or if the mental health problem was "*extreme, such as schizophrenia, or those that had been sectioned"*. This aspect of lay understanding of unfitness to plead is in line with the finding mentioned previously that, in a sample of 479 court referrals for fitness to plead evaluations, 73% of those found unfit to plead failed on 3 or more of the Pritchard criteria, indicating that the majority of those found unfit to plead are likely have considerable impairment to their ability to engage with a trial (James et al., 2001). However, the vast majority of respondents did not emphasise the need for a condition to be severe, and many were quite vague in their references to mental 'instability/unsoundness'; given the noted high threshold for unfitness to plead under the Pritchard criteria (Rogers et al., 2009; Peay, 2009), this researcher is led to conclude that, by and large, respondents in the current study likely underestimated the extent of the impairment required for an individual to be found unfit to plead as it currently stands.

4.3.1. Responses in light of revised Fitness to Plead concept

Considering the fact that one of the reasons behind revising the concept of fitness of plead concerns the broadly agreed finding that the threshold for unfitness is too high, it is worth reflecting on whether the respondents' ideas around fitness in fact fit more closely with this newer, comparatively broader version of fitness.

Within the revised concept, fitness to plead comprises, primarily, an individual's decision-making capacity in relation to their trial. As mentioned above, very few participants made specific reference to the importance of an impairment impacting upon someone's abilities in relation to their trial, and, unsurprisingly, no participants referred to an individual's decision-making capacity as being central to their fitness. However, if we consider the literature on factors known to influence one's decision-making capacity, it is worth noting that some participants did indeed refer to factors that are known to influence one's decision-making capacity. As well as cognitive ability, depression and schizophrenia, as discussed above, some participants made reference to a defendant's age, and that if they were '*too young*' they might be considered unfit, as well as referencing situational factors such as the stress of the courtroom, noting that if you're fit to plead, '*you could withstand the stress of the trial and answer questions'*, and being unfit might relate to someone '(not being able to) *cope- there'd be too much stress and they couldn't handle it'*. While this is not a suggestion that the presence of such factors would be sufficient to result in a finding of unfitness to plead under the decision-making capacity re-formulation, it is an acknowledgement that

certain issues touched on here by some respondents, such as one's ability to cope with stress, are known factors in impairing decision-making capacity, and will likely need to be considered if and when fitness to plead assessments come to be based on decision-making capacity criteria.

While it is acknowledged that, on the whole, respondents in the current study have likely underestimated the impairment required to be found unfit to plead, key themes such as a defendant having a mental health problem, with schizophrenia mentioned many times, are in line with real-life findings of profiles of unfitness to plead; it is useful for clinicians to bear in mind that such lay knowledge exists, specifically as such knowledge may inform a defendant's attempt to malinger within a fitness to plead assessment, as will now be discussed.

4.4. Research question 4

'What 'profiles' of malingering do respondents instructed to malinger enact?'

The specific question asked of participants here was: "In what ways did you attempt to be found unfit to plead?", or, in the case of a participant from the control group "…What kind of ways could you have attempted to be found unfit to plead?". The theme most frequently endorsed was that of 'feigning understanding difficulties', followed by the theme of 'didn't know how to seem unfit/didn't try' and 'personal characteristics'. It is worth taking a closer look at these themes and the specific strategies that respondents attempted so as to be found unfit to plead.

Within the theme of 'feigning understanding difficulties', some of the explanations of strategies respondents provided were that (they) '*responded but not in full detail, to show less understanding*', '(*tried to seem) stuck, confused, and not really getting it…maybe like a mild learning disability*' and '*aimed to not really understand, for you to think I was a bit "slow*"', gave '*sort of incomplete answers, maybe some a bit wrong*' and '*kept my answers short/ bit vague to make you think I didn't understand'*. Within the control group, some suggested strategies that they might have tried were as follows: '*I would have tried to be vague, seem like I don't understand, given more "I don't knows'*; '*I could have not given much information, just saying "no comment'* and '*I could try to answer it all wrong, saying "I don't know*"'.

This theme, of feigned understanding difficulties, was the outright 'winner' in terms of being the most frequently mentioned strategy by respondents for attempting to be found unfit to plead; despite the fact that within Research Question 3, a majority of respondents noted that 'mental health problems' or 'unsoundness of mind' were the main reasons why someone would be found unfit to plead, feigning an understanding difficulty, and not feigning a mental health problem, was the most employed strategy within this sample. In fact, not one respondent noted that they attempted to malinger any kind of mental health problem.

There is very little literature with which these results can be compared. One previous study, with a very similar design to the current study, involved a

simulated malingering design, with competency to stand trial measured by the Georgia Court Competency Test (GCCT) and malingered psychopathology measured by the Structured Interview of Reported Symptoms (SIRS) (Gothard, Viglione, Meloy & Sherman, 1995). This study is rare in that the respondents were, as in the current study, also asked to report, post-testing, on the malingering strategy they had employed. Within their sample, 20% had attempted to “Lie without a plan”, 13% of respondents replied that they had attempted to “Act confused” throughout testing, 13% had attempted to “Imitate a disorder”, 10% had attempted to “Imitate a person”, 10% had attempted to “Act crazy”, 10% had attempted to “Respond positively to unusual questions”, with the remainder employing a miscellaneous strategy (Gothard et al., 1995). It is clear from these findings that, while some 13% of participants attempted to act confused, which could be taken as analogous to malingered understanding difficulties in the current data, the majority attempted to portray quite a distinct psychopathological profile of impairment. Key here is the fact that the respondents were asked items relating to specific psychiatric symptoms (on the SIRS), raising the opportunity for such a profile to be malingered. In the current sample, however, when presented with questions entirely concerned with the trial process, respondents perhaps felt less able to malinger a profile other than poor understanding; had the respondents been provided with the ‘prompts’ to report bizarre symptoms, such as within an inventory such as the SIRS, it is possible that those who understood fitness to plead to relate to mental health problems (as indicated in Research Question 3), may have translated this into an attempt at malingering a psychopathological profile of unfitness.

Related to this is the fact that the second most endorsed theme in terms of attempts at being found unfit to plead, was the theme of 'didn't know how to seem unfit/didn't try'. Participants reported that '*it was hard- the questions were quite straightforward so it was hard to know how to fake them; I tried to answer kind of briefly to show that I didn't know enough to say more'*, '*I just answered quite normally- couldn't think of what to do, just answered normally'*; that they '*didn't try anything because I wasn't sure if I knew what it meant properly*' and '*didn't know how to convey being unfit- I thought I'd be asked to try it later*'. From the frequency with which these theme was endorsed, one could conclude that participants felt there were few obvious routes by which they could malinger unfitness to plead on the FTP. While participants within the simulated malingering group did score significantly lower than those within the control group, the frequent occurrence of this theme suggests that this discrepancy could have potentially been more significant had the FTP presented more obvious 'opportunities' for the participant to simulate malingering. This would seem to indicate that participants found the FTP relatively difficult to malinger on, save for attempts at malingering understanding or cognitive difficulties.

This is important in terms of guiding clinicians as to which profiles those inclined to malinger will be more likely to attempt, with the evidence here suggesting that the prospective malingerer may be more likely than not to attempt to portray understanding/cognitive difficulties. Also relevant here are the noted attempts at underperforming discussed previously, such as

individuals from the Simulated Malingerers group getting some relatively easy items such as ‘what is the role of the judge/jury’ quite markedly wrong; it is likely that clinicians will need to be alert to attempts at malingering cognitive difficulties on these more open-ended items, as well as the specific malingering items themselves.

However, there is one other theme that is important to consider, which was endorsed third most frequently (by some 11 respondents), and this is the theme of ‘Personal Characteristics’. Within this theme, respondents noted that certain idiosyncratic behaviours they had employed in an attempt to be found unfit to plead, such as ‘(I) *tried to be rude*”,“*I acted like I didn’t really care, not taking it seriously*” or that they “*tried being exaggerated and focusing on emotionality rather than evidence*” or “(tried) *to be very nervous/ worried/ stressed and unsure of myself*”. Respondents did not make links as to why they believed that these behaviours might be associated with being found unfit to plead, but a sizable minority of respondents took this approach nonetheless. Clinicians should be alert to the possibility that the defendant may be adopting an idiosyncratic approach to malingering, which may or may not be detected by the FTP malingering items but which may nonetheless manifest itself in an impaired score. Generally speaking, however, given the fact that defendants have been judged “highly abnormal” or suffering from a “high degree of mental abnormality, including being delusional” without being found unfit under English/ Welsh law (Rogers et al., 2008), it is likely the case that, within the current sample, respondents’ attempts at malingering would simply not meet the threshold for unfitness to plead.

4.4.1. Responses in light of the revised Fitness to Plead concept

Under the revised Fitness to Plead concept, decision-making capacity will be assessed; specifically, the defendant's ability to understand, retain, use and weigh, and communicate information relating to their decisions.

As can be seen here, the primary malingering strategy employed by respondents was that of malingering 'understanding difficulties'. Within this theme, there was much reference to deliberately trying to be seen to not understand information, or of providing limited answers in response to probing questions. Faced with a defendant employing this approach, the clinician would likely be unclear as to whether the individual fully understands the information at hand, as well as whether or not the individual is capable of retaining, weighing up and communicating their decisions if they are providing limited or incomplete answers. Naturally, providing less information resulted in a lower score on the FTP in this study. Whereas under the Pritchard criteria, less is expected of the defendant in order to be found fit, the FTP, with its explicit focus on the decision-making capacity of the individual, expects the defendant to be able to demonstrate all elements of decision-making capacity. While there are no cut-off scores associated with the FTP, it could still be speculated that were a defendant to employ this malingering strategy, and repeatedly provide limited or incomplete information in response to items on the FTP, their low score would likely lead the clinician to question their ability to make decisions at the level required by a trial. It is tentatively suggested therefore that, while noted above, underperforming at this level would be

unlikely to reach the threshold for unfitness under Pritchard criteria, under this new and lower threshold for unfitness, there is likely a higher risk of malingered understanding difficulties resulting in a clinician returning a finding of unfitness to plead. However, it is not suggested that clinicians would make this finding on the basis of FTP results alone, and is merely offered here as a warning that extra caution be taken, and additional attempts at establishing decision-making capacity be undertaken where indicated.

Finally, in relation to the theme of ‘Personal Characteristics’ and specifically the references to unusual attitudes, exaggeration and emotionality offered by some participants: while these characteristics mentioned were not described by participants as intending to convey a Personality Disorder specifically, there is some overlap between such characteristics and symptoms of different Personality Disorders. It is worth noting that one study has noted the difficulties involved in assessing decision-making capacity amongst individuals with a Personality Disorder, specifically when the respondent was in a state of high arousal or impulsivity (Szmukler, 2009). Whether such symptoms are malingered or otherwise, it is important to reiterate the principles of detailed clinical assessment, potentially carried out over multiple sessions in order to obtain an accurate measure of decision-making capacity, and by extension, fitness to plead.

4.5. Exploration of study characteristics

4.5.1: RSPM: A suitable criterion measure?

As explored in the Introduction, Raven's Standard Progressive Matrices (RSPM) is an example of a neuropsychological test that relies on the performance curve and the fact that malingerers may not always consider item difficulty when deciding which answers to fail; i.e. often performing poorly on easy items, but approaching chance when it comes to difficult items where they do not know the right answer and thus might inadvertently choose it (Conroy & Kwartner, 2006).

As with many simulated malingering studies in the literature, it is a non-verbal neuropsychological test. Whereas the TOMM and other tests such as the Rey 15-item test (See Chapter 1) may have good validity, they rely on the floor effect, or participants failing very easy items; this type of detection strategy can unfortunately be quite transparent to participants. Performance curve detection, on the other hand, should be less easily identified (Bender & Rogers, 2004).

In addition to the foregoing, the RSPM has performed reasonably well across validation studies, with a specificity of 74% and false positive rate of 5% in a large sample validation (McKinzey et al., 1999), and similar rates in a community sample (Andrade, Tharakan & Chari, 2001) (both studies using the rate of decay formula) and is relatively quick and easy to administer.

However, using this same formula in the current study, only 12.5% of the Simulated Malingerers group were identified as Malingering on the RSPM. It is crucial here to refer back to the finding that Simulated Malingerers' *Overall scores* on the RSPM were significantly lower than those from the Control group, suggestive of attempts at malingering. However, using the rate of decay formula did not result in correct classification of Simulated Malingerers in this study.

This finding is not unprecedented, as another study similarly found significant differences between malingering and control groups' overall scores, but not between their rate of decay scores (Andrade et al., 2001). Perhaps relevant here are some of the qualitative findings obtained, which referred to participants attempting to get patterns wrong, but crucially 'not the really obvious ones'. The study conducted by Andrade and colleagues, similar to the current study, was explicit in encouraging *judicious* malingering (so as not to be detected), compared with previous studies which did not make such specifications. With such instructions, participants may have been more wary of underperforming 'randomly', which may explain the lack of performance curve deviations. Although the current study was not directly concerned with exploring the effectiveness of the RSPM, these findings provide some tentative indications that the rate of decay formula may not have been an effective means of identifying malingering amongst a sample instructed to malinger judiciously.

What this means for the current study is that, had we used a criterion measure that was more effective at picking up judicious malingering, this alternative measure would, one assumes, have identified more malingerers; in this case, the disparity between the number of malingerers identified by the FTP and the number identified by the criterion measure would have been even greater, resulting in even worse sensitivity scores for the FTP.

4.5.2. Using an undergraduate sample

In choosing the sample for this study, several factors were considered before deciding upon using an undergraduate sample. Firstly, the literature was consulted and it emerged that while, for the most part, undergraduates are maligned as an unrepresentative sample of convenience, when it comes to studying simulated malingering, they may in fact be a particularly appropriate sample choice. Indeed it has been demonstrated that student malingerers are in fact more sophisticated in their attempts at malingering than are other simulated malingerers recruited from a clinical setting, such that a student sample is a particularly stringent group upon which to validate a test of malingering (Haines & Norris, 2001).

In exploring a test of fitness to plead, the most ecologically valid group that this measure can be tested on is likely to be actual criminal defendants; Brown and her colleagues are in fact in the process of carrying out this very research with the FTP, using a sample of defendants recruited through the Crown Court (P. Brown, personal communication, September 2015).

However, it would obviously be ethically questionable to require this same group to try to deliberately be found unfit (i.e. to malinger). Rather, using a sample of supposedly ‘sophisticated’ malingerers for such a study could be defended as the most suitable option in this case, where the focus is solely on the detection of malingering.

Furthermore, as this study required approximately 70 minutes of the participant’s time, and a moderate sample size, availing of the existing student research participation scheme minimised recruitment time (which would likely have been otherwise very challenging considering the time commitment required of participants) and maximised the time available to actually conduct the testing.

However, having conducted the research, it is clear that there were some unanticipated disadvantages to using an undergraduate sample. One of these relates to the fact that, being first-year undergraduates, the vast majority of the sample was either 19 years of age or younger; it is noted that, for many young adults, at this transitional stage, anxiety, particularly social anxiety, is very common. One study indicated that as many as 33% of undergraduates reported symptoms of social anxiety and that this was especially heightened during the transition to University (Strahan, 2003). One of the key components of social anxiety is the fear of negative evaluation from embarrassing oneself (Campbell, Bierman & Molenaar, 2016). While conducting this study, this researcher observed that many participants seemed quite nervous and concerned with ‘getting it right’. The qualitative finding that many of the group

instructed to malinger ‘did not know what to do/ didn’t try’ may be relevant here. Of course it is possible that many of the group did not know what to try; however, it is also possible that the embarrassment or fear of getting it wrong meant that fewer participants attempted to simulate malingering than would have been optimal.

Related to this is the fact that the research participation scheme prohibited the use of incentives for ‘successful malingering’. It is similarly possible that, applying a cost-benefit analysis, many participants were insufficiently motivated to risk incurring embarrassment, meaning that fewer attempts were made at malingering than may have been the case were there an incentive to do so.

4.5.3. Study instructions

Finally, it is also noted that, although fine-tuned at pilot stage, there appeared to have been some difficulties with some participants misunderstanding the instructions set B, that is, the instructions to malinger. The set-up was indeed initially confusing, as it required participants to imagine that they (themselves) were charged with a crime and that the study they were participating in was an assessment of their readiness for trial. Within the video assessment, they were then required to step into the shoes of someone else (i.e. Sam Taylor) for the purpose of walking through a trial process; however, some participants lost sight of the fact that they were playing a defendant undergoing assessment for trial and instead believed that Sam’s trial was “their” trial. On

this basis, some participants decided that as Sam's case was going quite well, they no longer needed to 'seem unfit' as they (Sam) would be found innocent. This is a step beyond what would be expected of a criminal defendant undergoing this assessment, as in the real-world, respondents would be asked merely to step into Sam's shoes, whereas in the current study, participants were asked to imagine firstly that they had been charged with a crime and were been assessed for their suitability for trial, and then to imagine that, within that assessment, they were being asked to step into Sam's shoes. It is accepted that this was a complex conceit, to expect participants to hold this "meta" idea in mind. It is heartening that so many of the participants paid close attention to the instructions and made attempts to malinger, as evidenced by their answering of the follow-up questions. However, the fact remains that a sizable minority appeared to have misunderstood the complicated instructions, further reducing the valid sample size.

4.6. The future of the FTP

4.6.1. Decision-making capacity, as assessed by the FTP

It is worth reiterating that when assessing an individual's ability to make decisions, the clinician must determine their ability to understand, retain, use and weigh, and communicate information relating to their decision (Mental Capacity Act, 2005).

Within the FTP (Appendix 5), items are included to probe the defendant's knowledge of the court process and court personnel, and their ability to retain information is assessed by means of questions about what they have

remembered from the film vignettes. The FTP also requires the individual to weigh up the advantages and disadvantages related to different decisions required in court, especially decisions around pleading guilty or not guilty, and giving evidence or not, as well as being asked to consider the consequences of being found guilty or not guilty. While this study was not an evaluation of the FTP generally nor of how well it measures decision-making capacity, preliminary results from the researchers indicate that the FTP has a two-factor structure, tapping into 'foundational abilities' and, crucially, 'decision-making abilities (P. Brown, personal communication, 20th May, 2016). While no further information is available at present regarding the foundational abilities factor, it is reassuring that the FTP is tapping into decision-making abilities specifically, considering that this was the remit for a new measure of fitness to plead set out by the Law Commission.

4.6.2. Optimising decision-making capacity at fitness to plead assessment

The experience of engaging in assessment in relation to their fitness to plead, involving considering different pleading options and whether or not to give evidence, amongst other decisions, is likely to be non-routine for many defendants, as well as a stressful situation. As was explored in the Introduction, we know that stress and non-routine situations can impede effective decision-making, and also, that special measures specifically aimed at making the court process less intimidating and stressful and at assisting the

vulnerable individual with understanding and communicating as best they can, already exist (Talbot, 2012).

To this end, it is suggested that the routine inclusion of extra supports at the point of fitness to plead assessment may enable vulnerable defendants to maximise their decision-making capacity at this stage, and prevent against vulnerable but not unfit defendants being found unfit to plead. To reiterate, such extra supports may include providing extra time, visual communication aids, shorter questions and testing times, and an intermediary being used (Gerry, 2012); it has indeed been suggested by the Law Commission that such special measures should in future be incorporated into the point of fitness to plead assessment as indicated, as well as throughout trial for those vulnerable defendants found fit to plead (Law Commission, 2010; Howard, 2011).

It is suggested here that, as well as optimising decision-making capacity for vulnerable defendants, the routine inclusion of extra supports could also be regarded as an additional safeguard against malingering; future research focusing on vulnerable respondents likely to perform quite poorly on the FTP being provided with extra supports could establish an accurate baseline score for this population, such that a score below this level achieved 'with supports' may be indicative of malingering. This new malingering 'cut-off' score could be applied with some confidence as clinicians would be reassured that it is based on the range of scores achieved by vulnerable defendants on the FTP under

optimal conditions, such that a score beneath this cut-off can be said to truly reflect underperformance, rather than unfitness.

4.6.3. Will the FTP be adopted by clinicians?

As we have seen, there has been one previous measure of fitness to plead developed for use in the U.K., namely the MacCAT-FP, which appears to be infrequently used in clinical practice or research (Akinkunmi, 2002; Brewer, 2013). This inevitably raises the question of whether or not the FTP will be met with the same fate. Certainly, a considerable number of psychiatrists have expressed their continued concerns around adopting a standardised measure (Royal College of Psychiatrists, 2011). However, it is important to note that primary amongst the concerns noted by psychiatrists in regards to a new test of fitness to plead was the fact that there would be no baseline against which such a defendant's score could be compared. It is suggested here that the validation studies that continue to be undertaken by the FTP's authors, as well as this current study, will go some way towards establishing an initial baseline. Regardless or not of whether there is a baseline, the administering of such a test could be viewed as an efficient means of establishing areas of difficulty for the defendant, which can be probed further during the clinical interview; it cannot be overstated that the FTP is not intended to replace clinical assessment, but rather to form a strand of it which can begin to help standardise fitness to plead assessment.

Relevant here is the fact that the Law Commission have recently revised their stance regarding the medical expertise requirement for experts conducting fitness to plead assessments, such that psychologists should be included amongst this group of experts (Law Commission, 2016). It is worth noting that psychologists' training will typically involve the critical evaluation and administration of standardised testing (with this assessment aspect of training increasing in recent years) (Ready & Veague, 2014; Krishnamurthy, VandeCreek, Kaslow, Tazeau, Miville, Kerns, Suzuki & Benton, 2004) and that a great number of psychologists working in the clinical and forensic fields will also have considerable experience in testing for malingering as part of a formal battery of assessments. Perhaps if psychologists are more central in conducting these assessments in future, the FTP will be more likely to be routinely adopted.

However, in the U.S.A., where fitness assessments are typically carried out by forensic psychologists, one study has revealed that when asked about the specific measures they use to assess fitness or competence to stand trial (CST), forensic psychologists mentioned the Weschler Adult Intelligence Scale-III (WAIS-III) and the Minnesota Multiphasic Personality Inventory 2 (MMPI-2) more often than any specific CST instruments; furthermore, only one CST instrument was mentioned, the MacCAT-CA (Lally, 2003). Psychologists continuing to use intelligence or personality measures in order to assess CST, rather than standardised measures developed specifically for that purpose, is something which is quite concerning, considering the rationale for the use of standardised testing being to establish transparency

and consistency across competence and fitness assessments (Chantler & Heseltine, 2007) and the potentially increased confidence of the courts in the results of an evaluation involving the use of a specifically-developed standardised fitness measure (Akinkunmi, 2002).

It is unclear whether the new FTP will be passed over by many, in favour of long established and familiar psychometric tools, as suggested by the situation in the U.S.A.; it is likely that in order for the FTP to be routinely adopted, considerably more research will be required in order to boost the confidence clinicians would have in using it.

4.7. Conclusions

4.7.1.Summary of study's strengths and limitations

It is noted that one of the strengths of the current study is that it managed to recruit a moderate sample size, and quite narrowly missed out on achieving the sample size required for sufficient power (recruiting 64 participants, with an aim of recruiting 70).

In adopting a mixed-methods approach, this study improved on the majority of previous simulated malingering designs, exploring not only the detection of malingering, but the method and motivations behind the respondents' attempts at malingering. This has meant that we have been able to explore some of the thinking behind individuals' approaches to malingering, and specifically, to malingering fitness to plead; providing this context should

enhance both the clinical and theoretical applicability of these findings. Furthermore, by anchoring the discussion in light of the decision-making capacity implications, the findings are directly applicable to the Law Commission's revised concept of fitness to plead.

In terms of limitations, the difficulties in identifying an alternative suitable sample group notwithstanding, it is acknowledged that the use of undergraduates limits the overall generalisability of the results to another population. It is noted, for example, that suspected malingerers in real-life settings tend to have had lower levels of education and to possibly be in the low average range of intelligence (Haines & Norris, 2001), evidently dissimilar to a typical undergraduate population.

It is unclear, however, whether the use of a simulation design can be wholly described as a limitation in this study. Certainly, while simulation designs are the prevalent design technique within the malingering literature, many have argued against such designs due to the threats to external validity inherent in non-organic malingering; furthermore, it has been demonstrated that the presence of incentives, either positive or negative, plays a key role in determining the quality and quantity of malingered symptoms (Rogers & Cruise, 1998). However, it has also since been demonstrated that student malingerers perform similarly to suspected 'real-life' malingerers, suggesting that the use of simulated designs may be justified (Brennan & Gouvier, 2006).

As mentioned above, it is also acknowledged that within this study, it was not possible to incentivise students to succeed in their attempts at malingering, which may have yielded more realistic results.

Furthermore, it was not possible to approximate the stress and threat that would likely accompany a ‘real-life’ assessment of fitness to plead, and this is in line with Rogers observation that one of the most limiting aspects of simulation designs remains the inability to approximate the serious consequences associated with unsuccessful malingering (Rogers & Cruise, 1998).

Finally, it was identified following the completion of the testing phase that there had been some minor discrepancies between the exact wording of the instructions given to the two groups. Under ideal experimental testing conditions, the only difference in instructions would have been the specific directions given to each group, i.e. to malinger or to perform to the best of your ability; all other description of the task should have been identical. It is regrettable that these discrepancies were overlooked and not addressed at an earlier stage. Following the pilot phase, it was clear that, for the simulated malingerers group, it was particularly important that participants understood that they were watching someone else’s trial as, otherwise, they may ‘pretend’ to be Sam while answering the FTP. For this reason, this reminder that they were watching someone else’s trial was included in the simulated malingerers group’s instructions, but unfortunately not in the instructions for the control group. It is not thought that this will have influenced the outcome, as the

control group did not have anything to try to convey to the researcher, and answering as if they were Sam had no impact on their score on the FTP. Regardless, the researcher acknowledges that this oversight was unfortunate and one that was avoidable.

4.8 Recommendations for administering the FTP and improving malingering detection with use of the FTP

The following recommendations are offered on the basis of literature review and the current study's findings, the constraints of the study's sample and limitations notwithstanding.

Firstly, it is suggested that, ideally, the FTP would be updated to include a more comprehensive malingering detection strategy; as discussed previously, this is not without precedent, as both the ECST-R and the GCCT in the U.S.A. have been revised with specific malingering scales, resulting in impressive sensitivity and specificity rates. As it currently stands, the FTP's four malingering items are insufficient as a stand-alone scale of malingering, necessitating further testing of malingering on the part of the clinician. Furthermore, the current items test only for malingered cognitive impairment; it is suggested that additional malingering scale(s) should also include items designed to measure malingered psychopathology. Within the current study, it was clear that many participants were familiar with the concept of psychopathology being a likely reason that one would be found unfit to plead. It is possible that some respondents, with such information in mind, might

attempt to underperform in an idiosyncratic way on the FTP, which, were a psychopathology malingering scale to be included, may be more likely to be detected.

However, so as not to delay the launch of the FTP, it is suggested that the clinician can take certain steps to optimise malingering detection on the FTP as it currently stands. As mentioned previously, the clinician should endeavour to be alert to attempts at malingering throughout (and not just on the specific items), as apparent attempts at underperforming on open-ended items were observed in this study, and could be further probed as part of the clinical assessment. On the basis of the current results, it is suggested that clinicians be particularly alert to attempts at malingering cognitive impairment, as this was the primary method by which participants noted they had attempted to be found unfit to plead.

As mentioned previously, it is suggested that the clinician carry out an additional malingering assessment as part of the clinical assessment of fitness to plead, if it is suspected that the defendant is underperforming; one study indicates that the two most commonly used stand-alone measures of malingering are the Rey 15-item test and the Test of Malingered Memory (TOMM) (Slick, Tan, Strauss & Hultsch, 2004). The clinician may be guided by the profile of malingering the defendant appears to be attempting and choose the measure accordingly.

It is also advised that the clinician be conversant with the various factors that may influence an individual's decision-making capacity, such as the impact depression may have on their temporal abilities, and the effect of age and stress, so as to ensure that such aspects are factored in to a clinical assessment of reformulated fitness to plead.

Finally, as was discussed in the Introduction, there is a need to balance protecting those who are 'truly' unfit to plead from standing trial and the consequences that that entails, with ensuring that those defendants who could be facilitated to engage with their trial if the right supports are in place, are not unjustly excluded from doing so. It is therefore reiterated that appropriate extra supports (such as visual communication aids, use of advocates, intermediaries etc) be provided at the point of fitness to plead assessment, such that the clinician can make as fully informed a judgement as possible regarding the individual's decision-making capacity and thus their fitness to plead.

4.9. Implications

4.9.1. Implications in terms of the literature around FTP and malingering

This study has demonstrated that while, on the whole, respondents likely underestimated the level of impairment required to be found unfit to plead, key themes such as a defendant having a mental health problem (with

schizophrenia mentioned many times) are in line with real-life findings of unfitness to plead. There have been no other comparable studies conducted in the U.K. that the author is aware of, and therefore the current study constitutes a baseline of lay knowledge regarding fitness to plead; only future research will reveal if this knowledge develops over time, or when the re-formulated concept of fitness to plead is implemented.

The current study indicated that, as well as the varied ideas that exist around what fitness to plead constitutes, so too did the sample's approaches to malingering. Again, there are have been no other such studies in the U.K. against which these findings can be compared, but it is offered that the lay sample's clear preference for malingering cognitive/understanding difficulties indicates the readiness with which this route of malingering was called to mind. Idiosyncratic suggestions of the sample relating to personal or personality characteristics are also noted and may form an important part of this baseline understanding of how a lay population may malinger unfitness to plead. The distinction between participants suggesting cognitive impairment versus something more akin to a Personality Disorder may be taken as tentative further support for the division of malingering along disparate profiles, in line with much of the recent literature, rather than an overarching malingering domain.

4.9.2. Implications in terms of clinical practice

This study has clinical implications in terms of providing further validation for this measure, which has yet to be launched; the Law Commission is awaiting findings from the validation of the FTP, with the current study one strand in this ongoing process.

The FTP appears to be an ecologically valid and engaging measure, and while the current study flagged up room for improvement with regard to its ability to detect malingering attempts, it is of course very promising that such a tool is undergoing comprehensive validation; it is hoped that this process will yield a robust measure that clinicians will have confidence in using and that, crucially, widespread use can bring some consistency and a common frame of reference to fitness to plead assessments.

The study has provided an in-depth exploration of malingering which has often been neglected within the fitness to plead literature. It is hoped that this exploration and its dissemination will highlight the importance of malingering detection in such assessments, so as to ensure that, under a lower threshold of unfitness to plead, the finding of unfitness to plead (and the serious consequences that this entails) will not be misapplied.

Finally, in terms of this study's implications for the field of clinical psychology, the reader is reminded that, as of this January, the Law Commission has revised its stance such that clinical psychologists should be granted status to 'officially' provide expert evidence alongside psychiatrists regarding a

defendant's fitness to plead. Considering the specialist training that clinical psychologists have in the use of standardised measures, as well as in the assessment of effort and malingering, it is suggested that this group is particularly well-suited to spearheading the introduction of a validated measure to improve the quality and consistency of assessments of fitness to plead; improvements which, so many agree, are desperately needed.

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Appendices

Appendix 1: Royal Holloway, Departmental Ethics Committee Approval

From: Psychology.it.support@rhul.ac.uk

Date: 22/06/2015
To: XXXX@rhul.ac.uk
Cc: PSY-EthicsAdmin@rhul.ac.uk
Subject: 2015/034R1 Ethics Form Approved

Applicant Name: Maeve Wallace

Application title: Establishing the accuracy of the “Fitness to Plead” tool in identifying malingering

Comments: This was sent back to one of the original reviewers, and it is now

Approved.

Good luck with your research.

(Reviewers’ original comments are included here for your information):

Revision required. In your revision, please provide the information requested by the reviewers below, which they require in order to fully evaluate the proposal:
There is no information about participant "recruitment". What does "within RHUL" mean? Students? Faculty? Advertisement? How will participants be compensated for participation?
Please describe the video in detail. This is the one point where participants can be distressed. I've personally seen participants become distressed by videos of crime scenes, even when seem innocent to the researcher so this should not be overlooked. But no detail is given in the application. I had to Google ABH to discover it involved descriptions of violent acts, since this abbreviation was not defined in the application. Where did the video come from? Is it actors? Or real? Do participants accept this as real? The attached documents tells the participant to imagine they are in the video but they obviously are not. I think the contents of the video should be described so it is clear exactly what the task is.

Appendix 2: Participant Debriefing Sheet

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Debriefing

Thank you for taking part in my research, it is very much appreciated.

You may have received instructions which asked you to try to deliberately be found unfit to stand trial. The reason for this is that my research was also trying to look at whether the questionnaire about the court process would detect an individual's attempt to respond in a misleading way.

For those of you who received instructions to perform to the best of your ability, the reason for this was so that we would have control data against which to compare the results of the other group who were intentionally misleading the researcher.

If you have been affected by the tasks you've been asked to complete today, please do not hesitate to contact myself, in confidence. Alternatively, you may wish to access support from the Student Counselling Service, who can be contacted on 01784 443128

If you have any questions about this research or would like to discuss your experience of it further, please do not hesitate to get in touch with me at Maeve.Wallace.2013@live.rhul.ac.uk

Maeve Wallace
Trainee Clinical Psychologist

Appendix 3: Participant Instructions

Instructions A: Control Group

- I would like you to imagine that you have been charged with committing an un-named crime. You are meeting with your allocated psychologist who will carry out some tests, which will consist of a video task and some visual recognition tasks;

- In the video task, you will be watching SOMEONE ELSE's FICTIONAL TRIAL. This video task will explore your understanding of trials.

- Please answer all questions/ complete all tasks to the best of your ability.

Appendix 3 (Continued)

Instructions B: Simulated Malingerers Group

- I would like you to imagine that you have been charged with committing an un-named crime. You are meeting with your allocated psychologist who will carry out some tests, which will consist of a video task and some visual recognition tasks;

- In the video task, you will be watching SOMEONE ELSE's FICTIONAL TRIAL. This video task will explore your understanding of trials.

PLEASE NOTE: I would like for you to imagine that you are very keen to avoid having to stand trial for your own crime. You have therefore decided that you want to be found to be UNFIT to stand trial. Throughout your meeting with your psychologist, when answering video questions/ visual tasks, you must try your hardest to be found UNFIT to stand trial.

HOWEVER: please also remember that you should not be so obvious that the examiner picks up on your attempts to perform below your abilities. If you are detected, you WILL have to stand trial."

Please read these instructions again to be sure you have understood.

Take some time to prepare how you will be found 'unfit' to stand trial.

Appendix 4: Study advertisement

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ROYAL HOLLOWAY UNIVERSITY OF LONDON

****Participants needed! Win a £25 Amazon voucher****

Have you ever wondered about what goes on in a courtroom..?

My name is Maeve Wallace and I'm a Doctorate student in the Department of Clinical Psychology.

I'm looking for participants to watch a video about a fictional trial and answer some questions about what they understand about the trial process. There will also be a brief test of reasoning using patterns.

The study takes approximately 1 hour/1 hour 10mins. Participants will be entitled to 3 research credits for their participation; if participants are not eligible for the research credit scheme, they will be entered into a draw to win one of the Amazon vouchers worth £25 each!

If you are interested, please contact me at Maeve.Wallace.2013@rhul.ac.uk or sign up via the online RHUL research portal at https://psychology-rhul.sona-systems.com/

The study takes place in the Bowyer Building.

Thank you in advance for your participation,

Maeve Wallace
Trainee Clinical Psychologist

Supervised by:
Dr. Simone Fox and Dr. Emily Glorney

Appendix 5: FTP tool

FTP- TOOL

OVERALL TEST INSTRUCTIONS

Instructions to subject: *I am going to ask you to imagine that you are a **DEFENDANT (the person accused of a crime)** called Sam Taylor. Imagine that you, Sam Taylor, have been charged with an offence of unlawful wounding.*

I will ask you to watch a film which shows what happened when you attended Crown Court for your trial. The film will begin with two meetings with your defence barrister outside the courtroom. You will then watch a witness, (the person who you are accused of wounding) in the case giving evidence in the courtroom.

I'm now going to ask you some questions to check you understanding of those test instructions:

- If incorrect response given, provide correct answer and repeat 4 questions again.
- Repeat questions 1-4 until satisfactory answers [without prompts] are provided.
- After 3 attempts, if subject has failed to obtain a total score of 4 testing should be terminated.

	1st	2nd	3rd	Scoring Criteria
Are you being asked to imagine that you are a defendant facing a charge?				*Yes* or variant required
What is your name in this task?				*Sam (Taylor)* is required
What have you been charged with?				*Wounding* is required
You will watch a film about your attendance at Court. What will I then get you to do?				*Answer questions* or variant is required

TEST 'SCENE SETTING'

- Photograph presented to subject: David Mullen.

Instructions to subject: *This is David Mullen. He is the bouncer at the Royal Oak pub. David Mullen has accused you of hitting him during a night out.*
I will now give you a few details about the charge against you. In March you were in a pub with two friends (celebrating your friend's birthday). It is alleged that an argument took place with a bouncer and <u>you</u> hit the bouncer.
You are now going to view a meeting with your solicitor and defence barrister. Here the charges being brought against you will be explained.
Please listen carefully as I will be asking you about what was discussed. Is that clear?

Scenes 1 & 2 played – 3 minutes

Instructions to subject: *Based on the information given by your defence barrister,* ***please tell me as much as you can remember of what happened IN THE PUB that night?*** When recall is finished prompt subject with "*Is that everything?"*

Q1. SECTION 1: First Attempt. Subject's free recall is recorded verbatim

.....

.....

.....

Instructions to subject: *Right, so the key points in that scene:*

1. *the bouncer came over and asked you to leave the pub at 1 a.m.*
2. *The bouncer had a bottle in his hand.*
3. *Your friend, Alex, hit the bouncer.*
4. *You grabbed Alex and tried to intervene*
5. *You were hit on the side of your face with a bottle.*
6. *You were wearing a yellow top.*

Emphasise the points the subject missed.

6 ☐

Q2. What do you understand about the charge against you?

.....

.....

3 ☐

Q3. If you were pleading 'not guilty' what does this mean? **if participant does not give say "prosecution will have to prove it or there will be a trial, prompt with "if you were pleading not guilty what might this mean for your case?" / "why might you choose to plead not guilty?"*

.....

..... **2** ☐

Q4. If you were pleading 'guilty' what does this mean? **if participant does not say either there will be a trial or more lenient sentence, prompt with "if you were pleading guilty what might this mean for your case?" / "why might you choose to plead guilty?*.....

.....

..... **4.** ☐

Q5. What does evidence mean?

.....

.....

..... **2** ☐

UNDERSTANDING ROLES OF COURT PERSONNEL AND THEIR OWN ROLE

Instructions to subject: *Okay, the next part of the film is where you are in the dock looking around the courtroom at the start of the trial. You will be shown all the people in the courtroom. Please watch carefully. I will then ask you some questions about the roles of the people in the courtroom. Is this clear?*

Clarify points of misunderstanding before continuing.

Scene 3 played

Photograph presented to subject: courtroom scene.

SECTION 2:

Q6. What is the role of the JUDGE in court? **"What else does the judge do?"*

.....

..... **2** ☐

Q7. What is the role of the DEFENCE BARRISTER? **"What else does the defence barrister do?"*

.....

.....**2** ☐

Q8. Please rate your agreement with this statement: "A defence barrister should always act in their client's best interests."

Strongly	Disagree	Neither	Agree	Strongly

Q9. Please rate your agreement with this statement: "A defence barrister should always follow their client's instructions."

Strongly Disagree	Disagree	Neither Agree/Disagree	Agree	Strongly Agree
0	**1**	**2**	**3**	**4**

Q10. What is the role of the PROSECUTING BARRISTER? **. "What else does the prosecuting barrister do?"*

.....

.....**2**. ☐

Q11. What is the role of the JURY? ** "What else do the jury do?"*

……

……**2.** 

Q12. What would you, as a DEFENDANT, need to do in court? ** "What else might the defendant do?"*

……

……**3** 

……

Instructions to subject: *Your trial will now start. You will see the prosecuting barrister talking to the jury at the beginning of your trial. He will then begin to question the bouncer, David Mullen. I want you to watch and listen carefully to the proceedings and as before I will ask you some questions along the way. Is this ok?* Clarify points of misunderstanding before continuing.

Scene 4 & 5 played – 3 mins

SECTION 3:

Can you please tell me what the new piece of evidence was? Administer but do not score.

Q13. What does this mean for your case?

.....

..... ☐ 2

M1. Had DM mentioned before that the person that attacked him was holding something? Malingering item. Score separately. **Y** ☐ **N** ☐

☐ 1

Q14. Did DM raise an issue about the group of 3 or 4 people?
*** if so, what?**

.....2

☐

Instructions to subject: *Right, now the trial is going to continue. You will firstly see the prosecuting barrister continuing to examine David Mullen. After that David Mullen will be questioned (cross-examined) by your defence barrister and the barristers will then talk to the Judge without the jury present.*

SECTION 4:

M2. Did DM say someone hit him? Malingering item. Score separately.

* if yes, ask where?

.....

..... 1 ☐

M3. Was DM injured? Malingering item. Score separately.

Y ☐ N ☐ ☐1

M4. Did DM say that he managed to strike the person or not? Malingering item. Score separately.

Y ☐ N ☐ ☐1

Q15. When DM said that he left the pub, what did he say happened?

.....

.....1 ☐

Scene 9 & 10 played. 2mins 30 seconds

Q16. What are the advantages of giving evidence?

.....

.....2 ☐

.....

.....1 2.....

Q18. Please rate how well you think your case is progressing:

Very Badly	Badly	Neither Bad/Well	Well	Very Well
0	**1**	**2**	**3**	**4**

Q19. **Why do you think that?**

.....

.....**1** ☐

Q20. Please rate how fairly you think you are being treated in this case:

Very Unfairly	Unfairly	Neither Fairly/Unfairly	Fairly	Very Fairly
0	**1**	**2**	**3**	**4**

Q21. Why do you think that?

.....

.....**2** ☐

Q22. Please rate how likely it is that you will be found Guilty:

Very Likely	Likely	Neither Likely/Unlikely	Unlikely	Very Unlikely
0	**1**	**2**	**3**	**4**

Q23. Why do you think that?

.....

..... **2**. ☐

Q24. If you were found guilty, how much do you think it will affect your life?

Somewhat	Quite a lot	Badly	Devastating
0	**1**	**2**	**3**

Q25. Why do you think that? * If participant says that it will affect many areas of their life, but doesn't elaborate, prompt with "such as?"

.....

..... **3** ☐

Q.26. If you were found not guilty, how much do you think it will affect your life?

Not at all	Somewhat	Quite a lot	A great deal
0	**1**	**2**	**3**

Q27. Why do you think that? * If participant says that it will affect many areas of their life, but doesn't elaborate, prompt with "such as?"

.....

.....

.....3☐

Q28. What sentence would you expect to receive if found guilty? * *If participant says it depends on whether they had a knife or not, but only gives one sentence, prompt for a sentence for both with a knife and without a knife. If participant says depends on previous convictions, answer based on a clean record. (i.e. they are a person of good character).*

.....

..... **3**

☐

Q29. Why would you expect that sentence?.....

.....

.....**3**☐

Appendix 6: Participant Information Sheet

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ROYAL HOLLOWAY UNIVERSITY OF LONDON

Information Sheet

Exploration of the lay understanding of the court process

My name is Maeve Wallace and I am a Trainee Clinical Psychologist at Royal Holloway, University of London. I am carrying out a study which will be looking at individuals' understanding of the court process, as well as a short test on reasoning using patterns. This project is being supervised by Dr. Simone Fox and Dr. Emily Glorney.

Your participation will contribute to the development of a tool which will be used by clinicians in determining whether an individual is capable of standing trial.

If you decide to take part, I will ask you to watch a short video of a fictional courtroom scenario and will ask you some questions about what you have seen. I will also ask you to complete a short test of pattern recognition. This will take around one hour and will take place in the Department of Psychology. Nobody except myself and my supervisors will be allowed to see responses and in the study you will be known only by a number, to ensure that your information remains completely confidential.

You have the right to refuse to take part in this study and to withdraw at any point should you wish to do so.

Please keep this sheet for your own reference. Please feel free to ask any questions before you complete the consent form overleaf. It will be stored separately from the anonymous information you provide for the research project. This study has been reviewed and approved by the Psychology Department's ethics panel at Royal Holloway, University of London.
If you would like to discuss any aspect of the research, you can contact me by email at Maeve.Wallace.2013@live.rhul.ac.uk or by phone on 01784 414012.

Thank you in advance for your participation,

Maeve Wallace
Trainee Clinical Psychologist

Appendix 7: Consent Form

Consent form

You have been asked to participate in this study, which is being carried out by Maeve Wallace.

Have you (please circle yes or no):

- Read the information sheet about the study? yes no
- Had an opportunity to ask questions? yes no
- Got satisfactory answers to your questions? yes no
- Understood that you're free to withdraw from the study at any time, without giving a reason yes no

(and without it affecting your education if applicable)?

Do you agree to take part in the study ? yes no

Signature: _____

Name in block letters: _____

Date: _____

NB: This consent form will be stored separately from the anonymous information you provide.

Appendix 8: Participant Demographics sheet

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ROYAL HOLLOWAY UNIVERSITY OF LONDON

Demographic profile

Please note, all responses to the below are completely confidential.

Age:

Gender:

RHUL Course:

Any current or previous involvement with the criminal justice system, for example, as a victim or a defendant in court proceedings, or as a jury member?

Appendix 9: Testing Instructions for Participants

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Please read the information below:

NB: There are two different sets of instructions for this research. You will either receive Instructions A or Instructions B.

I, the researcher, do not know which instructions you have received so if you could please try to follow the instructions WITHOUT letting me know which set you have received.