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The mind in the courtroom: on forensic mental health reports in judicial decision-making about guilt and sentencing in the Netherlands

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The mind in the courtroom

On forensic mental health reports in judicial decision-making about guilt and sentencing in the Netherlands

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List of abbreviations

APD	Antisocial personality disorder
CC	Criminal Code
CCP	Code of Criminal Procedure
DSM	Diagnostic and statistical manual of mental disorders
FMHE	Forensic mental health expertise
FMHR	Forensic mental health report
GBMI	Guilty but mentally ill
HCR-20v3	Historical Clinical Risk Management-20, Version 3
NGRI	Not guilty by reason of insanity
NIFP	Nederlands Instituut voor Forensische Psychiatrie en Psychologie
NRGD	Nederlands Register Gerechtelijk Deskundigen
PBC	Pieter Baan Centrum
TBS	Terbeschikkingstelling

1 General introduction

1.1 Background

Serious criminal cases, such as homicide and sex crimes, often receive a lot of public attention. In the Netherlands in about 26% of such cases the defendant is subjected to a forensic mental health evaluation, because it is possible that mental illness contributed to the alleged offense.[1] A recent example is the case of 49-year-old Sjonny W. In November 2021, he was convicted of three counts of manslaughter by the court of appeal in Amsterdam.[2] Two counts were cold cases from 2003 and 2004. The third victim disappeared in 2017. After their deaths, the defendant disposed of their bodies: the first victim was left naked on the banks of a lake, the second victim was cut into pieces and her body parts were put in garbage bags and dumped on the street, and the third victim has never been found. The defendant persistently denied all allegations and involvement with any of their deaths. Evidence linking him to the three deaths was limited. Because of the number of offenses covering a span of 14 years and the brutality of the crimes among other things, Sjonny was subjected to multiple forensic mental health evaluations during the course of the criminal procedure (Van Kordelaar, 2002). He cooperated with the evaluations, but his denial complicated matters, because his emotions and behavior at the time of the alleged offenses could not be discussed. The experts ultimately concluded that Sjonny suffered from an antisocial personality disorder, alcohol abuse and mild cocaine abuse. Yet experts could not establish a relation between these disorders and the offenses, nor could they provide advice about recidivism risk or appropriate treatment measures. The court ultimately found Sjonny W. fully criminally responsible and sentenced him to a prison sentence of 19 years and 11 months as well as involuntary commitment to a maximum secured, forensic psychiatric hospital (also known as a TBS measure). This verdict appears straightforward: Sjonny seems a dangerous and disordered man who is capable of severe violent acts. He needs to be treated and incarcerated for an extended period. However, in practice decisions about guilt and sentencing in cases with a forensic mental health report (FMHR) are more complex.

1 Personal communication with Dutch Institute for Forensic Psychiatry and Psychology (NIFP) in October 2022.

2 ECLI:NL:GHAMS:2021:3386.

An FMHR contains an abundance of information about a defendant. In a forensic mental health evaluation, experts, usually psychologists or psychiatrists, talk to the defendant about their thoughts, emotions, and behavior at the time of the alleged offense. They conduct psychological tests and talk to the defendant's social network. After a thorough evaluation, experts present their conclusions in a report. An FMHR contains information on whether a mental disorder was present at the time of the offense and whether this disorder affected behavior and decision-making at the time of the offense (in terms of criminal responsibility). The report describes how this disorder may affect future behavior and provides advice on possible treatment measures (Nederlands Instituut voor Forensische Psychiatrie en Psychologie, 2022). This report is added to the case file which is available to the court prior to trial. As such, an FMHR is an important source of information about the defendant aimed to aid the court in decisions about appropriate sanctions. Sanctions may include (compulsory) treatment measures, such as the TBS measure. The Dutch criminal justice system is founded on the premise that offenders are punished because they have free will and are deemed responsible for their actions (De Hullu, 2021, section 39 Criminal Code [CC]). It is generally accepted that defendants who commit offenses while mentally disordered should not be dealt with in the same way as sane defendants. As such, an FMHR can have considerable consequences in criminal proceedings, but research is currently lacking on the extent and manner in which an FMHR is used and what its effects are on sentencing decisions. This gap in knowledge is problematic because sentencing decisions are supposed to be transparent and respect important principles of legal certainty, equality, and consistency. The legitimacy of sentencing decisions therefore benefits from insight into the use of FMHRs in these decisions.

While the FMHR is intended to aid sentencing decisions, it is supposed to be (formally) irrelevant with respect to the question whether the defendant *committed* the alleged crime. An FMHR provides information about the person of the defendant and is not intended to be used for fact-finding about the offense. Guidelines for forensic mental health experts caution that information from an FMHR should not contribute to the evidence against the defendant and decision-making about guilt (Beukers, 2011; Nederlands Instituut voor Forensische Psychiatrie en Psychologie, 2022; Nederlandse Vereniging voor Psychiatrie, 2013). Such concerns can be especially relevant when a defendant denies the allegations and when incriminating evidence is relatively scarce, such as in the aforementioned case of Sjonny W.. It is feared that in such cases, FMHRs may contribute to the verdict, albeit because the purpose of an FMHR is to determine whether there is a relation between a mental disorder and the alleged offense (Nederlands Instituut voor Forensische Psychiatrie en Psychologie, 2022). From a cognitive psychological perspective, which will be discussed below, it is possible that such context information can affect decision-making about guilt. However, it is currently unknown whether such concerns are valid and if an FMHR contributes to decisions about guilt. And if so,

whether judges are aware of such an unwarranted effect. This knowledge is important because an unintentional effect of FMHRs on decisions about guilt, would violate the presumption of innocence by creating bias against the defendant based on his personal characteristics, such as his mental health. This would ultimately violate a defendant's right to a fair trial.

The aim of this dissertation is to study and explore the effects of an FMHR on judicial decisions about guilt and sentencing. To further understand any effects, another aim is to study how an FMHR is used in the decision-making process that ultimately leads to certain decisions about guilt and sentencing. A mixed-method approach consisting of a systematic literature review, two experimental vignette studies, and focus groups, is applied to answer the two research questions in this dissertation:

1) *To what extent and in what manner does an FMHR affect decisions about guilt?*
2) *To what extent and in what manner does an FMHR affect sentencing decisions?*

1.1.1 Reading guide

The remainder of this introduction is structured as follows. Paragraph 1.2 presents the legal framework and practice of forensic mental health evaluation in Dutch criminal proceedings. Paragraphs 1.2.2 and 1.2.3 discuss the relevant legislation regarding the use of an FMHR in judicial decisions about guilt and sentencing. Paragraph 1.3 presents prior empirical research regarding decisions about 1) guilt and 2) sentencing respectively. Finally, paragraph 1.4 describes the outline of the current dissertation and provides an overview of the other chapters (see Table 1.1).

1.2 Legal framework

1.2.1 Forensic mental health evaluation

Not every defendant in the criminal justice system is subjected to a forensic mental health evaluation. Certain case factors can be indicators for a forensic mental health evaluation. These include among others: a history of mental disorder, severity or brutality of the crime and strange behavior during criminal investigation (Van Kordelaar, 2002). The prosecutor or investigative judge (in Dutch: *rechter-commissaris*) can ask a psychologist or psychiatrist from The Dutch Institute for Forensic Psychiatry and Psychology (NIFP) to do a short pre-trial assessment. Based on this assessment, the NIFP advises the judge or prosecutor which defendants need a complete forensic mental health evaluation. Since 2020, as a result of shortages in forensic behavioral experts, a

consultation between the Prosecution's Office and NIFP has been implemented to determine in which cases a forensic mental health evaluation is preferred (Van Kordelaar, 2020). NIFP will match a case to a behavioral expert who is registered in the Netherlands Register of Court Experts (NRGD; section 51i and further Code of Expert Witnesses in Criminal Proceedings) and the prosecutor or investigative judge eventually appoints the expert (sections 150, 176 and 227 and further in the Code of Criminal Procedure [CCP]).

NIFP also advises which type of evaluation is necessary. There are multiple types of mental health evaluations depending on the nature and complexity of mental health problems, specific characteristics of the crime and what type of treatment measure is considered:[3] 1) a single psychological *or* a psychiatric assessment on an outpatient basis; 2) a multidisciplinary assessment by a psychologist *and* psychiatrist on an outpatient basis; 3) a triple mental health assessment in which the multidisciplinary assessment is expanded with a report from a social worker; 4) a multidisciplinary assessment at an inpatient, clinical facility (Pieter Baan Center [PBC]). In this last instance the defendant is observed and evaluated during a seven-week period (sections 196, 198 and 509g CCP). Reasons for the court to order multidisciplinary, clinical evaluation include the severity of the crime, the severity of the suspected psychopathology, the immediate security risk, and potential societal disturbance or media attention for the case in question (Van Kordelaar, 2002).[4] Defendants who refuse all cooperation with a forensic mental health evaluation are usually observed in the PBC. Their observation period can even be extended to 14 weeks to obtain sufficient information (section 198 sub 2 CCP). Each evaluation is guided by a standardized format of questions which forensic mental health experts have to answer for the court (Van Panhuis, 1994, 2000). These questions have been adapted throughout the years into the current format for adults[5] that is used since January 1st 2020:

0. If the defendant refuses cooperation with the evaluation, what are the considerations of the expert as a result of this uncooperative attitude?
1. Is the examined individual suffering from a mental disorder, intellectual disability, or psychogeriatric condition?[6] If so, how can this be described diagnostically?
2. What was the individual's mental condition at the time of the alleged offense?

3 For example, a multidisciplinary FMHR is a prerequisite for a TBS measure.
4 The PBC serves as a pre-trial detention center.
5 There is a separate format for juveniles. The current dissertation only focuses on adults.
6 This doctoral research started in 2018 when the terminology 'mental defect or disease (*gebrekkige ontwikkeling of ziekelijke stoornis van de geestvermogens)* was still in use (Stb. 2018, 37; Stb. 2019, 437). For clarity purposes, the most recent format is presented here.

3. Did the mental disorder, intellectual disability or psychogeriatric condition influence the behavioral choices of the examined individual, or his[7] behavior during the alleged offense?
4. If so, can the expert substantiate:
   (a) in what way this happened,
   (b) whether this results in an advice of diminished or no criminal responsibility for the alleged offense and,
   (c) in case of an advice of diminished responsibility, how this can be specified according to the expert.
5. (a) What are the expert's expectations, based on the described disorder, regarding the risk of recidivism?
   (b) Which protective factors in the personality or behavior of the examined individual should be considered regarding this risk?
   (c) What contextual, situational, or other conditions should be considered regarding this risk?
   (d) Can something be said about the mutual influence of these factors and conditions?
6. Are there arguments based on the personality and/or development of the examined individual which justify application of juvenile criminal law?
7. (a) What behavioral and/or other recommendations can be made in terms of interventions on reducing the potential recidivism risk,
   (b) Within which legal framework can this intervention be accommodated?

Box 1.1 Standard question format in an FMHR.

Experts have to justify their evaluation approach, which also means they have to explain which sources of information they used for their evaluation and conclusions (see guidelines from Nederlands Instituut voor Forensische Psychiatrie en Psychologie, 2022; Nederlands Register Gerechtelijk Deskundigen, 2018; Nederlandse Vereniging voor Psychiatrie, 2013). Each report contains the indictment along with other relevant information from the criminal investigation. Furthermore, the report contains biographical information, conversations with the defendant about the alleged offense(s), health and addiction histories, forensic psychological and/or psychiatric assessments including psychological testing, treatment history, and social network analyses. When the evaluation takes place in the PBC, the report also contains information from (group) observations. All these aspects provide input for answering the aforementioned questions and to adequately inform the court. An FMHR can be informative in multiple decisions in the criminal procedure (e.g. competency to stand trial, suitability for pre-trial detention; section 16 and 17 CCP). Yet,

7 The defendant or offender is referred to as a male throughout this dissertation. While the majority of individuals in the criminal justice system and in the forensic psychiatric population is male, the author is aware that defendants and offenders can also be female or identify with another gender identity.

the current dissertation focuses on two important (material) decisions the court has to make in a trial as stated in section 350 CCP:[8]

1) Guilt: whether the defendant committed the alleged offense as presented in the indictment.
2) Sentencing: decisions about punishment and measures.

1.2.2 Decisions about guilt

The first crucial decision the court must make in any criminal trial is whether the defendant committed the alleged offense. An FMHR is not intended to be used as evidence to determine whether a defendant committed the alleged crime (also known as *actus reus;* act or omission that make up physical elements of the crime). Yet this is not explicitly prohibited or regulated by law.[9] However, in 2007 the Supreme Court ruled that information about the offense in reports intended to inform the court about personal circumstances of the defendant, should *not* be used as evidence (Supreme Court, 18 September 2007, ECLI:NL:HR:2007:BA3610). This ruling specifically concerned statements about the alleged offense, such as a confession, to the experts during the evaluation. There are no formal regulations in place about other information in the FMHR which may or may not contribute to decisions about guilt. Nevertheless, from a logical point of view, information about the mental health of the defendant is not of any value in determining whether the defendant *committed* the alleged crime. Even though insight in the personality of a defendant can provide an explanation why someone displayed certain behavior, such indications are not evidence for whether specific behavior actually occurred. Conversely, mental health experts cannot diagnose a disorder (e.g. an antisocial personality disorder) solely based on the fact that the defendant is suspected of a (gruesome) crime (Nederlands Instituut voor Forensische Psychiatrie en Psychologie, 2022; Nederlandse Vereniging voor Psychiatrie, 2013). Mental health information can – under very specific circumstances – be taken into account to determine the mental intention of the defendant, but this almost never

8 Section 350 CCP also states two other decisions: if the offense has been proven, it must also be decided 1) how this offense is qualified under the law and 2) if this offense is punishable and the defendant criminally responsible. Criminal responsibility of the defendant has a direct influence on the sentencing options available to a court (see section 39 CC).

9 Section 339 CCP even describes that a statement of an expert witness is recognized as evidence. Section 343 CCP defines a statement of an expert witness as follows: information the expert gives in court on the insights he has gained from his own expertise and knowledge about the subject on which his opinion is sought, with or without an expert witness report prepared by him at the request of the court.

occurs in Dutch practice (see Tolbert case; Supreme Court, 9 December 2008, ECLI:NL:HR:2008:BD2775).[10]

The law is also unclear about how evidence should be evaluated and integrated to result in a decision about guilt. Section 338 CCP states that the court can only convict when it is convinced the defendant committed the alleged offense, based on the legal evidence. This legislation provides the court with substantial discretion in the evaluation and integration of the evidence, although an adequate motivation of the decision is required (Dubelaar, 2014). Another important part of section 338 CCP emphasizes that the court must be *convinced* of the defendant's guilt. This concept is quite elusive, and it is difficult to define the threshold when the court is sufficiently convinced of the defendant's guilt.[11] In the Netherlands, professional judges rely heavily on the case file containing the evidence from the pre-trial investigation. They receive this case file prior to trial. In adversarial jurisdictions, the evidence is presented to a jury according to strict rules in a bifurcated trial with a guilt and sentencing phase. In contrast, Dutch judges are instantly exposed to all information relevant for decisions about guilt, criminal responsibility, and sentencing in a single trial. These less structured features of criminal fact finding may prompt an FMHR to bias decisions about guilt (see paragraph 1.3.1).

1.2.3 Decisions about sentencing

Only if the court determines that a crime was committed by the defendant, the court proceeds to determine whether – and to what degree – the defendant is criminally responsible before deciding on the appropriate sanctions. A core principle of the Dutch criminal justice system is that a defendant is criminally responsible for his behavior unless an exception for blameworthiness is accepted (e.g. De Hullu, 2021). One of these exceptions is when a mental disorder, intellectual disability, or psychogeriatric condition (section 39 CC) leads to the offense. When a defendant is found *not* criminally responsible, punishment is impossible, but a treatment measure can still be imposed. However, many defendants who suffer from a mental disorder at the time

10 Many (adversarial) jurisdictions use the term *mens rea* or guilty mind component of an offense when referring to mental intention. Absence of *mens rea* results in a successful insanity plea in those jurisdictions. Contrary to the Dutch system, forensic mental health expertise is commonly used in these jurisdictions to determine whether *mens rea* (criminal intention) was present (see Chapter 2, and Grossi & Green, 2017 for an international comparison).

11 In the proposal for a modernized Code of Criminal Procedure, the new section 4.3.7 rephrases the requirement that evidence can only be accepted when it is *beyond reasonable doubt* that the defendant committed the alleged crime. However, this requirement will not solve the problem of the elusive concept of being convinced of someone's guilt.

of the offense are considered to have *diminished* criminal responsibility (Kempes & Gelissen, 2020). This means that a defendant is considered partially blameworthy for the offense and can thus be punished. The Dutch criminal justice system does not *formally* require that punishment needs to be proportional to the degree of criminal responsibility ('Zwarte Ruiter' case: ECLI:NL:HR:1957:2). Therefore, the extent to which diminished criminal responsibility should affect punishment decisions remains obscure (Claessen & De Vocht, 2012; Knoester & Boksem, 2020). Judges in the Netherlands have a lot of discretionary power in their sentencing decision. They can include many offense and offender characteristics to tailor each sentence. Only specific maximum sentences are codified for each specific offense in the Criminal Code. Discretion is further extended by the possibility to combine punishments (i.e. a prison sentence) and (treatment) measures.

The most intensive measure is the TBS treatment measure. This sanction can be imposed when a mental disorder was present at the time of a severe crime[12] and the offender presents a future danger to society (section 37a CC). This measure has two modalities: TBS with conditions and TBS with forced care. When a TBS measure with conditions is imposed, the offender must abide to specific treatment conditions without being forced to receive care. In practice, the offender will usually reside in a forensic psychiatric treatment clinic or rehab facility. An important precondition is that the offender is willing to be treated. A TBS measure with specific conditions can be imposed for a maximum total of 9 years and can be combined with a prison sentence with a maximum of 5 years (section 38 and 38a CC). A more severe option is a TBS measure with forced care. This entails that the offender is placed in a maximum secured psychiatric treatment facility to be treated for mental illness. The aims of TBS with forced care are security of society by means of incarceration (i.e. incapacitation) of the offender, and to rehabilitate the offender through treatment. This modality is imposed when a defendant is considered to pose a serious danger to others (section 37b CC).

When combined with a prison sentence, a TBS measure is executed only after the prison sentence has been completed or when the court appoints a date the TBS measure has to commence (section 37b sub 2 CC). TBS is initially imposed for a period of two years after which it can be extended for one or two years at the time (section 38d CC) by the court when the offender still poses a danger to society (section 38d sub 2 CC). For most violent crimes (i.e. crimes against the physical integrity of the victim), TBS with forced care can be repeatedly extended for an unlimited period of time (section 38e CC). Because of the uncertainty of when a TBS measure is to be terminated, defendants frequently choose or are advised by their lawyer to refuse cooperation with a forensic

12 A serious offense which, according to the statutory definition, carries a term of imprisonment of four years or more, or which constitutes any of the serious offenses defined in the law (see section 37a sub 1 CC).

mental health evaluation to prevent a TBS measure from being issued (Nagtegaal, 2018). Defendants have the right to refuse cooperation since they do not have to provide any self-incriminating information (principle of *nemo tenetur*; article 6 European Convention for the Protection of Human Rights and Fundamental Freedoms). The prevalence of defendants who refuse to cooperate with the evaluation has increased over the past decades from 23% in 2002 to 43% in 2017 (Nagtegaal et al., 2018). Depending on the extent of the uncooperative attitude of the defendant, the FMHR will be less elaborate and might not contain (much) information about possible mental disorders and the contribution of these disorders to the offense. Usually there is no advice on criminal responsibility or appropriate sanctions either. Absence of this expert information makes it difficult to fulfill the legal criteria to impose TBS (i.e. presence of a mental disorder and significant dangerousness of the defendant). However, judges have the discretionary power to impose TBS if in their professional opinion the legal criteria for TBS have been met and a multidisciplinary FMHR describing the uncooperative attitude of the defendant is present (section 37a sub 4 CC). To fulfill the criteria for TBS, the court can use previous forensic mental health evaluations (if available; ECtHR 3 March 2015, Constancia vs. the Netherlands) and other information in the case file, such as severity of the offense and frequency of prior convictions (section 37a sub 5 CC). Judges' own observations at the court hearing can be used as well (Kooijmans & Meynen, 2017). It remains largely unknown if judges systematically use this discretion and how an uncooperative defendant is handled otherwise.

Furthermore, beside TBS defendants with mental health problems can be sentenced to some sort of care through a suspended prison sentence with special conditions (section 14c CC; Leenderts et al., 2016; Van der Wolf, 2018). Examples of special conditions are psychological or psychiatric treatment, abstinence of substances and protective orders. Offenders are under supervision of the probation office. If they do not comply with the conditions, the suspended part of their prison sentence will be executed. Until January 1st 2020, a defendant could be placed in a (civil) psychiatric hospital for a year when found not criminally responsible. From 2020 onwards, this measure has been replaced by the civil measure of a care authorization (section 2.3 Compulsory Mental Health Care act) to divert these defendants out of the criminal justice system. Since this act came into force during this doctoral research, the civil measure is not part of this dissertation. The scope of this dissertation is limited to the role of FMHRs in decisions about prison sentences and TBS measures.[13]

13 This dissertation put specific emphasis on TBS measures because an FMHR is a prerequisite in decisions about TBS.

1.3 Prior research

1.3.1 FMHRs and guilt

From a psychological perspective, the manner in which information in an FMHR can percolate into decisions about guilt can be explained by theories of evidence integration and evaluation (e.g. Pennington & Hastie, 1992; Pennington & Hastie, 1993; Simon, 2004). Underlying these models is the assumption that evidence is evaluated and integrated in a holistic manner. These models help to explain how (irrelevant) factors can affect evidence evaluation and eventually contribute to decisions about guilt (see Chapter 3 in this dissertation for an in-depth description). Susceptibility to irrelevant factors can be facilitated by the uncertainty that accompanies the complex binary decision of a guilty verdict versus acquittal (Bodenhausen & Lichtenstein, 1987). Uncertainty in a criminal case is especially prominent in cases with a denying defendant and without overwhelming, incriminating evidence for guilt, as in the example case of Sjonny W.. To cope with this uncertainty, decision-makers may be inclined to rely more on experience and intuition to make a decision (Epstein, 1994; Gunnell & Ceci, 2010; Kalven & Zeisel, 1966; Tversky & Kahneman, 1974). Such experiential decision-making is vulnerable to bias. Unintentional variability in judgment may be the result (Kahneman et al., 2021).[14]

Biases that can occur in criminal fact-finding have been well-documented in the literature (see e.g. Charman et al., 2019; Rassin, 2017a). Research has shown that legal professionals and experts are susceptible to the context associated with the evidence. This can result in effects of irrelevant factors, such as the presented order of evidence, type of crime and explicitness of the evidence, on judicial decisions (Dror et al., 2006; Neal & Grisso, 2014; Rassin, 2017b, 2020). A context effect can also be applied to information in an FMHR. The report is specifically aimed at establishing an association between a disorder and the alleged offense. When diagnosis of a mental disorder provides a plausible explanation for the alleged offense (e.g. when a defendant is suspected of a violent crime: a disorder, for example an antisocial personality disorder, that is consistent with sudden aggressive behavior), this may function as context in which the evidence in a case is evaluated and affect the decision about guilt. Such an effect may even occur when the association between the mental disorder and the alleged crime is not explicitly described in the report (e.g. due to the denial of the defendant or an uncooperative attitude), or expressed with the conditional statement "in case the defendant is found guilty" (De Ruiter, 2010; Van Esch, 2012; Van Koppen, 2004). Congruency between the disorder and criminal behavior also suggests that an effect of an FMHR may depend on the type of disorder, in terms of whether this disorder provides a plausible explanation for the offense. However, research on potential

14 Kahneman et al., 2021 refer to this variability as 'noise'.

bias as a result of a forensic mental health evaluation in decisions about guilt is extremely scarce (see Chapter 2 for an overview). In the Dutch context, only one experimental vignette study among Dutch professional judges (N = 53) explored the effect of a diagnosis of antisocial personality disorder and psychopathy on the evaluation of evidence and guilt (Rassin, 2017b). Results showed that presence of such disorders increased the incriminating value of the evidence and significantly increased the proportion of guilty verdicts with 33%. This study used a small sample and focused on one specific diagnosis of a mental disorder (Rassin, 2017b). The limited international research on the use of forensic mental health expertise on decisions about guilt (also see Chapter 2 of this dissertation) shows inconsistent results (Mossière & Maeder, 2015; Mowle et al., 2016; Termeer & Szeto, 2021). These studies varied in how they presented information about mental health, which disorders they studied and the type of respondents they used. Also, these studies were set in other (adversarial) legal systems and therefore not directly generalizable to the legal system in the Netherlands. Literature and guidelines for forensic mental health experts all warn against the potential contribution of FMHRs to the decision-maker's conviction (Beukers, 2011; Nederlands Instituut voor Forensische Psychiatrie en Psychologie, 2022; Nederlandse Vereniging voor Psychiatrie, 2013). This dissertation will provide a first insight into whether this effect occurs and if professional judges are aware of such effects.

1.3.2 FMHRs and sentencing

Criminologists and legal psychologists have always been interested in the decision-making process behind sentencing decisions (e.g. Spohn, 2009) and more specifically, how (extra-legal) offender characteristics (e.g. gender, age, race/ethnicity) induce disparities in sentencing decisions (e.g. Bontrager et al., 2013; Mazzella & Feingold, 1994; Mitchell, 2005; Steffensmeier & Demuth, 2006; Wu & Spohn, 2009). Much of this prior research models the role of offender characteristics according to the *Focal Concerns Perspective* (Kramer & Steffensmeier, 1993; Steffensmeier et al., 1993; Steffensmeier et al., 1998; Ulmer, 1997). This perspective proposes that factors which inform sentencing decisions can be reduced to three focal concerns: 1) blameworthiness of the offender; 2) community protection based on the offender's dangerousness and 3) practical or bureaucratic constraints. Evaluation of these concerns is complicated by time and information constraints inherent to most decisions in the criminal procedure. However, it also appears that legal actors cannot easily digest the information that they do have at their disposal (Kramer & Ulmer, 2002). FMHRs, which tend to be quite detailed and contains specific expert information, may in fact produce an overload of information out of their legal expertise that is difficult to cognitively process or use. These constraints produce a level of uncertainty. As an adaptation to these constraints, a

perceptual shorthand for decision-making can be used by judges and other court actors that utilizes (heuristic, stereotypical) attributions about case and defendant characteristics to manage the uncertainty and the case flow (Steffensmeier & Demuth, 2006; Steffensmeier et al., 1998).

The focal concerns of blameworthiness and community protection can be informed by an FMHR (Albonetti, 1991; Berryessa, 2018; Steffensmeier et al., 1998). Blameworthiness of the offender proposes that punishment needs to be proportionate to the seriousness of the offense, consequences of the offense and the offender's responsibility. As such, this concern reflects the retributive purpose of punishment. From this perspective, it can be argued that when a defendant is not fully responsible, and thus less blameworthy, less (or no) punishment is deserved (Von Hirsch, 2009). Consequently, information about a mental disorder and diminished criminal responsibility in an FMHR can have a mitigating effect on punishment (Hart, 2008). Prior research also suggests that criminal responsibility may be attributed differently based on perceptions about the level of control of an individual's behavior. Perceptions about controllability of behavior may vary for different types of disorders. For example, symptoms associated with psychotic disorders (e.g. hallucinations, delusions etc.) are considered to be beyond someone's control. Symptoms of certain (antisocial) personality disorders (e.g. lying, manipulative behavior etc.) are considered to be more controllable (Edens et al., 2005; Weiner, 2010). As such, studying the type of disorder in an FMHR may be relevant to understand certain effects of FMHRs.

Community protection reflects the utilitarian goals of punishment through rehabilitation, deterrence and incapacitation (Albonetti, 1991; Steffensmeier et al., 1998; Ulmer, 1997). These goals can be informed by the offender's dangerousness. A defendant with a mental disorder (and/or a high recidivism risk) may be considered to pose a higher risk to society. These perceptions of dangerousness may also differ according to type of disorder (Angermeyer & Dietrich, 2006; Corrigan et al., 2003; Weiner et al., 1997). From a utilitarian perspective a longer spell of incapacitation may be justified to prevent recidivism (De Keijser, 2000). As such, an FMHR can have an aggravating effect on sentencing decisions. To overcome these potentially conflicting sentencing goals, a TBS measure is often combined with a prison sentence (in about 75% of cases; Raad voor Strafrechtstoepassing en Jeugdbescherming, 2020). The principle aim of a measure is to protect society and not to inflict suffering; the duration of a measure does not need a moral justification in terms of retributive proportionality (for a critical discussion of the Dutch dual-track system of punishments and measures see De Keijser, 2011). In practice, this means that an offender can be incarcerated for a period of time which extends beyond what suits his level of blameworthiness. However, there are indications that judges take proportionality into account when combining long incapacitating measures, like TBS, with a prison sentence (Knoester & Boksem, 2020).

However, the exact nature and extent of this interplay between punishment and measures remains largely unknown.

Empirical research has predominantly studied (extralegal) effects of demographic offender characteristics, such as gender, age and ethnicity, on sentencing disparities (e.g. Bontrager et al., 2013; Johnson et al., 2010; Mazzella & Feingold, 1994; Steffensmeier et al., 1998; Wermink et al., 2015; Wu & Spohn, 2009). Recently, more scholarly attention is paid to offender characteristics related to mental health, such as addiction, intellectual disability or neurobiological factors (e.g. Aono et al., 2019; Aspinwall et al., 2012; De Kogel & Westgeest, 2016; Edberg et al., 2022; Geijsen et al., 2018; Goldberg, 2022; Morse, 2013; Sinclair-House et al., 2020). Consequently, more studies have focused on the role of forensic mental health expertise in sentencing decisions (see Chapter 2 for a systematic overview), but empirical research on the effects of mental health information in FMHRs on sentencing decisions *in the Netherlands* is still scarce. Currently only a handful of studies using case analysis have explored specific aspects of a forensic mental health evaluation (e.g. conclusions about criminal responsibility, expert advice on treatment) in decisions about punishment and measures (Boonekamp et al., 2008; Claessen & De Vocht, 2012; Harte et al., 2005). Some studies found that in 86% to 90% of cases, judges decide in accordance with the expert advice about criminal responsibility and treatment options (Boonekamp et al., 2008; Harte et al., 2005). Others did not find a consistent effect of diminished responsibility on punishment decisions (Claessen & De Vocht, 2012). As a result of an increasing number of uncooperative defendants, scholars have explored whether this uncooperative attitude affects whether a TBS measure is imposed (Jongeneel, 2017; Nagtegaal et al., 2018; Van der Wolf et al., 2018). These studies are predominantly (explorative) retrospective, case analyses. The current body of literature lacks prospective studies. The use of retrospective case analyses is insightful, but poses an important methodological limitation, as it is impossible to determine the exact role of FMHRs in judicial decision-making processes based on written verdicts (Goodman-Delahunty & Sporer, 2010). Prior *international research* mostly consists of experimental vignette studies among mock jurors (see Chapter 2). These studies varied in how they presented information about mental health, which disorders they studied and the type of respondents they used. Results are therefore inconsistent. Also, prior research on the use of forensic mental health expertise in sentencing decisions is typically set in other (adversarial) legal systems with other policies and regulations and therefore not directly generalizable to the legal system in the Netherlands. This dissertation presents a first insight into the use and effects of FMHRs on sentencing decisions in the Netherlands using a social scientific mixed-method research design. Because of the lack of research situated in Dutch criminal justice system, this dissertation aims to explore the complex interplay between the fields of forensic psychiatry and criminal law to generate new avenues of research in an area which is currently in its infancy in the Netherlands.

1.4 Outline of the dissertation

This dissertation used a mixed-method approach to answer the two research questions: to what extent and in what manner does an FMHR affect decisions about 1) guilt and 2) sentencing? A mixed-method approach complements interdisciplinary research situated on the cutting edge of criminal law and forensic psychology and psychiatry. Triangulation of methods provides a comprehensive understanding of the complex and multifaceted process of judicial decision-making in cases with an FMHR (e.g. Johnson et al., 2007; Maruna, 2010).

First, *Chapter 2* presents a systematic review of the available, international, empirical literature on the role of forensic mental health expertise in judicial decision-making. It presents an overview of the available, international, literature to reveal gaps and shortcomings in this body of literature. Some of these gaps and shortcomings shaped the empirical research of this dissertation and are specifically addressed in Chapter 3, 4 and 5.

Chapter 3 focuses on the effects of an FMHR on decisions about guilt. An experimental vignette study based on a realistic case file among 200 law and criminology students was used. Because the effect of an FMHR on decisions about guilt is assumed to be unintended and therefore subconscious, an experimental approach is most appropriate to uncover this effect. Presence of an FMHR was manipulated between subjects by having a control condition without an FMHR and a condition with an FMHR with an uncooperative defendant and thus no substantial information about the presence of a mental disorder or recidivism risk. Another six conditions were used in which the defendant cooperated with the FMHR and type of disorder (antisocial personality disorder and schizophrenia) and recidivism risk (low, high, no info) were manipulated. This design made it possible to test whether different types of disorder common in the forensic psychiatric population affect verdicts differently (Dienst Justitiële Inrichtingen, 2021; Kempes & Gelissen, 2020; Vinkers et al., 2011). Prior research (see Chapter 2) suggests that these disorders may have different effects on decisions about guilt and sentencing. Manipulation of recidivism risk was added to assess whether an effect of mental disorder could be explained by (stereotypical) associations with dangerousness (Edens et al., 2005; Edens et al., 2004; Garcia et al., 2020; Link et al., 1999; Pescosolido et al., 1999; Van der Wolf, 2012).

Chapter 4 addresses the effects of presence of an FMHR and information in an FMHR on sentencing decisions (both punishment and measures). This question was studied using a second experimental vignette study among 355 law and criminology students. Using a similar design as the experiment in Chapter 3, the effects of an FMHR with and without a cooperative defendant on decisions to impose a TBS measure and the length of a prison sentence were studied. Additionally, effects of type of disorder and recidivism risk were

explored. The experiment allowed us to isolate the effects of (aspects of) an FMHR in sentencing decisions.

While experiments are useful to study specific factors that (subconsciously) affect decisions, the actual process involved in decision-making is difficult to unravel in quantitative experiments. Furthermore, the decision-making process of students might not be directly representative for professional judges. Therefore, *Chapter 5* presents a qualitative study with an ecologically valid sample of actual judges to further understand the role of FMHRs on judicial decision-making. Using focus group interviews with 17 criminal law judges participating in five groups, this study provides a general qualitative account of how information in FMHRs may play a role in judicial decision-making about guilt, punishment and (TBS) measures in Dutch criminal proceedings.

Finally, Chapter 6 presents the general discussion of this dissertation. This chapter provides a summary and discussion of the main findings and presents conclusions regarding the research questions. This chapter also addresses the strengths and limitations of this dissertation. Finally, recommendations and implications for future research and practice are presented based on the explorations in this dissertation. The outline of the empirical chapters in this dissertation is also presented in Table 1.1.[15]

Table 1.1: Outline of the dissertation

	Decision	*Chapter*	*Research question*	*Method*
To what extent and in what manner does (information in) an FMHR affect judicial decision-making about guilt and sentencing in the Netherlands?	Guilt Sentencing (type and length of sanction)	2	To what extent does forensic mental health expertise affect judicial decision-making according to the available scientific literature?	Systematic literature review (N = 27)
	Guilt	3	To what extent and in what manner does an FMHR affect decisions about guilt in the Netherlands?	Experimental vignette study among law and criminology students (N = 200)
	Sentencing (TBS measure and prison sentence)	4	To what extent does an FMHR and availability of information in an FMHR affect sentencing decisions in the Netherlands?	Experimental vignette study conducted among law and criminology students (N = 355)
	Guilt Sentencing (punishment, measures)	5	To what extent and in what manner does information in FMHRs play a role in judicial decision-making about guilt, punishment, and measures?	Five focus group interviews with criminal law judges (N = 17)

15 Chapters 2 to 5 were originally written as separate journal articles. Therefore, a degree of overlap between the chapters in this dissertation may occur.

2 Forensic mental health expert testimony and judicial decision-making
A systematic literature review

ABSTRACT

Forensic mental health expertise (FMHE) is an important source of information for decision-makers in the criminal justice system. This expertise can be used in various decisions in a criminal trial, such as criminal responsibility and sentencing decisions. Despite an increasing body of international, empirical literature concerning FMHE, a systematic overview of the extent and manner in which this expertise affects judicial decisions is lacking. The aim of this review is therefore to provide insight in the relationship between FMHE and different judicial decisions by synthesizing published, quantitative empirical studies. Based on a systematic literature search using multiple online databases and selection criteria, a total of 27 studies are included in this review. The majority of studies were experiments conducted in the United States among mock jurors. Most studies focused on criminal responsibility or sentencing decisions. Studies concerning criminal responsibility found consistent results in which psychotic defendants of serious, violent crimes were considered not guilty by reason of insanity more often than defendants with personality disorders (e.g. psychopathy). Results for length and type of sanctions were less consistent and were often affected by perceptions about behavioral control, recidivism risk and treatability of the disorder. Studies on possible prejudicial effects of FMHE are almost non-existent. Evaluation of findings, limitations and implications for future research and practice are discussed.

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2.1 Introduction

In most legal systems, a person who commits a crime is held criminally responsible for this act based on the proposition that a person has freedom of action and therefore could have refrained from committing the crime. In many legal systems, criminal responsibility requires the intention to conduct the act (*mens rea*) in addition to this conduct being voluntary and prohibited (intentional bodily movement), also known as *actus reus*. Both elements of the crime (*mens rea* and *actus reus*) have to be proven beyond a reasonable doubt to result in a guilty verdict. In other systems, such as the Netherlands, criminal responsibility is only assessed after the defendant has been found guilty of the alleged offense. In case a mental disorder was present at the time of the alleged crime and this disorder contributed to the commission of the crime, criminal responsibility can be reduced and as a result mitigate or even excuse punishment (see Grossi & Green, 2017 for an international comparison on the issue of criminal responsibility). As a result of this doctrine, the mental condition of a suspect is to be taken into consideration by criminal justice decision makers (Hart, 2008; Tsimploulis et al., 2018).

A judge or jury is usually not equipped with medical or psychological expertise to determine whether a defendant suffers from a mental disorder and to what extent this contributed to committing the crime by, for example, impairing the ability to appreciate the nature of the action or wrongfulness of the act (as defined by the American M'Naghten Rule, see "R v. M'Naghten," 1843). In order to inform the judge or jury on these factors and to assist them in their decision-making process, a forensic mental health expert can be requested to do an evaluation.

When it is suspected that a defendant suffers from mental health problems, it is possible to request a pre-trial mental health examination. Forensic mental health experts focus on giving evidence in court and advise on treatment for offenders with severe mental illness, thereby preventing recidivism and protecting society (Nedopil, 2009). Apart from evaluation of the mental health of a defendant, the expert, usually a psychologist or psychiatrist, also examines other aspects of a defendant's life. These aspects include criminal record, mental health history, substance use, family and peer relationships, employment and education, physical health (including medication) and prior (mental health) care or treatment (Glancy et al., 2015). Information is collected by examining records about the defendant's history, contact with collateral sources and interviews with the suspect. In addition to clinical assessment, psychological, neurological or biological tests may be used to determine whether a mental disorder is present. Assessment of risk of future dangerousness and recidivism is also frequently part of the examination. The expert will prepare a report of his findings and this will be added to the case file and/or they will have to testify during the actual trial. The contents of the testimony or report can be used by a judge or jury in various legal decisions in the criminal

procedure: decisions about criminal responsibility, sentencing decisions, but also competencies to confess, plead guilty, stand trial, be sentenced or be executed (Heilbrun, 2006).[1] Since expert information can play a crucial role in judicial decisions, the question therefore arises how decision-makers interpret and use the information provided by forensic mental health experts (Blais, 2015).

Prior research indicates that legal professionals value the information provided by forensic mental health experts (Redding et al., 2001). Therefore, it is important to understand how this information is used in decision-making. Consequences for both defendants and society are significant: mental disorders, especially depression and psychosis, are highly prevalent among prisoners and can result in adverse outcomes such as suicide and aggressive behavior when left untreated (see review by Fazel et al., 2016). Defendants who are not criminally responsible for their actions as a result of mental disorder should be hospitalized in order to protect society and themselves by treating their mental health problems. To optimize the use of forensic mental health information in judicial decision-making to benefit both the defendant and society, it is important to determine how this information is used in different judicial decisions. Despite the widespread relevance of mental health information in the legal system and the recent interest in this topic (see reviews and meta-analyses by Berryessa & Wohlstetter, 2019 about the effect of a psychopathy label on sentencing; Cappon & Vander Laenen, 2013 about mental health information in juvenile cases; Kois & Chauhan, 2018 about criminal responsibility), there is no overview of the use of forensic mental health expertise in different judicial decisions. Furthermore, there is currently no insight in possible prejudicial effects of this information in decisions where it is irrelevant (i.e. whether a suspect actually committed the alleged crime). Forensic mental health information can play a crucial role in individual cases whereby the specific effects may differ according to type of decisions and interaction with the specific context and circumstances of a particular case (such as type of disorder, offense, prior record etc.) (Cappon & Vander Laenen, 2013). However, it is important to explore whether any systematic effects of forensic mental health information can be distinguished in different types of decisions. A systematic review can provide this overview while also identifying areas where no or little research has been done yet (Petticrew & Roberts, 2006). Hence, the aim of the current review is to provide a synthesis of existing, international, empirical research on forensic mental health expert testimony and judicial decisions.

1 The types of decisions in which this information can be used may differ according to legal system.

2.1.1 Legal context

Before the relationship between forensic mental health expertise and judicial decision-making is further examined, it is important to outline the legal context and operationalize key concepts used in the current review, since we expected to find studies from multiple different jurisdictions. Comparison between jurisdictions of the use and effects of forensic mental health expert testimony on judicial decisions is difficult because legal standards and operationalization and classification of mental illness differ across jurisdictions (Grossi & Green, 2017). With regards to these differences, we have aimed to focus on the elements which are relevant in most legal systems and when necessary, explicate essential differences.

2.1.1.1 Guilt: mens rea

First, expert information on the mental health of the defendant is a resource to assess criminal responsibility, thereby focusing on the mens rea element of a crime (decision 1a, see Table 2.1). In many Western jurisdictions, the assessment of criminal responsibility is done in case of an insanity defense (for an international comparison see Grossi & Green, 2017). The prevalence of an insanity defense is extremely low. In the United States, in less than 1% of felony cases a defendant enters an insanity plea. Whether this plea is successful, differs considerably, because legal criteria to establish insanity vary across states (Callahan et al., 1991; Pasewark, 1986). In many US states a person may be considered insane when at the time of committing the act, the defendant was laboring under such a defect of reason, from disease of mind, as not to know the nature and quality of the act he was doing, or as not to know what he was doing was wrong (The M'Naghten rule; "R v. M'Naghten," 1843). In many European countries (e.g. the United Kingdom, Spain, Italy, Finland), as well as in most US states, Canada, Australia and New Zealand, a person may be considered not responsible when at the time of the crime as a result of mental illness or defect the defendant lacks substantial capacity to either appreciate the criminality of his conduct, or to conform his conduct to the requirements of the law (as proposed by the American Law Institute; "Model Penal Code" 1962). These last criteria incorporate elements from multiple other insanity tests used in the US, namely absence of volitional control (Irresistible Impulse Test; "R. v. Byrne" 1960) as well as the presence of a mental illness (Durham Rule; "Durham v. State" 1954).

Most legal insanity standards include the presence of a mental illness that causes significant deficits in the ability to understand the illegal nature of one's act and be aware of the consequences. Depending on the jurisdiction, defendants with a mental illness can be found guilty, not guilty by reason of insanity (NGRI) or guilty but mentally ill (GBMI) (Grossi & Green, 2017). Depending on the jurisdiction, a decision on criminal responsibility may be dicho-

tomous (guilty vs. NGRI) or on an ordinal scale (e.g. responsible, diminished responsible, not responsible) (Grossi & Green, 2017).

In addition to different legal standards about when criminal responsibility is absent, different perspectives exist with regard to what types of mental illness can reduce criminal responsibility. For example, differences exist on whether personality disorders, especially antisocial personality disorder and psychopathy, can impair criminal responsibility. In many European jurisdictions, a defendant with a personality disorder may be judged sufficiently mentally ill to result in a NGRI verdict. More often, these disorders can result in diminished responsibility. In contrast, personality disorders are generally not considered to impair criminal responsibility in North American jurisdictions. In certain states, personality disorders are explicitly excluded from insanity defenses (Grossi & Green, 2017).

A theoretical argument for diversity in criminal responsibility decisions for different types of disorders can be found in attribution theory. Attribution theory proposes that people typically attribute more responsibility to individuals whose behaviours appear to be tied to personality traits within their control rather than those that are less controllable (Edens et al., 2005; Weiner, 2010). Previous research suggests that jurors are generally more receptive to uncontrollable factors than to those that appear to be controllable (Barnett et al., 2007; Garvey, 1998). This perception results in the idea that, for example, mental disorders with delusionary thinking (e.g. psychotic disorders, schizophrenia) may result in less attribution of criminal responsibility than mental disorders with more (supposedly) controllable symptoms (e.g. lying, deception, lack of remorse as symptoms of antisocial personality disorder). In addition to an insanity defense, mental health information can also be used in a justification of self-defense or reduce the charge in certain crimes (e.g. murder versus manslaughter) by focusing on the extent of the criminal intent (Schweitzer et al., 2011).

2.1.1.2 Guilt: actus reus

While information from a forensic mental health expert plays an important part in assessment of criminal responsibility and thus often the *mens rea* element of a crime, this information should in no case affect the assessment of facts in a case and even less the decision whether a defendant committed the alleged crime (actus reus; decision 1b see Table 2.1) (Finkelstein & Bastounis, 2009). However, research has shown that the boundary between the process of subjective allocation of criminal responsibility based on personality assessment and the process of assessing guilt based on an examination of facts is not very clear (Bordel et al., 2006). To prevent any prejudicial effects, in some jurisdictions, such as some states in the United States, a (capital) trial is bifurcated in a guilt phase and a sentencing phase. In the guilt phase, admissibility of evidence is strictly regulated. To be admissible, evidence needs to be

relevant in a court of law (Federal Rules of Evidence 401). Evidence that is relevant to the legal question at hand can be ruled inadmissible if its probative value is outweighed by unfair prejudicial bias (Federal Rules of Evidence 403). Therefore, potential prejudicial information about the defendant, such as his criminal record or information about his personality, is not presented in the guilt phase of the trial. If the defendant is found guilty based on the evidence, the trial moves to a penalty phase in which the judge or jury receives additional information about mitigating and aggravating (personal) circumstances regarding the defendant, before deciding on the (death) sentence (Fisher, 2011; Mueller & Besharov, 1968).

In non-bifurcated trials, testimony on mental health problems and other personal circumstances of a defendant are not reserved for the sentencing phase of the trial. Information may even be known to the decision-makers before the trial starts if it is part of the case file (as is the case in the Netherlands). As a result, this information may interfere with the evaluation of the facts of the alleged crime. This could result in interpretation of facts and evaluation of guilt of the defendant unduly guided by knowledge of the personality and mental health of the defendant (Finkelstein & Bastounis, 2009; Fischhoff, 1975). It is possible that certain mental disorders, such as psychopathy, can lead to these prejudicial effects since symptoms of certain disorder are (stereotypically) associated with criminality. People with a mental illness are often perceived as being more violent and therefore dangerous (see review by Angermeyer & Dietrich, 2006). This stigma creates a (cognitive) relation between mental illness and criminality. Therefore, a defendant with a mental illness may be considered guilty more often than a defendant without mental illness (Mossière & Maeder, 2015).

2.1.1.3 Sentencing

A second important function of forensic mental health information is thus in the sentencing phase of a trial (decision 2, see Table 2.1). Information on the mental health of defendant can be submitted to mitigate punishment (e.g. life sentence instead of the death penalty) and to advise on rehabilitative efforts. A mental disorder can be accepted as a mitigating factor if this disorder has impaired the rationality of practical reasoning by the defendant or as an indication that he or she is no future danger to society (Burrows & Reid, 2011; Morse, 2011). In other jurisdictions, when a mental disorder leads to diminished responsibility this can also result in mitigated punishment. This function has its foundation in a retributive perspective on punishment. Punishment is supposed to be the deliberate infliction of suffering proportionate to the culpability of the offender and harm of the crime committed (just desert) (Von Hirsch, 2009). The presence of a mental disorder can reduce the responsibility for the crime committed and therefore mitigate or exempt the punishment imposed.

On the other hand, the prosecution can use information on the defendant's mental health as an aggravating factor to emphasize risk of future dangerousness. If a defendant is less capable of understanding the nature and wrongfulness of his act, he or she can be perceived as having a higher risk of future criminal behavior. Despite research demonstrating that clinical variables of disorders (with the exception of antisocial personality disorder/psychopathy) are not actually predictive of either general or violent recidivism (Bonta et al., 2014), people with a mental illness are often perceived as being more violent and therefore dangerous (see review by Angermeyer & Dietrich, 2006). Containment of this risk may be believed to be achieved through incapacitation by committing a person, either to prison or to a psychiatric hospital. This function has its foundation in a more utilitarian perspective on sanctions. Sanctions are imposed to serve a future purpose (e.g. individual prevention through incapacitation or rehabilitation) (e,g, Albonetti, 1991; De Keijer, 2000; Steffensmeier et al., 1998; Ulmer, 1997). Whenever the presence of a mental disorder is used to emphasize dangerousness for future harm to victims and society, it can be hypothesized that the presence of expert information about a mental disorder increases the length or severity of a sanction. This increased length of incarceration (or commitment in case of involuntary commitment to a treatment center) can have the purpose of incapacitation to protect society. Additionally, a longer duration of incarceration in a treatment center may be required to treat a mental illness and other criminogenic risk factors in order to rehabilitate an offender (Grossi & Green, 2017). As proposed by attribution theory, mental disorders with delusionary thinking can result in less attribution of criminal responsibility than mental disorders with more controllable symptoms, such as lying and deceiving (Edens et al., 2005; Weiner, 2010). Less criminal responsibility can subsequently mitigate sentencing decisions. Alternatively, certain personality disorders (e.g. antisocial personality disorder, psychopathy) with stable and rigid personality traits, may result in (perceptions of) high recidivism risk and dangerousness and therefore aggravate sentencing decisions (Berryessa, 2018; Corrigan et al., 2003). As such, differences in sentencing may occur based on type of disorder present. Whether a mitigating or aggravating effect occurs, may also depend on the manner in which information about the disorder and its etiology (i.e. biological causes) is presented (see for example Aspinwall et al., 2012). An overview of the (potential) effects of forensic mental health expertise on judicial decisions is displayed in Table 2.1.

Table 2.1: Effects of forensic mental health expertise on judicial decisions

Judicial decision	*Forensic mental health expertise*		
	+	0	--
1. Guilt			
a. *Mens rea*	x	v	v
b. *Actus reus*	x	v	x
2. Sentencing	v	v	v

Note: + = positive effect; 0 = no effect; -- = negative effect; x = not intended; v = allowed.

2.1.2 Prior research on forensic mental health expertise in judicial decisions

Most available research is often either doctrinal in nature focusing on case law and legislation or focuses on the quality of forensic mental health evaluation (e.g. Wettstein, 2005). Empirical research is less prevalent. A literature review on the use of mental disorder in judicial decisions in juvenile cases identified only 8 empirical studies focusing on this relationship: Cappon and Vander Laenen (2013) found that the presence of a mental disorder or mental health report increases the probability of a juvenile offender being confined. A recent meta-analytic review focused on the possible labeling effects of a diagnosis of a mental disorder, specifically psychopathy, on three punishment outcomes: dangerousness, treatment amenability and sentencing decisions (Berryessa & Wohlstetter, 2019). Generally, this meta-analysis found that a diagnostic label of psychopathy affected the three outcome measures compared to when no mental health diagnosis was present. However, no significant effects were found when a label of psychopathy was compared to other psychiatric disorders. These findings suggest a general labeling effect of a label of mental disorder instead of a specific labeling effect of psychopathy. Different results were found for studies using a lay public sample compared to studies using criminal justice actors. Multiple, and potential conflicting, effects can be hypothesized, and some research even suggests that the actual effects of introducing mental health information may be contrary to intended purposes (Edens et al., 2005; Stites & Dahlsgaard, 2015). An overview for studies specifically focusing on information from a forensic mental health expert instead of a label or diagnosis is, to the best of our knowledge, still absent.

2.1.3 Current study

The legal context facilitates multiple potential effects of forensic mental health expertise on different judicial decisions in a criminal trial (see Table 2.1). Despite the crucial role information from an expert can play in a criminal trial no systematic review exists on the effects of forensic mental health expertise

in different judicial decision-making with adult defendants. The aim of this review is therefore twofold: first, to provide an overview and synthesis of available empirical research on the use and effects of forensic mental health expertise on judicial decisions in criminal trials; second, to determine the nature and directions of these effects. The main research question of this review is therefore: to what extent does forensic mental health expertise affect judicial decision-making? Two sub questions were formulated to help answer the main question in this review:

1) To what extent and in what manner does forensic mental health expertise affect judicial decisions about guilt?
   The decision about guilt was split in two elements of this decision: *mens rea* and *actus reus.*
2) To what extent and in what manner does forensic mental expertise affect sentencing decisions in terms of type and length of sanctions?

This systematic review will supplement existing research and recent meta-analytic reviews by including multiple judicial decisions, focuses on experts instead of only (specific) diagnoses and includes multiple research designs (cf. Berryessa & Wohlstetter, 2019; Cappon & Vander Laenen, 2013; Kois & Chauhan, 2018; Tsimploulis et al., 2018). The goal is to benefit law and psychology scholars and practitioners by synthesizing and evaluating a complex body of international research while taking different legal standards into account. The methodology used in this review is described in paragraph 2.2. Results of the review are presented in paragraph 2.3 and discussed in paragraph 2.4.

2.2 Method

This systematic review provides an in-depth synthesis and evaluation of available research with respect to differences in legal standards across jurisdictions. To systematically review existing literature on the relationship between forensic mental health expertise and judicial decision-making in a criminal trial, we searched multiple electronic databases for journal articles and dissertations with a focus on the relationship between forensic mental health expertise and different judicial decisions in a criminal trial.

2.2.1 Search strategy

Between April 16th 2018 and May, 7th 2019 the following databases were searched to locate possible relevant studies: Web of Science, Academic Search Premier, Criminal Justice Abstracts, PsycINFO, PsycArticles, Psychology and Behavioral Sciences Collection, Sociological/Social Services Abstract, PubMed and ProQuest dissertations and theses. In order to systematically search each

database, a search string was created using combinations of keywords and synonyms related to 1) a forensic setting (forensic*, crim*, court, legal*, jur*, jud*) of 2) mental health expertise (mental disorder*, mental ill*, "mental disease*", psych*, mental, neuro*, bio*, genetic*, expert*, testimon*, report*, info*, eviden*) relating to 3) judicial decisions (guilt*, eviden*, proof, prove, insan*, "GBMI", "NGRI", convict*, verdict*, acquitt*, sentenc*, punish*, incarcerat*, detention, "involunt* commit*", "recidivis* risk*", danger*, "diminish* responsib*", "criminal responsib*", culpa*, "mens rea", mitigat*, aggravat*). Since the focus was on forensic mental health expertise in general and because we were interested in the mechanisms of decision-making, no key words on specific disorders were included. Additionally reference lists of included studies were searched to locate any other relevant studies that were not hit in the database search.

2.2.2 Study selection

To be included in this review a study needed to meet the following inclusion criteria: 1) an empirical study; 2) in a journal or dissertation with 3) a quantitative research design studying 4) a relation between forensic mental health expertise and a judicial decision in a criminal trial 5) concerning an adult defendant. As a result of practical limitations only studies published in English, Dutch or German were considered for inclusion (6). Relevant studies, based on title or abstract, were independently assessed and selected by the first author and a master student.

Forensic mental health expertise needed to focus on mental illness or disorder in a defendant or offender. Since we were interested in the content and/or type of expert testimony and not the admissibility or credibility of the expert testimony, no further criteria were set for the type of forensic mental health expert. The testimony by the expert could be presented through a report or as (written) testimony and should focus on the mental health of the defendant at the time of the alleged crime. If a study compared experimental conditions, a condition without forensic mental health expertise or information on mental disorder had to be present or there had to be a comparison of different types of mental disorders. The context of the study was a criminal trial. Any pre-trial decisions (e.g. competency to stand trial or pre-trial (in)sanity evaluations; see Pirelli et al. (2011) respectively Kois and Chauhan (2018) for a meta-analysis) or decisions in a civil procedure (e.g. civil commitment in a sexual violent predator trial in the United States; Cassani, 2020) were excluded. Furthermore, a study needed to (partially) focus on an ultimate decision (i.e. guilt or sentencing) in a trial in order to be included. Studies exclusively focusing on particular elements of a judicial decision (e.g. evaluate extent of future dangerousness in death penalty decisions) as an outcome were therefore also excluded to optimize comparability between studies.

Finally, only studies with adult defendants were included in this review to further ensure comparability between studies. Criminal procedure and sanctions for juveniles can be different to procedures and sanctions for adults (see Cappon & Vander Laenen, 2013 for a review).

2.2.3 Data extraction

After study selection and inclusion, relevant information to address the main objectives of this review were systematically extracted from the individual studies using a standardized format (adapted from the Cochrane Collaboration, Higgins & Green, 2008). Information on study characteristics (e.g. country of data collection, sample, sample size, sample selection, research design, instruments) was documented. If a study used an experimental design, the number of experimental conditions was noted to determine the ratio of number of participants to number of conditions. Furthermore, information on the type of expert (e.g. psychologist, psychiatrist, neurologist), diagnosis and offense were extracted. Finally, statistical results on the relation between (the content of) forensic mental health expertise and judicial decisions were collected.

Studies were evaluated using the following criteria: a) study design (e.g. experimental or observational) b) sample size (i.e. in experiments we used the ratio of participants to number of conditions), c) sample selection, d) type of decision and e) type of information or evidence (e.g. psychological or biological expertise, images).

2.3 Results

The total number of initial hits from the combined databases was 12.278.[2] Initial screening of title and abstract of these hits using the eligibility criteria resulted in 132 unique abstracts. Upon further full text examination, 99 studies were eliminated because they did not meet the set eligibility criteria. Ultimately it was decided to exclude another 15 studies because the focus of these studies was specifically on the battered woman syndrome (BWS) (Criterium 7; see Figure 2.1). This syndrome is very specific to a type of crime, offender and context in which this crime occurs. Therefore this type of disorder is less comparable to mental disorders in a diversity of contexts. This selection resulted in the inclusion of 16 articles and one dissertation. In two articles (Saks et al., 2014; Schweitzer et al., 2011) multiple experiments with unique samples were conducted ($k = 6$), which resulted in a total of 21 included studies. After hand searching the reference lists of the included studies, another six additional

2 This number includes duplicates between and within databases. Duplicates of relevant studies were removed later in the selection process.

studies were included. As such, a total of 27 studies were included in this review. The selection process is presented in a flowchart in Figure 2.1.

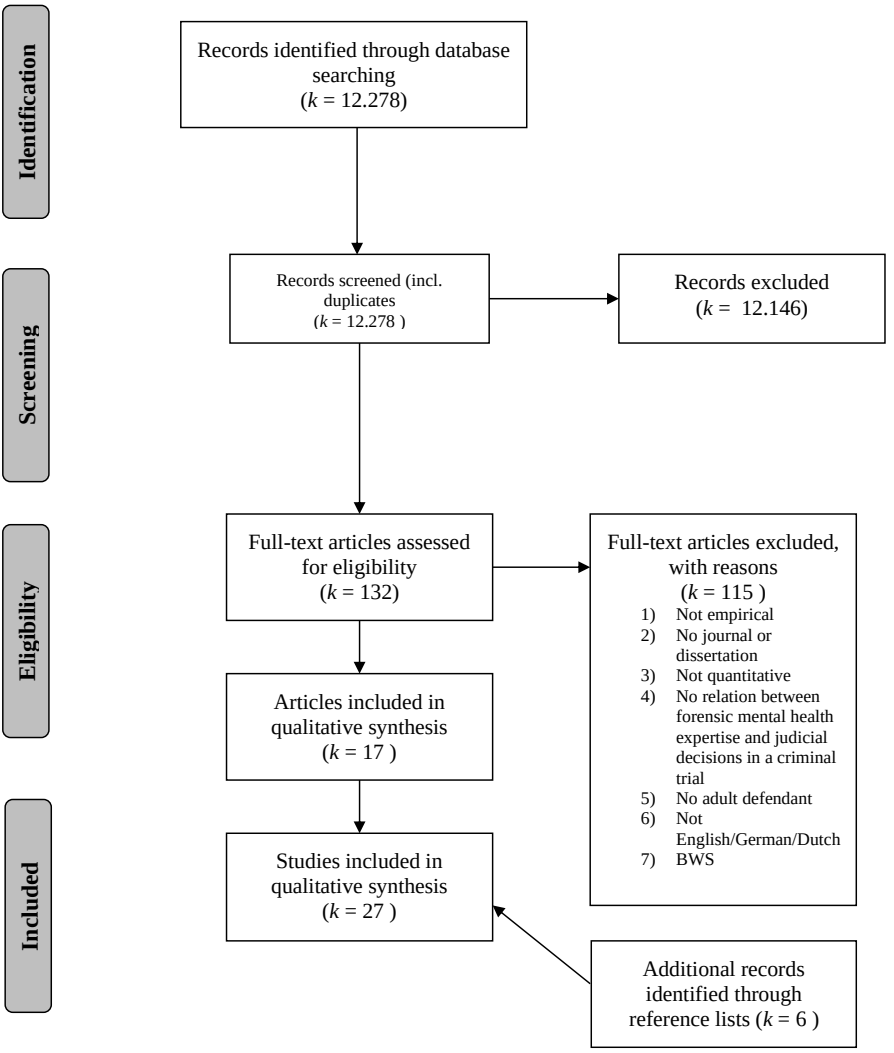

Figure 2.1: Flowchart study selection (Moher et al., 2009)

Information provided by forensic mental health experts can be used in different stages in the criminal justice system (Heilbrun, 2006). Studies are categorized according to the different types of decisions as presented in the research questions, namely guilt and sentencing. An overview of study characteristics and main results is provided in Table 2.2 (see the end of this chapter). Informa-

tion on study characteristics, type of forensic mental health expertise, offenses and diagnosis are presented (also see Table 2.2) before discussing main findings according to judicial decision.

2.3.1 Study characteristics

Included studies (k = 27) were conducted between 1987 and 2018 with more than 75% after 2000, which underlines the recent interest in this topic. The majority of studies (70%, k = 19) were conducted in the United States. The remaining studies were conducted in Canada (k = 5) (Blais, 2015; Blais & Forth, 2014; Lloyd et al., 2010; Rice & Harris, 1990; Rogers et al., 1992), France (k = 1) (Finkelstein & Bastounis, 2009), the United Kingdom (k = 1) (Maras et al., 2019) and the Netherlands (k = 1) (Rassin, 2017b). The vast majority (89%, k = 24) of studies had an experimental design using a case vignette.

2.3.1.1 Sample characteristics

Sample sizes varied between 53 and 896 participants (total N = 9045) with a majority being in the role of a mock juror. Most participants were female. Most defendants and offenders were male. Samples were selected from student populations, the internet, a research center, workshops or after actual jury duty. Remarkably, only one study used professional judges as participants (Rassin, 2017b). Additionally, a minority of studies did report on jury eligibility of their student or community participants (Boyle, 2016; Finkelstein & Bastounis, 2009; Gurley & Marcus, 2008; LaDuke et al., 2018; Maras et al., 2019; Rogers et al., 1992).

The remaining studies (k = 3) had an observational, cross-sectional design based on analysis of patient files in a maximum security psychiatric institution with patients who were found NGRI with a matched control group (Rice & Harris, 1990), or were based on trial transcripts of verdicts (Blais, 2015; Lloyd et al., 2010). Sample sizes varied between 86 and 148 cases (total N = 370). The majority of defendants in these samples was male.

2.3.1.2 Type of forensic mental health expert

The majority of studies (k = 21) included expert testimony by a psychologist and/or psychiatrist. Additionally, a number of studies (k = 7) included testimony by neuropsychologists or neurologists (Allen et al., 2019; LaDuke et al., 2018; Mowle et al., 2016; Saks et al., 2014; Schweitzer et al., 2011), with another number also including neuroimages as evidence (Gurley & Marcus, 2008; Mowle et al., 2016; Saks et al., 2014; Schweitzer et al., 2011). Five studies did not specify the type of expert used (Cox et al., 2010; Finkel et al., 1985; Lloyd et al., 2010; Reardon et al., 2007; Rendell et al., 2010).

2.3.1.3 *Offense type*

In the experimental studies, all but two studies based their vignette on a violent offense (varying from assault to several degrees of homicide). The other two focused on respectively sexual assault (Allen et al., 2019) and a comparison between a violent offense (aggravated assault) and a property offense (burglary) (LaDuke et al., 2018). In the observational, cross-sectional studies focusing on preventive detention decisions in Canada, the majority of offenders were convicted for a sexual offense (Blais, 2015; Lloyd et al., 2010).

2.3.1.4 *Diagnosis*

A majority of the studies studied at least one personality disorder (Blais, 2015; Blais & Forth, 2014; Cox et al., 2010; Lloyd et al., 2010; Rassin, 2017b; Schweitzer et al., 2011). Most studies studied multiple conditions of specific disorders, such as antisocial personality disorder or psychopathy as well as different varieties of psychotic disorders, such as schizophrenia (Edens et al., 2005; Edens et al., 2004; Gurley & Marcus, 2008; Mowle et al., 2016; Rendell et al., 2010; Rice & Harris, 1990; Roberts et al., 1987; Saks et al., 2014). Other diagnoses included alcohol use disorder/alcoholism (Boyle, 2016; Rogers et al., 1992), impulse control disorder (Allen et al., 2019), autism spectrum disorder (Maras et al., 2019), mental retardation, paranoid disorder and stress (Finkel et al., 1985; Reardon et al., 2007). Three studies did either not report a disorder (Hinkle et al., 1983) or explicitly stated that no disorder was present (Finkelstein & Bastounis, 2009; LaDuke et al., 2018).

2.3.2 Forensic mental health information in judicial decisions

In line with the presented legal framework and research questions, the main findings are discussed in three categories of decisions: 1) guilt: *mens rea,* 2) guilt: *actus reus,* 3) sentencing. Studies about sentencing decisions were categorized into decisions about the length of custodial sentences and recommendation of the death penalty.

2.3.2.1 *Guilt: mens rea*

A total of 13 studies researched decisions about the *mens rea* element in a verdict. Seven of these studies (54%) specifically focused on the relationship between forensic mental health expertise and insanity verdicts. One study was conducted in Canada (Rice & Harris, 1990), the others were all from the United States. Elements of the insanity defense in the United States may vary across different states, because they adopt different legal tests to asses legal insanity (e.g. M'Naghten Rule, American Law Institute (ALI) test). However, they

essentially focus on whether a defendant had a mental disease or disorder at the time of the alleged crime, whether this disorder substantially impaired the ability to appreciate the nature of the actions, or to differentiate right from wrong. Studies that explicitly described which type of legal test was used in their research, used the ALI test (Gurley & Marcus, 2008; Roberts et al., 1987). However, one study indicated that type of jury instruction and type of insanity test does not significantly affect jurors' decisions (Finkel et al., 1985), therefore no further distinctions will be made in the results below.

The other six studies[3] (46%) focused on *mens rea* as an element of a guilty verdict, thereby focusing on level of intent to qualify the offense (e.g. first-degree murder, second-degree murder, manslaughter) (Schweitzer et al., 2011), or criminal responsibility (Blais & Forth, 2014; Maras et al., 2019). All of these studies had an experimental design with a case vignette.

Results concerning an insanity verdict show a consistent main effect of expert testimony on verdicts of not guilty by reason of insanity (henceforth: NGRI) versus guilty verdicts among (student) mock jurors in case of a violent offense. The results can be elaborated upon by diagnosis, offense characteristics and type of evidence. Results of studies focusing on the *mens rea* element in a guilty verdict were more varied depending on diagnosis, offense characteristics and type of evidence. Defendants were more likely to be found NGRI in case of a psychotic disorder (e.g. schizophrenia) than in case of a psychopathic/antisocial personality or alcoholic disorder (Finkel et al., 1985; Roberts et al., 1987; Rogers et al., 1992). However, it was impossible to determine whether presence of *any* diagnosis affected insanity decisions, because none of these studies had a control condition where no disorder or expert testimony was present. One study focusing on the likelihood of a guilty verdict in a self-defense case, did use a control group with no disorder present and found that an antisocial personality disorder or psychopathy increased the likelihood of a guilty verdict compared to the (healthy) control group (Blais & Forth, 2014). Finally, in case of a an autism spectrum disorder, a guilty verdict was less likely since the defendant was judged as less responsible than when the disorder was not present (Maras et al., 2019).

In two studies, characteristics of the offense (i.e. seriousness, planfulness) were found to interact with the diagnosis of a mental disorder (Rice & Harris, 1990; Roberts et al., 1987). Although characteristics of the offense are in principle irrelevant to the determination of insanity in the United States (Roberts et al., 1987; *State v. Nuetzel*, 1980), serious but unplanned offenses did result in more NGRI verdicts but only for schizophrenia with delusions relevant to the crime.

3 The study of Schweitzer et al. (2011) reported four separate studies and a meta-analysis of those studies (not included), therefore this section contains only three publications but six studies are discussed.

When biological (e.g. traumatic brain injury) or neurological evidence (MRI image) for a disorder was presented, mock jurors gave more NGRI verdicts (Gurley & Marcus, 2008; Rendell et al., 2010) than when this evidence was absent. One study reported that the decision of insanity was affected by the type of expert (psychologist or psychiatrist) and testimony (clinical or actuarial) and the conclusion (sane or insane) of this testimony, irrespective of diagnosis (Hinkle et al., 1983). Students and jurors were likely to decide according to the conclusion of the expert about (in)sanity. Additionally, jurors who were presented with actuarial testimony by a psychologist gave a NGRI verdict more often compared to clinical testimony (Hinkle et al., 1983). Three of the four experiments by Schweitzer et al. (2011) found no direct effect of different types of expert testimony (i.e. clinical psychologist, clinical neuropsychologist, neurologist, neuroscientist with and without neuroimages as evidence) on the verdict (e.g. not guilty, first-degree murder, second-degree murder, man-slaughter) irrespective of severity of the offense (assault, armed robbery and homicide). The primary determinant of a guilty verdict was the perception of behavioral control. Compared to the control condition without an expert, the presence of any expert testimony was related to lower levels of perceived control by the defendant. Only the final experiment by Schweitzer et al. (2011) showed that addition of a neuroimage to the expert testimony reduced the severity of the charged offense (simple assault instead of aggravated assault) when compared to clinical information by a psychologist or no expert at all.

Overall, the results demonstrate that irrespective of study design and type of legal test of insanity, psychotic defendants of serious, violent crimes are found not guilty by reason of insanity more often than defendants with psychopathic/antisocial personality disorders (Finkel et al., 1985; Rice & Harris, 1990; Roberts et al., 1987; Rogers et al., 1992). Defendants with psychopathy or antisocial personality disorder were found guilty more often (Blais & Forth, 2014), while autism spectrum disorder reduced ratings of responsibility and, as a result, a guilty verdict was less likely (Maras et al., 2019). These results were found in both experimental studies with case vignettes as well as in an observational, cross-sectional study based on files from patients in a maximum security hospital (Rice & Harris, 1990). Findings on the effect of neurobiological evidence on the verdict were not consistent. Although some support was found that the presence of neuroimages results in more NGRI verdicts or less *mens rea* (Gurley & Marcus, 2008; Schweitzer et al., 2011), no firm conclusions can be drawn.

2.3.2.2 Guilt: actus reus

Only two studies focused on the possible prejudicial effect of forensic mental health information on guilt in terms of *actus reus* (Mowle et al., 2016; Rassin, 2017b). Both experiments reported a positive main effect of information about a mental disorder on decisions about guilt. Mowle et al. (2016) found that

testimony on the presence of psychopathy in a defendant charged with robbery and assault, significantly increased the likelihood of a guilty verdict. This result was not found for schizophrenia. Neuroscientific evidence of a disorder did not affect verdict choice. Similarly, Rassin (2017b) focused on the effect of a psychiatric diagnosis of antisocial personality disorder and psychopathy on evaluation of other available evidence (i.e. fingerprint evidence) and how this subsequently affected conviction rates. He found a positive effect of a the diagnosis on conviction. Judges were more convinced of guilt and had a higher conviction rate in a homicide case where the defendant had a psychopathic personality and antisocial personality disorder than when this disorder was absent. Judges also perceived the presented evidence in this case (i.e. fingerprint evidence) as stronger than judges in the condition without any psychopathology. This study by Rassin (2017b) was the only one in this review that used professional judges as participants. However, both conditions in the experiment contained a relatively small sample of participants (n = 24 and n = 29).

As a result of only two studies in this review with a focus on possible unintended effects of forensic mental health information on decisions of guilt in terms of *actus reus*, any conclusions are preliminary. Nonetheless, it appears that these effects depend on the type of disorder present in the case since a positive effect was found for the disorder of psychopathy but not for schizophrenia.

2.3.2.3 Sentencing

Of the total of 27 included studies, 19[4] (partially) focused on the relation between forensic mental health expertise and sentencing decisions. Sentencing decisions are categorized into decisions on length of sanctions or recommendation of the death penalty.

2.3.2.3.1 Length of sanctions

Thirteen studies researched the relationship between forensic mental health expertise and length of the prison sentence imposed. Two studies were based on observational, cross-sectional data (Blais, 2015; Lloyd et al., 2010), the other 11 studies had an experimental design with a case vignette.

Results on the relationship between forensic mental health expertise and sentence length were inconsistent and almost no direct effects were found. Three studies did not report a significant association between forensic mental health expertise and length of incarceration (Finkel et al., 1985; LaDuke et al., 2018; Rendell et al., 2010). Main effects were found in two studies, although

4 Due to the fact that a number of studies (n = 7) focused on guilt as well as sentencing decisions, they are included in both categories. Therefore the sum of studies in each category exceeds the total number of 27 included studies.

based on different expertise and also in opposite directions. First, Mowle et al. (2016) reported a significant positive correlation between psychopathy and recommended sanction length. They found no effect of neuroscientific evidence. Finkelstein and Bastounis (2009) found a main negative effect of information provided by a psychologist on sentence length. An aggressive response on a Rorschach test (Exner & Erdberg, 2003) resulted in a significant lower sentence compared to a non-aggressive response to this test. They also reported an interaction effect. In the aggressive response condition, participants without legal knowledge were more lenient in sentencing than future magistrates.

Six studies reported a relationship between forensic mental health expertise on length of a sanction but this relation was affected by other factors in the case or trial: treatability of the disorder, future dangerousness or recidivism risk, and perceived behavioral control.

Two studies from Canada focused on the reliance of judges on expert testimony in preventive detention decisions. Following a conviction for a violent or sexual offense, the prosecution can request a preventive detention resulting in a sentence for a dangerous offender (DO) or long-term offender (LTO). The majority of DO are serving indeterminate sentences. LTOs are supposed to be safely managed in the community after serving a determinate sentence. In making a final decision, judges must consider recidivism risk, treatment amenability and risk management (Blais, 2015; Lloyd et al., 2010). Both studies reported that a diagnosis of psychopathy affected experts' ratings of treatment amenability and risk management. A negative assessment of treatment amenability and risk management resulted in more indeterminate (DO) sentences (Blais, 2015; Lloyd et al., 2010).

Three other studies (Schweitzer et al., 2011) reported that presence of any expert testimony led to lowered perceived control of the defendant on his actions, which resulted in more lenient sentences. No significant differences between types of testimony (e.g. psychological or neuroscientific) were found. The majority of mock jurors in one of the experiments by Schweitzer et al. (2011) also reported that the sentence should be spend in a treatment center in case mental health problems were present. The finding that offenders with mental health problems should spent their sentence in treatment instead of prison was also supported by the study of Finkel et al. (1985), although this differed according to type of disorder. Defendants with schizophrenia, a split-brain or stress were to spend their time in a psychiatric hospital, while a chronic alcoholic was more likely to be sent to prison. Finally, Allen et al. (2019) found that expert information on an impulse disorder resulted in lower prison sentences, while concurrently increasing length of involuntary hospitalization. Neurobiological evidence resulted in lower prison sentences and increased length of involuntary hospitalization compared to psychological evidence. Treatability of the disorder also resulted in lower prison sentences and decreased the length of recommended hospitalization. However, no

interaction between mental health status and treatability was found (Allen et al., 2019).

To conclude, the relationship between forensic mental health expertise and decisions on custody length is not consistent. Almost no direct effects were reported, regardless of research design or sample type. Approximately a quarter of studies in this category reported no significant effects. Other studies stated that other factors such as perceived control of behavior, future risk and treatability of the disorder affected the relationship between forensic mental health expertise and duration of sanctions.

2.3.2.3.2 Death penalty

Six out of the 19 included studies focused on the death penalty versus a life sentence in prison. These studies were all conducted in the United States. In the United States, criteria for a death penalty recommendation include the defendant being a continuing danger to society and absence of any mitigating circumstances (Montgomery et al., 2005). Forensic mental health expertise can provide information on both criteria. All studies had an experimental design using a case vignette and all made explicit that a sample of death-qualified jurors was used.

Two studies did not report a significant main effect of mental health expertise on the recommendation of the death penalty (Cox et al., 2010; Edens et al., 2004). Edens et al. (2004) reported that psychopathy increased ratings of risk of future violence, although this did not affect death penalty recommendations. Cox et al. (2010) reported that risk of future violence, regardless of a mental disorder, significantly increased death penalty recommendation. The majority of studies reported a main effect of forensic mental health expertise on death penalty recommendation. However, the direction of this effect differed according to type of disorder, type of evidence and timing of expert testimony in a trial:

The death penalty was recommended more often with psychopathic disorders compared to psychotic disorders or no disorder (Edens et al., 2005; Saks et al., 2014). Psychopathic defendants were judged as being more dangerous than healthy defendants and were considered less treatable (Edens et al., 2005; Edens et al., 2004; Saks et al., 2014). This finding suggests that psychopathy is not considered a mitigating circumstance and is used to support the criterium of danger to society. Defendants suffering from a psychotic disorder were less likely to receive a death penalty recommendation, even though no differences between psychopathic and psychotic disorders were found regarding judgment of future dangerousness (Edens et al., 2005; Edens et al., 2004). This result could imply that a psychotic disorder is considered a mitigating circumstance in itself.

When a diagnosis of psychopathy was supported by neuroimage evidence, the percentage of recommended death penalties marginally decreased (from 62% to 47%, $p = .12$) (Saks et al., 2014). However, when neuroimage evidence

for schizophrenia was presented, differences in death penalty recommendations between psychopathy and schizophrenia disappeared and the defendant with schizophrenia was judged more responsible with than without neuroimage evidence (Saks et al., 2014).

One study focused on the effect of expert testimony about an alcohol use disorder on death penalty recommendations (Boyle, 2016). Presence of such expert testimony resulted in less inclination towards the death penalty during the trial, independent of an alcohol use disorder. This result was only found in a college sample, not in a community sample. However, in the eventual decision of punishment, only gender and punitiveness of the jurors were significant predictors of the death penalty in both samples: males and more punitive oriented jurors voted for the death penalty. Testimony about alcohol use disorder did not have a significant effect on death penalty recommendation. This finding suggests that this diagnosis is neither used as a mitigating nor aggravating circumstance in the sentencing phase of a capital trial.

Further support for varying effects of forensic mental health expertise during the course of a trial, was found by Reardon et al. (2007). Their study focused on effects of the presence and severity of mental illness or mental retardation on death penalty recommendations in combination with manipulations of the severity of the crime and timing of the hearing (pre-trial or during sentencing). When jurors were presented with severe mental health problems in a pre-trial hearing, the probability of reaching a death verdict was lower than when they learned of the severe mental health problems during the sentencing phase of the trial.

Overall, the results suggest an effect of forensic mental health expertise on death penalty verdicts. However, the direction of the effect varies and differed according to type of disorder (schizophrenia or psychopathy), type of evidence (neuroimage or not) and timing of expert testimony in a trial.

2.4 Discussion

The aim of the current review was to provide a synthesis of empirical, international, quantitative research on the effects of forensic mental health expertise on judicial decision-making in a criminal trial. This review highlights what we know, what we do not know and how to guide future research. The results of this review show the diversity of effects and thereby use of forensic mental health expertise on different judicial decisions.

The majority of included studies in this review was conducted in the United States with the use of (student) mock jurors and a focus on sentencing decisions. Corresponding to the legal framework described earlier (see Table 2.1), empirical findings from this review are mostly consistent with allowed use of forensic mental health expertise in multiple judicial decisions.

2.4.1 Guilt: *mens rea*

The most consistent results were found for studies concerning criminal responsibility in terms of an insanity defense. Irrespective of study design, forensic mental health expertise about a psychotic defendant resulted in more decisions of NGRI than a case of a defendant with a psychopathic personality disorder (Finkel et al., 1985; Rice & Harris, 1990; Roberts et al., 1987; Rogers et al., 1992).

Controversies in the literature consist on whether psychopaths can be considered cognitively impaired due to lack of moral understanding (Fine & Kennett, 2004; Stern, 2014). These differences can also be found in legislation and practice across different jurisdictions: in European jurisdictions, a defendant with a personality disorder may be judged sufficiently mentally ill which may result in an NGRI verdict. In contrast, personality disorders are generally not considered to impair criminal responsibility in North American jurisdictions (Grossi & Green, 2017). Psychopathy is not considered a mental disease or defect that impairs rationality or capacity to control behavior ("Model Penal Code," 1962; Morse, 2011; Stern, 2014). The studies included in this review are therefore in line with the current legislation and practice of the insanity defense in the United States. The results also provide support for the attribution theory. More responsibility is attributed to people who have personality traits that are considered more controllable, such as lack of remorse, deceptive behavior and irresponsibility (Edens et al., 2005; Weiner, 2010), which can be characteristics of an antisocial personality disorder. According to the results of this review, in cases of psychopathy the insanity defense was accepted less frequently and therefore responsibility for the crime was assumed. Effects of neurobiological evidence were not consistent, although presence of neuroimages sometimes seems to result in more NGRI verdicts (Gurley & Marcus, 2008; Schweitzer et al., 2011). Previous literature expressed concerns that neuroscientific information, and especially neuroimaging, can result in an (attentional) bias in judicial decision-making, by being interpreted as an objective finding or explanation of disease and behavior (Scarpazza et al., 2018). Since the results in this review were not consistent, they do not provide solid support nor opposition for this concern.

2.4.2 Guilt: *actus reus*

Only two studies focused on possible prejudicial effects of forensic mental health information on decisions about guilt in terms of *actus reus.* Therefore any firm conclusions are premature. Nonetheless, it appears that a possible prejudicial effect depends on the type of disorder: a positive effect was found for psychopathy but not for schizophrenia (Mowle et al., 2016; Rassin, 2017b). This finding supports the idea of a potential stigmatizing effect of psychopathy. Antisocial behavior is one of the traits consistent with psychopathy, which

may result in the association between this disorder and criminal behavior even when it has not yet been proven that the defendant committed the alleged crime (Mossière & Maeder, 2015).

2.4.3 Sentencing

In many jurisdictions forensic mental health expertise can be used to support mitigating circumstances for a defendant. Yet, information by these experts can also be used to support aggravating claims related to future dangerousness. Empirical findings on sentencing decisions, provide support for both situations; diagnoses of psychopathy increased perceptions of future dangerousness and poor treatment outcomes and, as a result, had positive effects on length of prison sentences and death penalty recommendation (Edens et al., 2005; Saks et al., 2014). Yet, presence of a disorder could also reduce perceived behavioral control and therefore reduce sentence severity (Schweitzer et al., 2011). When forensic mental health expertise was present in a trial but no disorder was diagnosed, no effect on culpability, recidivism risk or sentencing was found, regardless of type of testimony (psychological, neurological with/without images) (LaDuke et al., 2018). These results imply that a diagnosis instead of only presence of an expert affects sentencing decisions. The results provide some support for both a retributive as well as a utilitarian perspective. While the presence of a disorder may decrease the attribution of criminal responsibility, it may also increase the perception of future dangerousness and therefore increase sanction severity. This utilitarian perspective on punishment was also noticed in studies where it had to be decided in what type of institution the sentence should be spent. The majority of participants decided that in case of a mental disorder, a sentence should be spent in a hospital or treatment center instead of in prison (Finkel et al., 1985; Schweitzer et al., 2011). An increased length of hospitalization simultaneously decreased the duration of a prison sentence (Allen et al., 2019). This implies support for treatment of a defendant with a mental disorder instead of (only) punishment. No effect of neuroscientific information on sentencing decisions was found.

2.4.4 Future research

Both substantial results regarding the research questions and a number of methodological findings lead to recommendations for future research. First, information on a mental disorder provided by a forensic mental health expert appears to have inconsistent effects depending on type of disorder and whether it is used or interpreted to emphasize future dangerousness or diminished control over one's actions. Future research should focus on disentangling this possible double-edged sword effect of this information (see for example As-

pinwall et al., 2012; Fuss et al., 2015 for research on the double-edged sword effect of a biomechanism of psychopathy). It is also important to focus on the specific circumstances in a case, such as severity and type of crime. All but one study (LaDuke et al., 2018) focused on violent offenses (e.g. assault, homicide). Three of these studies focused on sexual offenses (Allen et al., 2019; Blais, 2015; Lloyd et al., 2010). It will be valuable to study whether the effects in current review can be generalized to other offenses in which presence of mental disorders are prevalent, such as arson (Anwar et al., 2011). It is possible that other types of mental disorder are associated with other crimes than described in this review. This may result in different effects of forensic mental health expertise.

Second, research on possible prejudicial effects of forensic mental health expertise is almost non-existent. Even though most findings in the current review are conform regulations and legal provisions, Rassin (2017b) and Mowle et al. (2016) showed that presence of forensic mental health expertise on psychopathy has a positive effect on determination of *actus reus*, despite this information being irrelevant to this decision. The extent to which these unintended effects may occur, also depends on legal standards in different jurisdictions and type of disorder present (Mowle et al., 2016). Future research should clarify this issue.

Another important finding was that the vast majority of the included studies was conducted in an adversarial legal system, particularly the United States. As a result, samples mostly consisted of students as mock jurors who were oftentimes recruited from undergraduate psychology classes in exchange for course credits. Despite the fact that decisions regarding insanity and oftentimes sentencing are determined by juries elected from a community, multiple studies did not report whether their sample was jury eligible (Finkel et al., 1985; Reardon et al., 2007; Rendell et al., 2010; Roberts et al., 1987; Schweitzer et al., 2011). Furthermore, since most student samples consisted of psychology students, it is possible that their attitudes towards mental health and effects on (delinquent) behavior may differ from attitudes held by the general public (Mossière & Maeder, 2015), despite Finkel et al. (1985) not finding significant differences in NGRI verdicts according to prior knowledge of mental conditions among these students. Included studies reported that students tended to attribute less guilt and more insanity to a defendant as well as more leniency in sentencing decisions compared to actual jurors or future magistrates (Finkelstein & Bastounis, 2009; Hinkle et al., 1983). Surprisingly, only one experimental study had a (small) sample of professional judges (Rassin, 2017b). More research should be done in inquisitorial systems and include samples with legal professionals, or other appropriate proxies for these professionals, to determine whether the effects from current review can be generalized to professional decision-makers and inquisitorial jurisdictions.

Another recommendation concerns study design. The majority of included experimental studies had no control condition in which expert testimony or

diagnosis was absent. These studies usually contrasted multiple different diagnoses (i.e. psychopathy versus schizophrenia) or different types of expertise (e.g. psychology, neuropsychology). As a result, most findings were limited to contrasts between these different diagnoses or different types of expertise. Therefore it is not clear whether simple presence of mental health expertise or any diagnosis affects decisions. A minority of experiments in this review had a control condition (Allen et al., 2019; Blais & Forth, 2014; Boyle, 2016; Edens et al., 2005; Edens et al., 2004; Maras et al., 2019; Schweitzer et al., 2011). Even though a true control condition seems illogical in case of an insanity defense, it would help determine whether a diagnosis such as antisocial personality disorder or psychopathy can significantly result in more NGRI verdicts than when no disorder is present. More research with an improved experimental design is necessary to optimize internal validity. In line with this recommendation, we suggest that future (experimental) research benefits from larger sample sizes to optimize statistical power (Simmons et al., 2018). Included studies varied extensively with regard to number of subjects per condition, with some conditions being as low as 10 to 12 subjects (Roberts et al., 1987), although these numbers improved over the years.

Other factors that need to be taken into account into study design are presentation and content of the expert testimony. Not all studies incorporated the available legal actions for that specific jurisdiction, such as presentation of expert testimony by both parties or cross-examination of expert witnesses. Definitions of diagnoses should be as complete and precise as possible. Most recent studies, but not all, based diagnoses on recognized classification systems as the Diagnostic and Statistical Manual of Mental Disorders (American Psychiatric Association, 2013) or instruments such as the Psychopathy Checklist-Revised (PCL-R; Hare et al. (2000). A recent meta-analysis found that a simple label of a psychiatric disorder, without any traits, resulted in more support for punitive legal sanctions, increased perceptions of dangerousness, as well as a negative effect on treatment amenability, especially in lay people (Berryessa & Wohlstetter, 2019). Therefore, it is important to provide a detailed and complete diagnosis with criteria and its relationship with the alleged crime to minimize different (stereotypical) perceptions and interpretations of mental disorders and improve internal validity of a study. Finally, the current body of literature is mostly based on quantitative research. To further understand *how* decision-makers incorporate forensic mental health expertise into their decisions, a more qualitative approach is called for.

2.4.5 Limitations and conclusions

Some limitations of this review should be taken into account when evaluating the results. First, only published articles (in English) were included. Grey literature is therefore underrepresented, although a dissertation database

(ProQuest) was searched. Publication bias could therefore not be ruled out (Rothstein et al., 2006). Unpublished studies or studies in other languages than English may produce other results.[5] Second, including studies with different presentation modus of the expert information, types of evidence and different study designs in multiple jurisdictions can diminish the comparability of studies in this review. However, by combining these different studies, an extensive overview of the current body of literature could be provided.

Despite these limitations, this systematic review is the first to our knowledge to provide an overview of available empirical research studying the effects of forensic mental health expertise on multiple judicial decisions for adult defendants. While the current literature focuses on the intended use of forensic mental health expertise in judicial decision-making, research on possible undesired effects is still in its infancy (Mossière & Maeder, 2015; Rassin, 2017b). Apart from the use of forensic mental health expertise in decisions concerning an insanity defense, no systematic effects of forensic mental health information on a diversity of judicial decisions could be distinguished. The diversity (and lack) of results emphasizes the need for further research examining this relationship in different phases of the criminal trial and in different legal systems. Especially in inquisitorial systems, such as the Netherlands, empirical research on the use of forensic mental health expertise in judicial decisions is lacking.

Research should also focus on the role of mental health of the defendant in decisions prior to trial. Since an indication for a pre-trial forensic mental health evaluation is given earlier on in the criminal procedure, this leads to a specific selection of cases (in addition to the general selection and filtering processes in the criminal justice system) in which such an evaluation is more common (e.g. severity of offense, defendant's and offense characteristics etc.) Further research should clarify the potential effects this selection may have further down the line of decision-making.

Expert information can play a crucial role in judicial decisions and have serious consequences for a defendant and for society. Therefore, it is important to determine and evaluate how different actors in the criminal justice system use this information and to what extent any unintended effects might occur. With this review we provide a first step and guide in advancing this research area in order to optimize the use of this valuable information in the criminal justice system. This review shaped the studies in Chapters 3, 4 and 5 of this dissertation.

5 Studies published in other languages than English may likely come from other legal systems than the adversarial system from the United States.

Table 2.2: Included studies

Study	*Design*	*Participants*		*FMHE*	*Diagnosis*[1]	*Crime*[2]
		N	*Sample*			
Hinkle et al. (1983) US	E	320	Students (n = 160) Jurors (n = 160)	Psychologist vs psychiatrist testimony	Unknown	Murder
Finkel et al. (1985) US	E	132	Students (with and without legal knowledge)	Testimony, expert unknown	Epilepsy Paranoid schizophrenia Stress Chronic alcoholism Split-brain	Homicide
Roberts et al. (1987) US	E	181	Students	Psychiatrist and clinical psychologist	ASPD Schizotypical personality disorder Paranoid schizophrenia: ○ Unrelated to crime ○ Related to crime	Murder
Rice & Harris (1990) C	CS	148	Male patients in maximum security psychiatric institution	Psychiatrist	Schizophrenia[3] Psychotic disorder Personality disorder	(Attempted) murder Assault

[1] The mental health problems/disorders are copied from each specific study, therefore there is no uniformity in terminology.
[2] The crimes are copied from each specific study, therefore there is no uniformity in terminology.
[3] Based on DSM III criteria (American Psychiatric Association, 1987).

Other factors	*Judicial decision*			
	Guilt		*Sentencing*	
	Fact (actus reus)	*Intent (mens rea)*	*Custody*	*Death penalty*
N/A	N/A	-[a]	N/A	N/A
N/A	N/A	Epilepsy: - Paranoid schizophrenia.: - Stress: - Chronic alcoholism: + Split brain: 0	0[b]	N/A
Planfulness	N/A	Severity of illness: - Schizophrenia X[c] Planfulness: + [d]	N/A	N/A
Severity offense	N/A	Psychotic disorder: - Severity offense: -	N/A	N/A

Study	*Design*	*Participants*		*FMHE*	*Diagnosis*	*Crime*
		N	*Sample*			
Rogers et al. (1992)	C E	460	Students Community sample	Psychiatrist	Psychotic/paranoid disorder Alcoholism	Homicide
Gurley & Marcus (2008)	US E	396	Students	Psychiatrist and psychologist testimony	Psychosis[4] Psychopathy[5]	Murder
Rendell et al. (2010)	US E	383	Students	Mental health expert testimony	Psychopathy Schizophrenia	Second-degree murder
Schweitzer et al. (2011)	US E	1) 237 2) 294 3) 512 4) 433	Community sample	Evidence by a clinical psychologist, clinical neuropsychologist or neurologist	Personality disorder	1)Armed robbery + homicide 2)Armed robbery + assault 3)Assault 4)Assault

[4] Based on criteria for schizophrenia.
[5] Based on criteria for psychopathy.

Other factors	*Judicial decision*			
	Guilt		*Sentencing*	
	Fact (actus reus)	*Intent (mens rea)*	*Custody*	*Death penalty*
N/A	N/A	Psychotic/ paranoid disorder cf. alcoholism: -	N/A	N/A
Neuroimage TBI	N/A	Psychosis: - Neuroimages: - TBI: --	N/A	N/A
Evidence: biological or psychological (MMPI-2) Evidentiary strength insanity defense: moderately strong or moderately weak	N/A	Psychopathy or schizophrenia: 0 Evidentiary strength: - Biological evidence: -	0	N/A
Neurologist information: structural/functional damage, neuroimage/ no neuroimage Perceived control	N/A	1) 0 2) 0 3) Perceived control: - 4) Perceived control: – Neuroimage: -	1) 0 2-4) Perceived control: - Length: -	N/A

Study	*Design*	*Participants*		*FMHE*	*Diagnosis*	*Crime*
		N	*Sample*			
Blais & Forth (2014)	C E	247	Students and community sample	Clinical psychologist	Psychopathy, ASPD/CD	Aggravated assault
Maras et al. (2019)	UK E	160	Mock jurors: students and community	Forensic psychiatrist	Autism spectrum disorder[6]	Assault and battery
Mowle et al. (2016)	US E	419	Community member summoned for jury duty	Psychologist	Psychopathy Schizophrenia	Robbery and assault

[6] Based on DSM-5 criteria on autism spectrum disorder (American Psychiatric Association, 2013)

Other factors	*Judicial decision*			
	Guilt		*Sentencing*	
	Fact (actus reus)	*Intent (mens rea)*	*Custody*	*Death penalty*
Age Gender	N/A	Psychopathy: + ASPD/CD: + Age: 0 Gender: 0	N/A	N/A
N/A	N/A	-	N/A	N/A
Political orientation Neuroscientific evidence	Psychopathy: + Neuro: 0 Schizophrenia: - for liberals	N/A	Psychopathy: + Neuro: 0	N/A

Study	*Design*	*Participants*		*FMHE*	*Diagnosis*	*Crime*
		N	*Sample*			
Rassin (2017b) NL	E	53	Judges	Psychiatrist	Psychopathic personality and ASPD	Homicide
Finkelstein & Bastounis (2010) FR	E	198	Students (n = 93) Future magistrates (n = 105)	Psychologist	No disorder: response to Rorschach test	Assault causing death (no intent)
Lloyd et al. (2010) C	CS	136	Court transcripts	Unknown	Psychopathy (PCL-R)	67,9% sex offenses
Blais (2015) C	CS	86	Court transcripts	Psychiatrist or psychologist testimony	ASPD/psychopathy[7]	60% sex offenses
LaDuke, Locklair & Heilbrun (2018) US	E	896	Community sample	Psychological, neuropsychological, structural neuroimaging, functional neuroimaging expertise by video testimony	No diagnosis present	Burglary Aggravated assault

[7] Based on item from Level of Service Management/Case Inventory (LS/CMI).

Other factors	*Judicial decision*			
	Guilt		*Sentencing*	
	Fact (actus reus)	*Intent (mens rea)*	*Custody*	*Death penalty*
N/A	+	N/A	N/A	N/A
Knowledge of criminal law Deliberation Crime scene photo	N/A	N/A	Aggressive response: - Aggressive response and no legal knowledge: -	N/A
Treatment amenability Recidivism risk	N/A	N/A	Psychopathy: 0 Treatment amenability: - (PCL-R, DO)	N/A
Risk management Treatment amenability	N/A	N/A	ASPD/psychopathy: 0 Treatment and risk: +	N/A
Fact evidence Violence risk Recidivism risk Culpability	N/A	N/A	Fact evidence for burglary: - Violence risk: 0 Recidivism risk: 0 Culpability: 0	N/A

Study	*Design*	*Participants*		*FMHE*	*Diagnosis*	*Crime*
		N	*Sample*			
Allen et al. (2019) US	E	369	Community sample	Evidence by a neurologist or psychologist	Impulse control disorder	Sexual assault
Edens et al. (2004) US	E	338	Students	Psychologist testimony	Psychopathy[8] Psychosis[9] (prosecution) No disorder (defense)	Murder
Edens et al. (2005) US	E	231	Students	Psychologist testimony	Psychopathy[10] Psychosis[11] (prosecution) No disorder (defense)	Murder

[8] Diagnosed through Factor 1 items from PCL-R.
[9] Based on DSM-IV criteria for schizophrenia.
[10] Diagnosed through Factor 1 items from PCL-R.
[11] Based on DSM-IV criteria for schizophrenia.

Other factors	*Judicial decision*			
	Guilt		*Sentencing*	
	Fact (actus reus)	*Intent (mens rea)*	*Custody*	*Death penalty*
Treatability	N/A	N/A	*Prison:* Neurologist: - (vs psychologist) Psychologist: - (vs healthy) Treatability: - MH X treatability: 0 *Hospitalization:* Neurologist: + (vs psycho) Psychologist: + (vs healthy) Treatability: - MH X treatability: 0	
Dangerousness	N/A	N/A	N/A	Dangerouness: + Death penalty: 0
Dangerousness	N/A	N/A	N/A	Dangerouness: + Death penalty: +

Study		Design	Participants		FMHE	Diagnosis	Crime
			N	*Sample*			
Reardon et al. (2007)	US	E	230	Community sample	Unknown	Mental retardation[12] Paranoid schizophrenia	Robbery ending in murder
Cox et al. (2010)	US	E	144	Students	Mental health expert	Psychopathy (PCL-R)	Murder
Saks et al. (2014)	US	E	1) 825 2) 882	Community sample	Psychologist or neuroscientific testimony	Psychopathy Schizophrenia[13]	1) Murder 2) Murder
Boyle (2016)	US	E	705	Students (n = 354) Community sample (n = 351)	Clinical psychologist testimony	Alcohol use disorder[14] (defense)	Murder

Note. FMHE = forensic mental health expertise; US = United States; E = experiment; N/A = not applicable, a = negative effect or relation; b = no (significant) effect or relation; c = interaction; d = positive effect or relation; C = Canada; CS = cross sectional; ASPD = antisocial personality disorder; TBI = traumatic brain injury; CD = conduct disorder; UK = United Kingdom; MMPI-2 = Minnesota Multiphasic Personality Inventory-2; NL = Netherlands; FR = France; PCL-R = Psychopathy Checklist—revised; DO = dangerous offender; MH = mental health status.

12. Defined according to the 2002 American Association on Mental Retardation (Luckasson et al., 2002).
13. Based on criteria in DSM IV (American Psychiatric Association, 2000).
14. Based on DSM-V (American Psychiatric Association, 2013)

Other factors	*Judicial decision*			
	Guilt		*Sentencing*	
	Fact (actus reus)	*Intent (mens rea)*	*Custody*	*Death penalty*
Severity of mental disorder Heinousness of crime Timing of decision	N/A	N/A	N/A	Heinousness X severity of mental problems: + Pre-trial: - Sentencing: +
Risk for future violence in detention	N/A	N/A	N/A	Psychopathy: 0 Risk: +
Type of evidence (clinical, genetic, neurological, neuroimage)	N/A	N/A	N/A	1) Psychopathy, and neuroimage: - 2) Psychopathy: +
N/A	N/A	N/A	N/A	Students: - Community: -

3 The effects of forensic mental health reports on decisions about guilt in the Netherlands
An experimental approach

ABSTRACT

In the Netherlands, in approximately 25% of the more serious criminal cases, a pre-trial forensic mental health report (FMHR) is requested to inform the court whether a mental disorder was present at the time of alleged crime, whether this disorder affected behavior and decision-making at the time of the offense and how this disorder may affect future (criminal) behavior. While informative for sentencing decisions, information about mental disorders or recidivism risk is irrelevant for the question whether the defendant committed the alleged crime. Yet based on cognitive psychological theory of evidence evaluation and integration, we hypothesized that information in an FMHR would affect the evaluation of evidence as well as the ultimate decision about guilt. Using an experimental vignette study among 200 law and criminology students with manipulation of the presence and content of an FMHR, we found a main effect of the presence of an FMHR report on decisions about guilt. The proportion of guilty verdicts increased with almost 20% when an FMHR was present compared to when this report was absent, irrespective of the type of disorder (schizophrenia or antisocial personality disorder) or level of recidivism risk (low or high) present in the report. We did not find support for our hypothesis that this effect could be explained by assimilation of other available evidence. Implications for further research and practice are discussed.

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3.1 Introduction

Mentally ill people are overrepresented in the criminal justice system and mental illness is more prevalent among prisoners than in the general population (Dirkzwager et al., 2021; Dorn et al., 2014; Favril & Dirkzwager, 2019; Fazel & Danesh, 2002; Fazel et al., 2016). In the United States, for instance, more mentally ill individuals are detained than admitted to mental health hospitals or treatment facilities (Fuller Torrey et al., 2010). Consequently, people with mental illness are profoundly prevalent in criminal procedures and information regarding mental illness can have a significant role in criminal trials. In the Netherlands, in approximately 25% of the more serious criminal cases, a pre-trial forensic mental health report (FMHR) is requested to inform the court (Nederlands Instituut voor Forensische Psychiatrie en Psychologie, 2020; Nederlandse Vereniging voor Psychiatrie, 2013). Forensic mental health experts evaluate whether a mental disorder was present at the time of the alleged crime, whether this disorder affected the defendant's behavior and decision-making at the time of the offense and how this disorder may affect future (criminal) behavior. This evaluation results in advice on criminal responsibility[1] (three degrees: no responsibility, diminished responsibility, full responsibility), an indication of recidivism risk and advice on possible treatment measures (e.g. Hummelen & Van der Wolf, 2018; see Koenraadt, 2010 for an English overview of this evaluation; Van Marle et al., 2013).

In Dutch criminal trials the court first determines the crucial question whether the alleged behavior was committed by the defendant. Second, it is determined whether the conduct constitutes a criminal act. Only if this second question has been answered affirmatively, the court proceeds to determine whether the defendant is criminally responsible, and therefore blameworthy. It is at this third stage and not earlier that mental health information is formally considered relevant (Keiler et al., 2017). Forensic mental health information is thus commonly used for assessing criminal responsibility and subsequently in sentencing decisions.

While not prohibited by Dutch procedural law, in practice forensic mental health information is logically irrelevant for determining the material facts in a case, specifically regarding the question whether the defendant committed the alleged crime (*actus reus*). In the Dutch inquisitorial system, judges rely heavily on the case file containing all evidence collected in the pre-trial investigation. In contrast to adversarial jurisdictions where the evidence is presented during a trial in accordance with strict rules of evidence (e.g. Federal Rule of Evidence 403) in a bifurcated trial, Dutch criminal judges are instantly exposed to all information relevant for both the decision about guilt and for subsequent decisions about criminal responsibility and sentencing. The court

1 In this manuscript 'criminal responsibility' is used to address blameworthiness of the defendant and to what extent a defendant is eligible for punishment and/or treatment.

also has substantial discretion to evaluate and combine the available evidence as they see fit, because Dutch procedural law does not regulate such integration (Dubelaar, 2014).

This unstructured feature of criminal fact finding may prompt psychological pitfalls that can bias decisions about guilt. Such pitfalls are well-documented in the literature (see for example Charman et al., 2019). Studies have shown, for example, that professional judges are susceptible to irrelevant factors (e.g. presented order of evidence, context effects) with respect to evidence evaluation and ultimately decisions about guilt (Rassin, 2017b, 2020). This susceptibility to irrelevant factors is further facilitated by the uncertainty that accompanies the intricate complex binary decision of a guilty verdict versus acquittal (Bodenhausen & Lichtenstein, 1987). Especially when the evidence in a case is weak and/or circumstantial (for example when a suspect denies the allegations) decision-makers may rely (subconsciously) more on experience and intuition to make a decision in addition to evaluation of the pieces of evidence (Epstein, 1994; Gunnell & Ceci, 2010; Kalven & Zeisel, 1966; Tversky & Kahneman, 1974).

As a result of the unstructured criminal fact finding in the Dutch procedure and because judges can be cognitively susceptible to irrelevant factors, it is plausible that information in an FMHR meant for the sentencing phase may inadvertently affect deliberations about guilt. However, very little empirical research has focused on this effect so far (see Chapter 2). Hence, the main research question in the current study is to determine to what extent and in what manner an FMHR affects decisions about guilt[2] in the Netherlands.

3.1.1 Theory

According to theories of holistic evidence evaluation and integration, a categorical decision in a complex criminal case is made by evaluating and integrating individual pieces of information to construct a coherent story that instigates a cognitive shift towards a guilty verdict or an acquittal (e.g. Pennington & Hastie, 1992; Pennington & Hastie, 1993; Simon, 2004).[3] According to the cognitive psychological model of coherence-based reasoning (Simon, 2004), once this decision has been made, a coherent representation of the case bidirectionally affects the evaluation of evidence by further inflation and assimilation of individual pieces of evidence to strengthen the coherency of

2 In this manuscript 'decisions about guilt' means the determination whether the suspect committed the alleged crime (*actus reus*). In the Netherlands, forensic mental health information is rarely used to determine criminal intent in terms of *mens rea* (see Chapter 2). Criminal responsibility is assessed after it is decided whether the suspect is guilty.

3 In the Netherlands the court may decide that the defendant committed the offense as charged only when the judges are *convinced* based on the legal evidence (Section 338 CCP). Whenever the court is not convinced of the defendant's guilt, they must acquit.

the story. This is an automated and thus subconscious decision-making process (Simon, 2004). When the evidence in a case is weak and/or circumstantial (especially when a suspect denies the allegations), irrelevant information can provide context to interpret the evidence. Consequently, in the process of shifting towards a coherent scenario, irrelevant context information can affect the relevant evidence in a case and ultimately affect the conviction decision (Simon, 2004).

Information provided by an FMHR can facilitate this effect of irrelevant contextual information (see Neal & Grisso, 2014) because such a report is specifically aimed at establishing an association between a disorder and the alleged criminal behavior. When information in an FMHR provides an adequate explanation for the alleged crime (e.g. a disorder that can explain sudden aggressive behavior when a defendant is suspected of a violent crime), this information may increase the perceived plausibility and coherence of a guilty scenario and result in a guilty verdict.

3.1.2 Prior research

Prior research on the effects of information in FMHRs on decisions about guilt is scarce (see review in Chapter 2). With regard to research on the effects of the specific presence of an FMHR on decisions about guilt, only one study focusing on the Dutch legal system has been done so far. Van Es et al. (2020) used an experimental vignette study among 155 students to study whether presence of an FMHR affected the incriminating value of evidence, the evaluation of guilt and ultimately the verdict. They tested whether the simple presence of an FMHR affected decisions about guilt or the specific diagnosis of a borderline personality disorder in the defendant accounted for the expected effect. Results showed that the mere presence of an FMHR without a disorder being diagnosed, did not significantly affect the verdict or evaluation of evidence. Yet an FMHR including a diagnosis of borderline personality disorder in the defendant significantly increased guilty verdicts with almost 30% but did not affect the evaluation of other evidence. This study served as a pilot study for the experiment in this chapter.

The focus of most prior research has remained on the effects of specific mental disorders on verdicts (Mossière & Maeder, 2015; Mowle et al., 2016; Rassin, 2017b; Termeer & Szeto, 2021). These studies vary in how they presented information about these mental disorders to their respondents, the type of respondents they used, the type of disorders they studied and legal systems in which the research was done. For example, Rassin (2017b) used an experimental vignette study among a sample of professional judges from the Netherlands to study whether irrelevant information about a diagnosis of antisocial personality disorder and psychopathy provided by a psychiatrist would assimilate the incriminating value of the evidence and ultimately affect

decisions about guilt. Results showed that the presence of the disorders assimilated the evaluation of the evidence and increased the proportion of guilty verdicts with 33% compared to when information about these disorders was absent. A similar effect of information about psychopathy was found by Mowle et al. (2016) in an experimental vignette study among 419 jurors in the United States. They found that expert testimony by a psychologist about psychopathy in the defendant significantly increased guilty verdicts compared to testimony about schizophrenia. A guilty verdict was less likely when the defendant suffered from schizophrenia, but only when jurors had a liberal political orientation. Most recently, Termeer and Szeto (2021) conducted an experimental vignette study among 248 students, in which they compared a defendant with a history of schizophrenia to a defendant with a history of depression or a healthy defendant. They found that a defendant with schizophrenia was less likely to be found guilty compared to a defendant with a history of depression. In addition, they examined whether mental illness affected perceived dangerousness of the defendant based on prevalent negative stereotypes between mental illness and dangerousness and violence in the general population (Angermeyer & Dietrich, 2006; Link et al., 1999; Pescosolido et al., 1999). While perceived dangerousness was positively correlated to a guilty verdict, presence of a mental illness had no effect on these perceptions of dangerousness (Termeer & Szeto, 2021).

Finally, Mossière and Maeder (2015) studied effects of information about mental disorders often associated with violent behavior (i.e. schizophrenia and substance abuse) compared to mental disorders that have no such association (i.e. depression and obsessive-compulsive disorder) and a healthy defendant in two different samples: students and a community sample of jury-eligible Americans. Information about mental illness was presented as part of the alibi of the defendant and not by a forensic expert in the trial. There was no significant effect of any mental illness on the verdict for either sample.

Hence, the limited amount of research that has been carried out showed inconsistent results and because of considerable variability regarding how they presented information about these mental disorders to their respondents, the type of respondents they used, the type of disorders they studied and legal systems in which the research was done, any conclusions based on these results are tentative. Research on effects of FMHRs on decisions about guilt in the Netherlands is still scarce. Therefore, the aim of this study was to explore to what extent and in what manner an FMHR affects decisions about guilt.

3.1.3 Current study

The central research question of this study was to what extent and in what manner an FMHR affects decisions about guilt in the Netherlands. Based on

this research question, the theory and limited prior research we identified three main hypotheses that we explored:

1) Presence of an FMHR in a case with weak and circumstantial evidence will increase the incriminating value of available evidence and result in more guilty verdicts compared to when an FMHR is absent.
2) Presence of an FMHR *with a disorder* (irrespective of its nature) in a case with weak and circumstantial evidence will increase the incriminating value of the available evidence and result in more guilty verdicts compared to when a diagnosis of a disorder is not present in the FMHR.

In accordance with prevalence of specific disorders in the forensic population in the Netherlands (Kempes & Gelissen, 2020; Vinkers et al., 2011) and based on the inconsistent and diverging results in the previously discussed research (Mowle et al., 2016; Rassin, 2017b; Termeer & Szeto, 2021), we further examined the effects of the presence of two specific mental disorders: schizophrenia and personality disorder with antisocial traits. We hypothesized that:

3) Diagnosis of a personality disorder with antisocial traits will increase the incriminating value of the available evidence and result in more guilty verdicts compared to a diagnosis of schizophrenia.

Previous research (Mossière & Maeder, 2015; Termeer & Szeto, 2021) has focused on stigmatization as an explanation of an effect of mental illness on verdicts by studying perceptions of future risk and dangerousness (Termeer & Szeto, 2021) or studying mental disorders stereotypically associated with violence (Mossière & Maeder, 2015). While these studies focused on perceptions of risk, we wanted to explore whether actual information about recidivism risk would contribute to the relation between mental disorder and decisions about guilt. Since indication of recidivism risk is a crucial part of a Dutch FMHR, we explored whether an effect of mental disorder on decisions about guilt varied according to information about recidivism risk. In order to study the research questions and test these hypotheses, we conducted an experimental vignette study among law and criminology students. The experimental design and procedure are explained in the *Method* section (paragraph 3.2) after which the results are presented in paragraph 3.3. Paragraph 3.4 discusses these results and the implications for future research and practice.

3.2 Method

3.2.1 Participants and procedure

Participants were 307 students recruited from law and criminology courses at 9 universities in the Netherlands.[4] A large number of participants (n = 107, 34.9%) was removed because they failed (at least) one of the manipulation checks about the information given in the vignette (see paragraph 3.2.2.3). The final sample consisted of 200 participants.[5] The majority of the sample were young (M = 22.03 years; SD = 4.50), female (85%) criminology students (73%) in their third year of undergraduate studies (35.5%).[6]

Participants were recruited through virtual learning environments and websites of multiple Dutch universities (e.g. Blackboard, Brightspace, Canvas) and via social media (e.g. Facebook and Instagram). The recruitment message provided a Qualtrics[7] link to a 15-minute survey. When participants clicked on the Qualtrics link, they were presented with a consent form. After giving informed consent, participants were directed to the case summary. No incentives were given for participation. This study was approved by the Committee of Ethics and Data of Leiden Law School.

3.2.2 Materials and measures

3.2.2.1 Vignette

All participants received a summary of a case file (approximately 1200 words) resembling an actual case file used in Dutch criminal proceedings (see Appendix A). The vignette was adopted and adapted from a study by De

4 In most inquisitorial legal systems, including the Netherlands, judicial decisions are made by professional judges. However, it is particularly difficult to use professional judges as participants in experimental research, because experimental designs often require large sample sizes. Permission to conduct this experiment among professional judges was unfortunately denied because it would produce an overload on the courts, according to the Council of Judiciary. To obtain a sufficient sample size, we conducted this experiment among law and criminology students. Law and criminology students are more representative for professional judges than other student populations (e.g. psychology students) often used in prior research on this topic, because they are more familiar with the materials and decisions they were required to respond to. In a pilot study by Van Es et al. (2020) we established that these students made similar decisions to professional judges (Rassin, 2017b) with regard to the effects of forensic mental health information on decisions about guilt.

5 A power analysis in G*Power (Faul et al. 2007) suggests a sample size of 200 participants provides 80% power to detect a, relatively small, main effect for each hypothesis (w = 0.2, power = 0.8, α = 0.05; cf. Allen e.a. 2019).

6 First year undergraduate: 27%; second year undergraduate: 4.5%; fourth year or older undergraduate: 11.5%; master's: 21.5%.

7 Qualtrics survey software is a tool used to create and conduct online survey research.

Keijser and Van Koppen (2004, 2007). In this fictitious but realistic case, a male defendant was accused of aggravated assault with serious bodily harm (section 302 CC). The defendant and his girlfriend had broken up on the day of the assault. The defendant went on a night out with two friends. He had multiple beers. While on their way home, they crossed paths with the victim and the victim's girlfriend. The defendant and the victim, as well as the victim's girlfriend, did not know each other. The defendant and the victim had had an argument about something the defendant had said to the victim's girlfriend. After that, the defendant allegedly followed the victim and his girlfriend and attacked the victim. He allegedly kicked the victim against his body and head multiple times. The physical trauma resulted in loss of memory, loss of speech and permanent paralysis in the victim according to a neurologist. Other than the girlfriend, no one witnessed the assault, and the defendant denied all allegations. The case file contained legally sufficient, but relatively weak and circumstantial evidence in order to facilitate doubt whether the suspect committed the alleged crime. This doubt was necessary to determine whether the manipulation of information in the FMHR would affect the evaluation of guilt and ultimately the verdict (see De Keijser & Van Koppen, 2004). The information in the case file consisted of: 1) two interrogations in which the defendant denies all allegations; 2) a statement about the assault by the victim's girlfriend; 3) statements of two friends of the defendant on the situation prior to the assault. They went home before the alleged assault took place; 4) a hesitant identification of the defendant by the victim's girlfriend in a photo line-up; 5) statement by a neurologist on the injuries of the victim. The statements and identification procedure were indicative but inconclusive of guilt. The study by De Keijser and Van Koppen (2004, 2007) among professional judges showed that this vignette, as intended, facilitated doubt about the defendant's guilt since 77% of the judges provided a guilty verdict.

3.2.2.2 Design

After reading the case summary, participants were randomly assigned to one condition in the 2 (Diagnosis: personality disorder with antisocial traits or schizophrenia) x 3 (Recidivism risk: low risk or high risk or no information provided) between-subjects factorial design or to one of the two control conditions (no FMHR or an FMHR without disorder and recidivism risk information

due to refusal to cooperate with the evaluation),[8] making a total of 8 conditions.

In the conditions in which the information about a mental disorder and recidivism risk were manipulated, a fictitious and simplified forensic mental health evaluation (between 330 and 400 words) by both a psychologist and psychiatrist was presented to participants (see Appendix A). Use of language in the reports was based on actual FMHRs to make them as realistic as possible.

The first diagnosis was a personality disorder with antisocial traits. In addition to the diagnosis, symptoms of the disorder (e.g. aggressive impulses, lack of empathy, impairment of impulse control and frustration; American Psychiatric Association, 2013) were described. This facilitated a similar and comparable interpretation of the disorders between participants. The other diagnosis was schizophrenia not otherwise specified [NOS]. Symptoms included impulsive aggression, hallucinations and delusions (American Psychiatric Association, 2013). Descriptions and labels of the disorders were based on actual Dutch FMHRs. Regardless of diagnosis, all evaluations contained information on the contribution of the disorder to the alleged offense, along with a preliminary advice on criminal responsibility (in this case diminished responsibility). Since the defendant denied any involvement in the offense, no adequate treatment advice could be given in any of the conditions.

The second between-subject factor that was manipulated was recidivism risk. In the conditions with a diagnosis, participants either received information indicating low recidivism risk, high recidivism risk (both based on the Historical Clinical Risk Management-20, version 3 [HCR-20v3]; Douglas et al., 2014) or no additional information about recidivism risk.

3.2.2.3 Questionnaire

Participants were able to review the case summary and the forensic mental health evaluation while completing the questionnaire. First, participants rated the factual evidence on a Likert scale ranging from 1 (*Not incriminating at all)* to 10 (*Very incriminating*). Evidence included:

1) Identification of the defendant by the victim's girlfriend;
2) Witness statement by friend no. 1;
3) Witness statement by friend no. 2.

8 This condition was added because in recent years, the number of 'refusers' in clinical forensic mental health assessment in the Netherlands has increased from 23% in 2002 to 43% in 2017 (Nagtegaal et al., 2018). Arguments for this refusal are that information gathered in a forensic mental health evaluation can be used to sanction an offender to extensive treatment measures (in Dutch: 'tbs maatregel') instead of or in addition to a prison sentence (section 37a CC). For most violent crimes, this treatment measure can be enforced for an unlimited period of time and therefore exceed a (maximum) prison sentence imposed for the same offense (section 38e CC).

Next, participants indicated whether they found the defendant guilty or not and indicated how convinced they were of the defendant´s guilt on a scale ranging from 1 (*Not convinced*) to 10 (*Very convinced*). Finally, some questions on demographics (gender, age, study course, university and year of studies) were asked. Factual manipulation checks at the end of the questionnaire were used to ensure participants were sufficiently exposed and attentive to the manipulated factors. Participants were not able to review the case or FMHR once they had reached the manipulation check questions. Three multiple choice questions on the presence and information in the forensic mental health evaluation were presented:

1) Was an FMHR present in the case?

If yes,

2) What disorder was diagnosed with the defendant?
3) What was the predicted recidivism risk?

If participants answered at least one question incorrectly, they were excluded from the analyses. As a result of the strict check which was postponed to the end of the questionnaire where all three questions had to be answered correctly to pass, a substantial proportion of participants (34.9%) was removed from further analyses. This is not uncommon in online experimental research (Thomas & Clifford, 2017).

3.2.3 Analyses

The current study used three main outcome measures: the ultimate verdict, evaluation of guilt and evaluation of evidence. First, Chi square tests were used to determine whether the proportion of guilty verdicts differed between conditions. For explorative interaction effects we used logistic regression analysis. Second, independent sample t-tests and Mann-Whitney[9] tests were used to determine whether there were significant effects on the evaluation of guilt. Analyses of variance were used to explore interaction effects. Finally, (multivariate) analyses of variance were used to test (interaction) effects on the evaluation of the evidence.

9 For the majority of groups, assumptions of normality were violated (based on visual inspection, values of Kolmorogov-Smirnov tests and values of kurtosis and skewness). Therefore, for most analyses non-parametric Mann-Whitney test are reported. The analyses were also performed using independent sample t-tests. Results of the t-tests were not different unless stated otherwise.

3.3 RESULTS

3.3.1 Descriptive and preliminary analyses

There were no significant differences between the conditions regarding sex, age, type of studies and year of studies of the participants. Spearman's rho correlations indicated that the evaluations of the three individual pieces of evidence were all significantly correlated (Spearman's rho = .190-.711, p <.001; α = 0.68). Because of these correlations and sufficient internal consistency of the items, the three combined pieces of evidence is an acceptable measure of the total evidence evaluation. Therefore, we also analyzed the average combined score of the three individual pieces of evidence. Across all conditions the conviction rate was 82% (n =164). Participants who supported a guilty verdict rated all evidence as stronger ($Mdn_{combined}$= 6.00, U = 1173.500, z = -5.67, p <.001) and were also more convinced of the defendant's guilt (Mdn = 7.00, U = 556.000, z = -7.80, p <.001) compared to those who acquitted (Evaluation of evidence: $Mdn_{combined}$ = 4.67; Evaluation of guilt: Mdn = 4.00). The evaluation of guilt was moderately correlated to the final verdict (Spearman's rho = .553, p <.001).

3.3.2 Hypothesis 1: Effect of the presence of an FMHR

3.3.2.1 Verdict

In order to test the first hypothesis whether the presence of an FMHR had an effect on decisions about guilt, we compared the groups with and without the presence of an FMHR. Table 3.1 shows that a guilty verdict was more likely when an FMHR was present (85%), compared to the control condition in which a report was absent (66,7%; χ^2 (1) = 6.295, p =.012, φ = .177). The proportion of guilty verdicts increased with 18.3%.

3.3.2.2 Evaluation of guilt

The evaluation of guilt showed similar results: when an FMHR was present, evaluation of guilt was also higher (M = 6.54, SD = 1.50, Mdn = 7.00) compared to when this report was absent (M = 5.91, SD = 1.84, Mdn = 6.00), but this effect was not significant (U = 2238.000, z = -1.874, p = .081).

3.3.2.3 Evaluation of evidence

Table 3.1 shows the mean scores for each individual piece of evidence as well as a combined score for the three pieces of evidence. No significant effects of the presence of an FMHR on the evaluation of evidence were found, neither

for the individual pieces (F (3, 196) = 1.292, v = 0.019, p = .278, η_p^2 = .019) nor for the combined score (t (198) = 1.153, p = .250, d = 0.22). Participants seem to evaluate the evidence similarly in both conditions.

Table 3.1: Effect of an FMHR

	Condition	
	FMHR absent	FMHR present
N	33	167
Guilty verdict (%)	66.7%	85%*
Evaluation of guilt (M, SD)	5.91 (1.84)	6.54 (1.50)
Evaluation of evidence (M, SD)		
Identification	4.67 (1.85)	5.28 (1.66)
Statement (1)	6.03 (1.59)	6.20 (1.75)
Statement (2)	5.21 (1.54)	5.32(1.54)
Total	5.30 (1.38)	5.60 (1.35)

Note. FMHR = forensic mental health report; *M* = mean; *SD* = standard deviation; * $p < .05$.

3.3.3 Hypothesis 2: Effect of information about any disorder

3.3.3.1 Verdict

Within the FMHR present condition, we proceeded to compare the two groups with information about a disorder (so either schizophrenia NOS or a personality disorder with antisocial traits) with an FMHR without information about a disorder. Table 3.2 shows that there was no significant difference between the two groups (Fisher's exact test, one-sided p = .499, φ = -.028).

3.3.3.2 Evaluation of guilt

The evaluation of guilt showed similar results as no significant effect of the presence of a disorder was found (U = 1652.500, z = -.297, p = .766).

3.3.3.3 Evaluation of evidence

Finally, we found no significant effect of information about a disorder on the evaluation of the evidence, neither for the individual pieces using multivariate analysis of variance (F (3, 163) = 1.592, v = 0.028, p = .193, η_p^2 = .028) nor for the combined score (t (165) = 1.405, p = .162, d = -0.33). Surprisingly, univariate

analysis of variance showed that the evidence of identification of the defendant by the victim's girlfriend was evaluated as significantly more incriminating when no disorder was present (M = 5.96, SD = 1.30) compared to when information about a disorder was present (M = 5.17, SD = 1.69, F (1, 165) = 4.784, p = .030, η_p^2 = .028).

Table 3.2: Effect of information about any disorder

	Condition	
	Disorder absent	Disorder present
N	24	143[a]
Guilty verdict (%)	87.5	84.6
Evaluation of guilt (M, SD)	6.71 (1.27)	6.51 (1.54)
Evaluation of evidence (M, SD)		
Identification	5.96 (1.30)*	5.17 (1.69)
Statement (1)	6.38 (1.71)	6.17 (1.76)
Statement (2)	5.54 (1.79)	5.29 (1.86)
Total	5.95 (1.26)	5.54 (1.36)

Note. [a] = this condition is a combination of the 6 conditions in which any disorder was diagnosed. Therefore the sample size is larger compared to the condition in which the disorder was absent; M = mean; SD = standard deviation; * $p < .05$.

3.3.4 Hypothesis 3: Effect of type of disorder

3.3.4.1 Verdict

In accordance with the third, and final, hypothesis, we studied whether the diagnosis of a personality disorder with antisocial traits leads to more guilty verdicts compared to a diagnosis of schizophrenia (see Table 3.3). We found no significant differences (χ^2 (1) = 0.103, p =.748, φ = .027).

Furthermore, we explored whether there was an effect of recidivism risk within the conditions with a diagnosed disorder. We first analyzed whether the mere presence of information about recidivism risk affected the verdict. The analysis showed that when information about recidivism risk (irrespective of whether this was high or low) was *absent*, guilty verdicts were significantly higher (93.8%) than when this information was *present* (80%)[10] (χ^2 (1) = 4.631, p =.031, φ = -.180). Next, we explored whether there was a significant difference

10 Combination of the high risk and low risk conditions.

between information about low recidivism risk and high recidivism risk. No significant differences were found (χ^2 (1) = 0.096, p =.757, φ = .032). Finally, we found no interaction effect between the type of disorder and presence of information about recidivism risk on the verdict (b = -.190, p = .848, 95% CI [0.118;5.768], χ^2 (2) = 0.140, p =.932).

3.3.4.2 Evaluation of guilt

The evaluation of guilt showed similar results to the verdict: no significant effect of type of disorder (U = 2170.000, z = -1.557, p = .119). Although the evaluation of guilt also showed similar results to the verdict with regard to the effect of information about recidivism risk, this effect was not significant (U = 2015.500, z = -1.157, p = .247). The interaction between type of disorder and recidivism risk was not significant either (F (2, 137) = 0.161, p = .851, η_p^2 = .002).

3.3.4.3 Evaluation of evidence

Finally, no significant effects of type of disorder on the evaluation of the evidence were found, neither for the individual pieces (F (3, 139) = 0.871, v = 0.018, p = .458, η_p^2 = .018), nor for the combined score (t (141) = -.808, p = .413, d = -0.14). We neither found main effects of information about recidivism risk nor interaction effects between type of disorder and recidivism risk, for either the individual pieces of evidence (Main effect: F (6, 272) = 0.618, v = 0.027, p = .716 η_p^2 = .013; Interaction effect: F (6, 272) = 0.756, v = 0.033, p = .605, η_p^2 = .016), or for the combined score (Main effect: F (2, 137) = 1.289, p = .279, η_p^2 =.018; Interaction effect: F (2, 137) = 0.283, p = .754, η_p^2 = .004).

Table 3.3: Effect of type of disorder

	Conclusion	
	Schizophrenia NOS	Personality disorder with antisocial traits
N	76	67
Guilty verdict (%, overall)	85.5	83.6
- Low risk (n = 52)	77.8	80
- High risk (n = 43)	84.2	79.2
- No info on risk (n= 48)	93.3	94.4
Evaluation of guilt (M, SD)	6.66 (1.61)	6.34 (1.44)
- Low risk (n = 52)	6.48 (1.85)	6.20 (1.26)
- High risk (n = 43)	6.10 (1.44)	6.29 (1.55)
- No info on risk (n= 48)	6.73 (1.53)	6.61 (1.58)
Evaluation of evidence (M, SD)		
Identification	5.33 (1.69)	4.99 (1.67)
Statement (1)	6.26 (1.75)	6.06 (1.77)
Statement (2)	5.29 (1.94)	5.28 (1.78)
Total	5.63 (1.35)	5.44 (1.37)

Note. NOS = not otherwise specified; *M* = mean; *SD* = standard deviation.

3.4 DISCUSSION

The main objective of this experimental vignette study was to explore the extent and the manner in which an FMHR affects decisions about guilt in the Netherlands. Based on the theory of coherence-based reasoning in evidence evaluation and integration (Simon, 2004), the organization of the Dutch criminal trial and results from the scarcely available prior research (Mossière & Maeder, 2015; Mowle et al., 2016; Rassin, 2017b; Termeer & Szeto, 2021; Van Es et al., 2020), we hypothesized that 1) presence of an FMHR in a case with weak and circumstantial evidence will increase the incriminating value of available evidence and result in more guilty verdicts compared to when an FMHR is absent; 2) presence of an FMHR *with a disorder* (irrespective of its nature) in a case with weak and circumstantial evidence will increase the incriminating value of the available evidence and result in more guilty verdicts compared to when a diagnosis of a disorder is not present in the FMHR. And finally, 3) diagnosis of a personality disorder with antisocial traits will increase the incriminating value of the available evidence and result in more guilty verdicts compared to a diagnosis of schizophrenia.

Our experiment demonstrated that the mere presence of an FMHR increased the likelihood of reaching a guilty verdict, supporting the first hypothesis.

The proportion of guilty verdicts significantly increased with 18.3% when an FMHR was present compared to when an FMHR was absent. This result should be interpreted with care since the effect size was relatively small ($\varphi = .177$) (Cohen, 1988). No effects of the presence of an FMHR were found on the evaluation of evidence or the evaluation of guilt. We also did not find support for the second hypothesis in which we expected that the presence of any disorder would affect decisions about guilt. Apart from a significant difference regarding evidence of the identification of the defendant, no substantive effects on decisions about guilt were found. Finally, we also found no effect of type of disorder on evaluation of evidence or decisions about guilt. Our exploration of a potential effect of recidivism risk, surprisingly, revealed that when no information on recidivism risk was provided in an FMHR, the number of guilty verdicts was significantly *higher* compared to when information about any recidivism risk was given in the report. This finding suggests that information on recidivism risk in combination with the information about a mental disorder, limits biased decisions about guilt compared to only information about a disorder without presence of any information about future risk. Information about recidivism risk did not affect the evaluation of evidence or the evaluation of guilt and no interaction effects between type of disorder and information about recidivism risk on any of the decisions were found. It is possible that these explorative tests for (interaction) effects were underpowered as a result of smaller sample sizes in these analyses.

Nevertheless, the most important finding remains that when an FMHR is available in a case of a violent crime, its mere presence can bias decisions in favor of a guilty verdict regardless of the content of the report. We did not find support for our hypothesis that any effect could be explained by assimilation of other available evidence. Information about mental illness of a defendant acts as an incriminating context to help construct a coherent guilty scenario, but this does not appear to be reflected in the evaluation of available evidence, as suggested by the theory of coherence-based reasoning (Simon, 2004) or other theories of holistic evidence evaluation (Pennington & Hastie, 1992, 1993). The evidence in our experiment was evaluated in a similar manner across all conditions. A more general context effect of an FMHR may be the underlying mechanism: a mental disorder can provide a fitting explanation for a violent crime and when the evidence is weak or circumstantial in a case, this explanation may, legitimately or not, be considered to support a guilty scenario. The result that the proportion of guilty verdicts in the conditions without information about recidivism risk was significantly higher than in the conditions with information about recidivism (an increase of 13.8%) may provide further support for this stereotypical association of mental disorder and violent behavior (Angermeyer & Dietrich, 2006; Link et al., 1999; Pescosolido et al., 1999). Providing information about recidivism risk may have prompted a minor barrier (proportion of guilty verdicts was still 80%) on the coherency of a guilty scenario.

A context effect by an FMHR may already have its origins in the pre-trial forensic mental health evaluation and consequently result in confirmation bias during trial (Neal & Grisso, 2014; Nickerson, 1998). In Dutch practice, prior to the actual evaluation, forensic mental health evaluators receive information about the crime and the defendant from either the prosecutor or the court (Koenraadt, 2010). In their evaluation experts may therefore be inclined to work with the hypothesis that the defendant is guilty, even if this person denies all allegations (Crombag et al., 2005). Part of the evaluation is, among other things, to discuss the alleged crime with the defendant. The evaluator is then asked to research whether there is a psychopathological explanation for the alleged offense. A report that contains any explanation of how psychopathology in a defendant is related to the alleged criminal behavior can facilitate a confirmation bias towards a guilty scenario during trial (de Ruiter, 2010; Neal & Grisso, 2014; Van Koppen, 2004). This potential cumulative effect should be studied further.

The present study contributes to the existing body of (international) empirical literature by providing further insight into the potentially biasing effects of information in FMHRs on decisions about guilt. The current study has partially confirmed the findings of both Dutch studies by Rassin (2017b) and by Van Es et al. (2020), as our study did find an effect of an FMHR on decisions about guilt, but not yield an effect of an FMHR on evaluation of evidence or an effect of a specific disorder.

The current study also expands upon this literature by additionally exploring the effects of different types of disorder as well as a possible effect of recidivism risk. Contrary to a number of prior studies (Mowle et al., 2016; Termeer & Szeto, 2021), we did not find a significant difference between a diagnosis of schizophrenia and a personality disorder with antisocial traits. An explanation for this finding is that both disorders can be associated with violent behavior (e.g. Fazel et al., 2009; Yu et al., 2012) and consequently provide a plausible explanation for the alleged crime of aggravated assault and thus elicit a similar effect. Furthermore, aggressive symptoms overlap between the two disorders and were described in a similar way in the vignettes (e.g. impulsive aggression and aggressive impulses). In relation to the type of offense (aggravated assault), it is not unlikely that participants placed more emphasis on the symptoms of aggression than on the label attached to these symptoms. In fact, this further emphasizes that it does not matter what type of psychopathology is diagnosed to elicit bias in a criminal case as long as the symptomatology is congruent with the violent behavior (see Berryessa & Wohlstetter, 2019 for a recent meta-analysis on a general labelling effect of mental disorder on punishment outcomes).

3.4.1 Study limitations and strengths

The results in the current study are accompanied by a number of limitations. First, due to multiple strict manipulation checks, a substantial number of participants were eliminated from the study, therefore reducing sample size. A substantial exclusion rate is however not uncommon in online survey research. Moreover, the exclusion may even increase statistical power by reducing statistical noise and without introducing significant sampling bias[11] (Thomas & Clifford, 2017). Nonetheless, some analyses (i.e. interaction effects) may have been underpowered due to smaller sample sizes in these analyses.

Second, the external validity of the current study is limited. The use of a vignette allows us to study complex social situations without confounding variables, thereby enabling us to observe a (causal) effect of information in an FMHR on decisions about guilt (Hughes & Huby, 2004). While this method optimizes internal validity, this is usually at the expense of external validity and especially ecological validity (Atzmüller & Steiner, 2010; Sniderman & Grob, 2003). This vignette study used simplified stimulus materials (i.e. summaries from relevant parts of a fictitious case file) and a research setting (i.e. online with students) which does not correspond with actual practice in the Dutch legal system, in which professional judges decide in a panel of three in more serious cases, such as aggravated assault. We were primarily concerned with maximizing the internal validity of our study (i.e. our ability to minimize the influence of potential confounding factors such as poor comprehension) to study unintended and subconscious effects of an FMHR on decisions about guilt, rather than its direct generalizability to actual trials.

Notwithstanding these limitations, this study does have some notable strengths. First, it is among the first studies to extensively research potential subconscious biasing effects of FMHRs on decisions about guilt in the Netherlands. The focus of most prior research is on cognitive bias at the stage of the pre-trial forensic mental health evaluation (de Ruiter, 2010; Murrie et al., 2013; Neal & Grisso, 2014; Rassin & Merckelbach, 2014; Van Koppen, 2004; Zapf et al., 2018) without studying any subsequent effects on the ultimate judicial decisions. Second, the current study elaborated upon initial indications of unwarranted effects by FMHRs with one type of disorder (Rassin, 2017b; Van Es et al., 2020). We studied multiple different disorders prevalent among the Dutch forensic population (Kempes & Gelissen, 2020; Vinkers et al., 2011) and also explored whether a potential bias by an FMHR varied according to information about recidivism risk. Despite simplified stimulus materials, all information in the vignettes was representative of an actual case file and actual FMHRs. Finally, while a sample of students affects external validity of the results, law and criminology students are more representative for professional judges in

11 Analyses showed no significant demographic differences (gender, age and studies) between participants who passed or failed the manipulation checks.

the Netherlands than other student populations (such as psychology students) that have been used in prior research on this topic.

3.4.2 Implications

Based on the results and limitations of this study a number of recommendations for future research can be made. First, although we found a general biasing effect in favor of a guilty verdict of the mere presence of an FMHR, there are still many unanswered questions related to the underlying mechanism of this effect. We did not find support for a mechanism of assimilation of evidence by the FMHR. Therefore, future research should focus on further exploring the effect of cognitive bias, both in samples of students (as potential jurors, depending on jurisdiction) as well as among professional judges since the processing of information in an FMHR seems to differ between these populations (cf. Rassin, 2017b).

Second, although the effect of different types of mental disorder was examined, this study focused on only one type of (violent) crime. Yet offenders with mental disorders are heterogeneous in types of disorder they suffer from, as well as in types of crime they commit (Vinkers et al., 2011). The current study, as well as most prior research, has focused on severe violent crimes and disorders that are compatible with violent behavior (Mowle et al., 2016; Rassin, 2017b; Termeer & Szeto, 2021). Future research should focus on whether an FMHR still causes bias in decisions about guilt, when a disorder is not, or less, compatible with the type of crime (e.g. a psychotic disorder with certain sex crimes) (Vinkers et al., 2011). Moreover, many individuals in the (Dutch) forensic population suffer from comorbid disorders, often with substance abuse (e.g. Kempes & Gelissen, 2020; Ogloff et al., 2004; Ogloff et al., 2015). There already is much debate both in the literature and in practice about the implication of (comorbid) substance abuse for questions regarding criminal responsibility and subsequent sentencing (e.g. Goldberg, 2022; Kennett et al., 2015; Morse, 2013). Future research should therefore also take potential unwarranted effects and bias by substance abuse into consideration.

Additionally, future studies should consider an interaction between information about a mental disorder and severity of the crime (e.g. violent crimes versus property crimes), thereby exploring whether an unwarranted effect is stronger in case of a severe crime as can be argued by the conviction paradox. This paradox describes the tendency to be satisfied with less evidence to become convinced about a defendant's guilt in a more serious case compared to a less serious offense, because the consequences of a false-negative decision (i.e. a guilty individual is acquitted) are considered more severe for society than in the case of a less serious crime. This situation produces a paradox because one would expect decision-makers to be especially careful when evaluating the evidence in a more serious case, because the consequences of

a false positive decision (i.e. wrongful conviction) for a defendant are very serious in case of a more severe crime (De Keijser & Van Koppen, 2007).

Finally, a biasing effect of an FMHR on decisions about guilt in the Netherlands has now been demonstrated in a number of vignette studies (Rassin, 2017b; Van Es et al., 2020). The next step is to study this effect in a more external and ecologically valid setting with professional judges reading a realistic case file and are allowed to make elaborated decisions with three judges as is practice in severe criminal cases. More ecologically valid (qualitative) research on this potentially biasing effect, will provide more understanding of the extent and underlying psychological mechanisms of this issue and whether judges are aware of such effects.

3.4.3 Conclusion

In this explorative study, we demonstrated that the mere presence of an FMHR, regardless of its content, can bias decisions in favor of guilt. This result generates new possibilities for further research into its underlying cognitive mechanisms and into the generalizability to other types of disorders, types of crime and jurisdictions. Since people with mental illness are frequently present in criminal procedures, research is necessary to determine the extent of potential effects of bias by an FMHR on decisions about guilt to gain more insight in factors that are used in these decisions. This is important to prevent wrongful convictions and increase legitimacy and credibility of judicial decision-making.

4 Sentencing with(out) forensic mental health information

An experimental vignette study

ABSTRACT

In the Netherlands, a pre-trial forensic mental health report (FMHR) can be requested to inform the court whether a mental disorder was present at the time of the offense, whether this disorder affected behavior and decision-making at the time of the offense, how this disorder may affect future behavior and advise on possible treatment measures. However, a substantial number of defendants refuse to cooperate with FMHRs to avoid being sentenced to a forensic psychiatric hospital for at least two years (TBS). With an experimental vignette study among law and criminology students (N = 355), we tested whether TBS is less likely for an uncooperative defendant than for a cooperative defendant. Second, we tested whether an uncooperative defendant receives a longer prison sentence, when TBS is not imposed. Results showed that refusing to cooperate reduces the likelihood of a TBS measure and that this is compensated by a slightly longer prison sentence. Extending international research, we explored whether type of disorder and recidivism risk in an FMHR had an effect on sentencing. Results show that schizophrenia led to TBS more often than antisocial personality disorder regardless of recidivism risk. Type of disorder or recidivism risk did not substantially affect the prison sentence regardless of whether TBS had been imposed. Recommendations for research and practice are discussed.

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4.1 Introduction and background

Forensic mental health reports (FMHRs) (in Dutch: *pro Justitia-rapportages*) serve an important function in the criminal justice system. In the Netherlands, an FMHR is relevant for sentencing decisions. These pre-trial reports are used to advise professional judges about whether the presence of a mental disorder affected the behavior and decision-making of the defendant at the time of the offense. They also provide an evaluation of whether and how the disorder might affect future (criminal) behavior. Lastly, these reports contain conclusions about criminal responsibility (three degrees: full responsibility, diminished responsibility, no responsibility), a risk assessment and advice on possible treatment measures with appropriate regulations (Hummelen & Van der Wolf, 2018; Koenraadt, 2010; Van Marle et al., 2013).

Defendants, however, are not obligated to cooperate with this forensic mental health evaluation, as they have the right not to incriminate themselves (article 6 European Convention for the Protection of Human Rights and Fundamental Freedoms; section 29 CCP). The number of uncooperative defendants in the Netherlands has increased in the past two decades, from 23% in 2002 to 43% in 2017 (Nagtegaal et al., 2018). An important reason for defendants to refuse cooperation with the evaluation is to reduce the likelihood of being sentenced to a TBS measure (in Dutch: *terbeschikkingstelling*): (involuntary) commitment to a forensic psychiatric hospital (section 37a and 37b CC). In the Netherlands, the TBS measure is the most severe measure that can be imposed for dangerous defendants who suffered from a mental illness at the time of the alleged crime (see Jehle et al., 2021 for a comparison of European countries when dealing with dangerous offenders). For most violent crimes, TBS can be repeatedly extended with one- or two-year increments for an unlimited period and can thus result in a (life-)long period of incarceration (sections 38d sub 2 and 38e sub 1 CC).[1] To reduce the possibility of being sentenced to TBS and the possibility of being incarcerated for a long, potentially indefinite, period, lawyers often encourage their client to refuse cooperation with a forensic mental health evaluation (Nagtegaal, 2018). When judges do not impose TBS due to the suspect's refusal to cooperate, a prison sentence (with a specific maximum) often remains the only option to incapacitate a potentially danger-

1 TBS has two variations: TBS with conditions (section 38 CC) and TBS with forced care (section 37b CC). When a TBS measure with conditions is imposed, the offender has to abide to specific treatment conditions without being forced to receive care. In practice, the offender will usually reside in a forensic psychiatric treatment clinic or rehab facility. An important precondition is that the offender is willing to be treated. A more invasive measure is a TBS measure with forced care. This entails that the offender is placed in a (maximum) secured forensic psychiatric treatment facility to be treated for mental illness for two years. The measure can be repeatedly extended with one- or two-year increments in the case of very serious index offenses (i.e. crimes against physical integrity of the victim which include most violent and sexual offenses and arson).

ous offender convicted of a serious offense (Nagtegaal et al., 2018). The current study aims to test whether TBS is indeed imposed less often with an uncooperative defendant than with a cooperative defendant and whether this is compensated by imposition of a longer prison sentence.

4.1.1 Background

Even without cooperation, it remains legally possible to impose TBS. In such cases, an FMHR from two mental health experts (of which at least one psychiatrist) should be present, explaining that the defendant refused cooperation with the evaluation (section 37a sub 4 CC). Depending on the extent of the uncooperative attitude of the defendant, such FMHRs are less elaborate and do not contain (much) information about possible mental disorders, criminal responsibility, and advice on appropriate sanctions. In such cases, judges have the discretionary power to impose TBS if in their opinion the following legal criteria have been met: 1) presence of a mental disorder[2] at the time of a serious offense,[3] and 2) whether the defendant poses a significant danger to society. Judges can base assessment of these criteria on other information in the case file, such as severity of the offense and frequency of prior convictions (section 37a sub 5 CC). Prior forensic mental health evaluations,[4] and judges' own observations at the court hearing can be informative as well to determine whether a disorder is present.[5] The decision about whether a disorder is present, is ultimately the court's responsibility. The legal criterion of what constitutes a mental disorder is ambiguous (Gröning et al., 2020; Ligthart et al., 2019; Mevis & Vegter, 2011). For example, section 39 CC only states that a defendant who is not criminally responsible for a crime committed by reason of a mental disorder, is excused from punishment. This criterion is very broad and not further specified in law or jurisprudence. The disorder does not have to be classified conform the terminology of the Diagnostic and Statistical Manual of Mental Disorder (DSM-5).[6] Such an open criterion leaves the court with the responsibility to determine if a defendant suffers from a mental disorder, how this translates to criminal responsibility and whether this legitimizes TBS.

2 A mental disease or defect according to section 37a CC. For clarity purposes, we will use the term 'mental disorder'.
3 A serious offense which, according to the statutory definition, carries a term of imprisonment of four years or more, or which constitutes any of the serious offenses defined in the law (see section 37a sub 1 CC).
4 It varies per case whether these are available.
5 ECtHR 3 March 2015, Constancia vs. the Netherlands; Kooijmans & Meynen, 2017.
6 American Psychiatric Association, 2013 and see Dutch Supreme Court 18 December 2012, ECLI:NL:HR:2012:BY5355.

However, judges are often hesitant to determine the presence of a mental disorder themselves because they are laymen with respect to forensic psychiatry. Case analyses have shown that a majority of uncooperative defendants do not receive TBS (about 75%; Nagtegaal et al., 2018; Van der Wolf et al., 2018). Arguments given for not imposing TBS are lack of information or conclusions in the FMHRs, and lack of prior forensic mental health evaluations to establish the presence of a mental disorder (Van der Wolf et al., 2018). Still, judges may believe that an uncooperative defendant accused of a serious offense has mental health problems, which can make him a societal risk. Consequently, in the absence of TBS, judges might be inclined to impose a longer prison sentence. This incarceration can serve the utilitarian goals of community protection and aversion of potential risk (Albonetti, 1991; Jongeneel, 2017; Nagtegaal et al., 2018; Steffensmeier et al., 1998; Van der Wolf et al., 2018). Moreover, the lack of information in the FMHRs of uncooperative defendants also means that potential mitigating information (such as the role of a mental disorder in criminal responsibility) is absent, which might lead to longer prison sentences as well (Jongeneel, 2017; Nagtegaal et al., 2018). In other words, from the defendant´s perspective it is not necessarily wise to be uncooperative with a mental health evaluation. But other than a few studies analyzing verdicts with an uncooperative defendant retrospectively, research in which the role of an uncooperative attitude in an FMHR on sentencing is tested, is lacking.

It is important to note that in the Netherlands, it is possible to combine a prison sentence with a TBS measure when a defendant is considered (partially) responsible for their crimes. Contrary to many other jurisdictions, criminal responsibility is not used as a binary construct (i.e. the defendant is considered either responsible or not guilty by reason of insanity). Many evaluated and cooperating defendants are considered diminished responsible for their crimes (35,2%; Kempes & Gelissen, 2020). Combinations of TBS and a prison sentence are therefore common: in 2018 about 75% of imposed TBS measures were combined with a prison sentence (Raad voor Strafrechtstoepassing en Jeugdbescherming, 2020). A mental disorder can diminish criminal responsibility and mitigate a prison sentence while also be a reason to additionally impose TBS. The prison sentence is then proportionate to the blameworthiness of the offender and meant to fulfil retributive goals (De Keijser, 2000; Hart, 2008; Steffensmeier et al., 1998; Von Hirsch, 2009), while a TBS measure is used to incapacitate the offender to protect society and treat the offender for the purpose of rehabilitation (Albonetti, 1991; Steffensmeier et al., 1998). Because a measure is not intended to inflict suffering, that suffering does not need to be proportionate to the offense or blameworthiness of the offender (for a critical discussion of the Dutch dual-track system of punishments and measures see De Keijser, 2011).

Despite the important role information from an FMHR can have in sentencing decisions, empirical research on how information in an FMHR (e.g. disorder, recidivism risk) is used in sentencing decisions in the Dutch context is lacking

(see review in Chapter 2). This gap in the literature is problematic given the prevalence of FMHRs in trials and judges' discretionary power to decide on the presence of a mental disorder, criminal responsibility, and dangerousness of the defendant. These decisions can have serious consequences for the defendant. As such, more insight in the use of information in FMHRs in sentencing decisions is necessary to benefit the legitimacy of these decisions.

Apart from the aforementioned studies that focused on the uncooperative defendant (Jongeneel, 2017; Nagtegaal et al., 2018; Van der Wolf et al., 2018), a small number of studies used case analysis to explore the correspondence between expert advice in FMHRs and sentencing decisions in the Netherlands. Results show that in most cases (between 86% and 90%) judges follow the conclusions about criminal responsibility and treatment as given by the experts (Boonekamp et al., 2008; Harte et al., 2005; Nagtegaal et al., 2018). Furthermore, one explorative study examined the effect of diminished criminal responsibility on the length of a prison sentence when TBS had also been imposed (Claessen & De Vocht, 2012). Based on published cases, it was shown that diminished responsibility could have a mitigating effect on the prison sentence although this effect can be negated by seriousness of the crime or other circumstances in a case (Claessen & De Vocht, 2012). Whether the mere combination of TBS with a prison sentence acts as a mitigating factor on the length of the prison sentence remains largely unknown. The use of retrospective case analysis is insightful, but poses an important methodological limitation, as it is impossible to determine the exact role of FMHRs in judicial decision-making processes.

Prior research in other jurisdictions have used experimental vignette methods to study the effects of forensic mental health expertise on different sentencing decisions, mostly among mock jurors (see review in Chapter 2), While results were not all consistent, studies demonstrate that the type of disorder matters in decisions about sanction type (i.e. death penalty, involuntary hospitalization). Expert testimony about schizophrenia appears to be a mitigating factor in capital cases (in the United States), while psychopathy aggravates perceptions of dangerousness and (capital) sentencing (Barnett et al., 2004; Berryessa & Wohlstetter, 2019; Edens et al., 2005; Edens et al., 2004; Kelley et al., 2019; Mowle et al., 2016; Saks et al., 2014). However, most of these studies were conducted in the United States and are therefore not easily generalized to the Dutch jurisdiction. Sentencing options for individuals with mental health problems are different in the Netherlands (see above). Furthermore, in contrast to some other jurisdictions (e.g. in the United States), Dutch law and jurisprudence do not provide any regulations or definitions as to what type of mental disorder can affect criminal responsibility or what type of sanction should be imposed (see Beukers, 2017). It is therefore necessary to explore whether type of disorder also affects sentencing decisions in the Netherlands.

4.1.2 Current study

The current study is a first attempt to experimentally study the decision-making in sentencing decisions in cases with a mentally ill defendant in the Netherlands. The following research question is studied: to what extent does an FMHR and the available information about mental disorder and recidivism risk therein affect sentencing decisions in the Netherlands? We focused on two sanction options: TBS and imprisonment. Based on current legislation and legal practice, and the scarcely available studies, we hypothesized that:

1) When a defendant is uncooperative with a forensic mental health evaluation, TBS is less likely than when a defendant cooperates.

When the criteria for imposing TBS are not met as a result of an uncooperative attitude, it is suggested in the literature that a (long) prison sentence often remains the only sentencing option (Jongeneel, 2017; Nagtegaal et al., 2018). We thus expected that in case of an uncooperative defendant decision-makers would increase their focus on incapacitation through imprisonment using their own perception of potential risk to society. Furthermore, there is a lack of potentially mitigating factors in an FMHR to inform their decisions. As such, we hypothesized that:

2) In case TBS is not imposed, an uncooperative defendant will receive a longer prison sentence than a cooperative defendant.

The experimental design of the current study also presents the opportunity to study whether specific information in an FMHR affects sentencing decisions. The legal criterion of what constitutes a mental disorder is very open and not further defined in jurisprudence (Beukers, 2017; Gröning et al., 2020; Ligthart et al., 2019; Mevis & Vegter, 2011). To expand upon prior international research, we therefore explored whether specific mental disorders within an FMHR, namely schizophrenia and antisocial personality disorder (APD), affected sentencing decisions (i.e. imposing TBS and a prison sentence) differently. These disorders were selected based on their use in international research and their prevalence in the Dutch forensic population (Dienst Justitiële Inrichtingen, 2021; Kempes & Gelissen, 2020; Vinkers et al., 2011). Moreover, these disorders often differ in the way that criminal responsibility is attributed based on whether behaviors appear to be tied to personality traits within the individual's control (Edens et al., 2005; Tsimploulis et al., 2018; Weiner, 2010). Consequently, schizophrenia and APD may differ in their mitigating or aggravating effects on sentencing (Barnett et al., 2004; Berryessa & Wohlstetter, 2019; Edens et al., 2005; Edens et al., 2004; Kelley et al., 2019; Mowle et al., 2016; Saks et al., 2014; see Chapter 2). Since specific effects of mental disorders on sentencing decisions have not been studied in the Dutch context yet, we only explored potentially different effects of these disorders. Finally, we explored whether sentencing decisions varied according to information about

risk assessment in the FMHR. Including this factor allowed us to study whether this risk assessment was used to determine the defendant's danger to society, and if effects of a mental disorder occur other than as an (implicit) association with dangerousness and criminality (Edens et al., 2005; Edens et al., 2004; Garcia et al., 2020; Link et al., 1999; Pescosolido et al., 1999; Van der Wolf, 2012).

An experiment allowed us to isolate effects of (aspects of) the FMHR on sentencing decisions. The experimental design and procedure will be explained in the *Method* section (paragraph 4.2) after which the results will be presented in paragraph 4.3. Paragraph 4.4 discusses these results and the implications for future research and practice.

4.2 Method

4.2.1 Participants

Participants were 355 students recruited from law and criminology courses at seven universities in the Netherlands. Law and criminology students served as proxies for professional judges. It is often inevitable to resort to a student sample for quantitative research on legal decision-making in the Netherlands. Permission to recruit sufficient criminal law judges is often denied in the Netherlands because the Council of Judiciary acts as a very strict gatekeeper to prevent overload of courts (see Bosma & Buisman, 2017; Van Spaendonck, 2021). The experimental design in this study (see paragraph 4.2.2) required many participants to guarantee power of the analyses, which could not be achieved by recruiting professional judges in the Netherlands (Simmons et al., 2011).[7] According to the Council, these numbers would produce an overload and burden onto the courts. Permission to conduct this experiment among professional judges was therefore unfortunately denied. However, by using a student sample we could provide for power in our analyses. Law and criminology students are not directly representative of professional judges who decide in criminal cases in the Netherlands and have had years of training and experience (see paragraph 4.4.1 for a discussion about generalizability of the results). Yet, because of their education in criminal law and as prospective legal professionals, these students may be considered to be more representative for decision-makers in the Dutch legal system than other types of students (i.e. psychology students) or members of the general public. The majority of the sample were young (M = 21.46 years; SD = 4.24), female (62.8%) law

7 A power analysis in G*Power (Faul et al., 2007) suggests a sample size of at least 244 participants provides 80% power to detect a relatively small (interaction) effect size (f = 0.2, power = 0.8, α = 0.05; cf. Allen et al., 2019). As such, a sample of criminal law judges was not feasible.

students (83.1%), and in their first year of undergraduate studies (49.3%).[8] Participants were recruited through virtual learning environments and websites of multiple Dutch universities (e.g. Blackboard, Brightspace, Canvas) and via social media (e.g. Facebook and Instagram). The recruitment message presented a link to a 15-minute Qualtrics survey. After giving informed consent, participants were directed to the case summary. No incentives were given for participation and data were collected anonymously. This study was approved by the Committee of Ethics and Data of Leiden Law School.

4.2.2 Design, materials and procedure

4.2.2.1 Case vignette

All participants received a summary of a case file (approximately 1000 words) resembling an actual case file used in Dutch criminal proceedings (see Appendix B). The vignette was adopted and adapted from a study by De Keijser and Van Koppen (2004). In this fictitious but realistic case, a male defendant was accused of aggravated assault with serious bodily harm (section 302 CC). After a night out and multiple beers, the defendant attacked the victim. The defendant and the victim did not know each other. The defendant and the victim had an argument about something the defendant had said to the victim's girlfriend. After that, the defendant followed the victim and his girlfriend and attacked the victim. He kicked the victim against his body and head multiple times. The assault resulted in loss of memory, loss of speech and permanent paralysis according to a neurologist. The defendant confessed and was held in pre-trial detention for 3 months. The defendant was ultimately found guilty of aggravated assault with serious bodily harm.

4.2.2.2 FMHR

After reading the case summary, participants were randomly assigned to either one of eight conditions in a completely between-subjects design. Figure 4.1 provides a schematic representation of this design. The conditions are:

– C1. A condition without an FMHR. This condition allows for analysis of the effect of the mere presence of an FMHR, regardless of its content. This condition was used to test the effects of presence of any FMHR on imprisonment[9] decisions.

8 While almost half of the sample consists of first year students, they were recruited at the end of their first year. Therefore they had completed the introductory course to criminal law.

9 This condition could not be used in decisions about TBS because TBS cannot be imposed when an FMHR is completely absent.

- C2. A condition with an FMHR in which the defendant was uncooperative with the evaluation. This condition did not provide any information about type of disorder, nor about recidivism risk. This condition was used to test the two hypotheses in this study. Furthermore, this condition served as a control condition for the subsequent six conditions in a factorial design in which the defendant cooperated and both type of disorder and recidivism risk were varied.
- C3-C4-C5. These conditions contained an FMHR with a cooperative defendant with an antisocial personality disorder. In these conditions the level of recidivism risk was varied: there was either a low risk (C3), a high risk (C4) or no information about risk at all (C5). The condition without any information about risk is needed to test whether the presence of a mental disorder has a main effect on sentencing decisions regardless of associated recidivism risk.
- C6-C7-C8. These conditions contained an FMHR with a cooperative defendant with schizophrenia. In these conditions the level of risk was varied: there was either a low risk (C6), a high risk (C7) or no information about risk at all (C8).

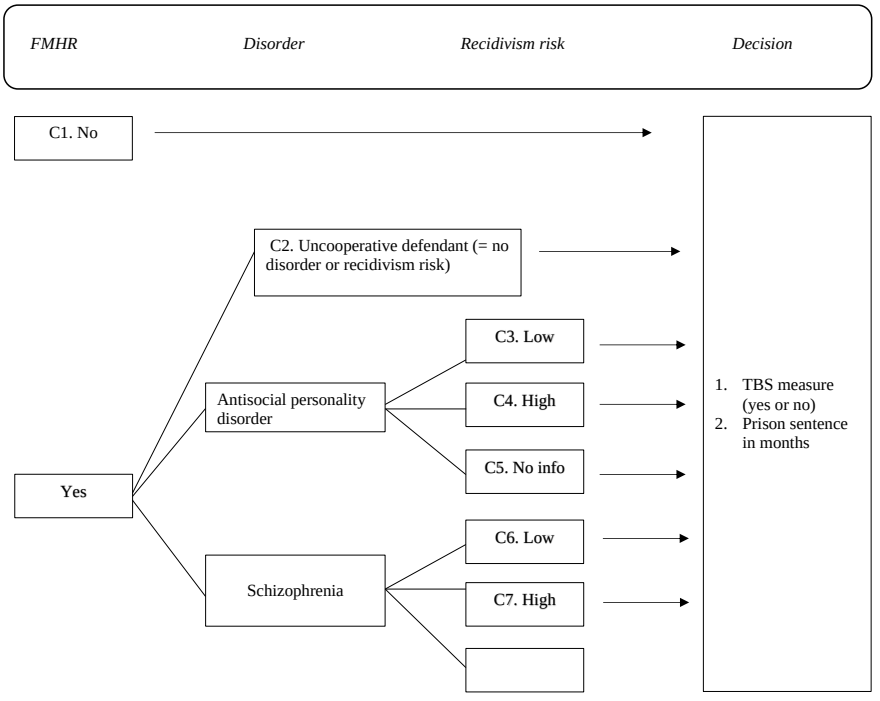

Figure 4.1: Visualization of experimental design.

In the condition with an uncooperative defendant, the FMHR stated that after evaluation in a forensic observation clinic[10] by a multidisciplinary team of experts, no conclusions could be given about the contribution of a possible mental disorder to the offense, advice on criminal responsibility, risk assessment or treatment advice. In the conditions with the cooperating defendant, a fictitious, condensed multidisciplinary forensic mental health evaluation (between 250 and 350 words) by a psychologist and psychiatrist was provided to participants. Use of language in the reports was based on actual FMHRs to make them as realistic as possible.

The disorder in the FMHR with a cooperating defendant was either a personality disorder with antisocial traits (APD) or schizophrenia. In accordance with actual FMHRs in the Netherlands, symptoms of the disorders were described. Symptoms of APD included aggressive impulses, lack of empathy, impairment of impulse control and frustration (American Psychiatric Association, 2013). Symptoms of schizophrenia included impulsive aggression, hallucinations,

10 While most forensic mental health evaluation are done on an outpatient basis (Nederlands Instituut voor Forensische Psychiatrie en Psychologie, 2021), serious cases with uncooperative defendants are often evaluated in a forensic observation clinic (Dutch: Pieter Baan Centrum) for a period of up to seven weeks (this can even be extended to 14 weeks) by a multidisciplinary team of experts (section 196, 198 and 509g CCP).

and delusions (American Psychiatric Association, 2013). This facilitated a similar and comparable interpretation of the disorders among participants. Descriptions and labels of the disorders were based on actual Dutch FMHRs. Regardless of disorder, all evaluations contained information on the contribution of the disorder to the offense, resulting in a conclusion of diminished criminal responsibility. The forensic mental health evaluation also contained an advice that the defendant should be treated for an extensive period and that the defendant was willing to cooperate with treatment. However, no specific treatment options or appropriate legal frameworks were provided in order to test whether and if so, which type of sanction participants would impose (see Appendix B).

The second between-subject factor that was manipulated was recidivism risk. In the conditions with a cooperating defendant, participants either received information about a low recidivism risk, a high recidivism risk (both based on the Historical Clinical Risk Management-20, version 3 [HCR-20v3] (Douglas et al., 2014) or no additional information about recidivism risk (see Appendix B). The complete design of the study with sample sizes per condition is presented in Table 4.1.

Table 4.1: Experimental design of the study

				Decision	
Condition	*Disorder*	*Risk*	*N*	*TBS*	*Prison*
C1. No FMHR (control)	-	-	56	N/A	X
C2. FMHR with uncooperative defendant	-	-	41	X	X
C3. FMHR	APD	Low	49	X	X
C4. FMHR	APD	High	44	X	X
C5. FMHR	APD	-	40	X	X
C6. FMHR	Schizophrenia	Low	34	X	X
C7. FMHR	Schizophrenia	High	38	X	X
C8. FMHR	Schizophrenia	-	44	X	X
			N	278[11]	346[12]

Note. FMHR = forensic mental health report; APD = antisocial personality disorder; – = not present; X = condition used with this outcome measure; N/A = not applicable.

11 The removal of the control condition resulted in the removal of 56 participants from analyses on TBS. Twelve participants chose to impose a compulsory treatment order based on judicial care authorization (section 2.3 Forensic Care Act). Because of its low prevalence and because this is a civil measure (in the Compulsory Mental Health Care Act) we decided to remove these participants from the analyses about TBS to optimize comparability. This resulted in a sample size of 278.

12 The final sample size does not include participants who filled in '0' when they were asked to determine the length of an unsuspended prison sentence (n = 2) or were an outlier based on z-scores (> 3 standard deviations from the mean; n = 7).

4.2.2.3 Procedure and questionnaire

Since we did not expect students to be fully aware of the sanctions that could possibly be imposed in this specific case, we provided them with general guidelines of the available sanction options with their appropriate regulations, requirements, and limitations. First, each participant was asked to impose an unconditional prison sentence with a maximum of 8 years (or 96 months) which is the maximum prison sentence that can be imposed for aggravated assault with serious bodily harm (section 302 CC). Additionally, participants could choose to combine this with other sanction modalities (e.g. a suspended sentence with/without special conditions) or measures. Only in conditions with an FMHR, participants were able to choose TBS with conditions (section 37a CC) or TBS with enforced care (section 37b CC). These options were only available when participants considered the defendant to be diminished responsible or not responsible at all.[13] Conform law and legal practice, TBS options were also provided when the participants assessed the defendant fully responsible for his actions in the condition with the uncooperative defendant (section 37a sub 3 jo section 37 sub 3 CC). The focus of the current study lies on the TBS measure and prison sentence.

To assess whether the manipulations were successful participants rated the criminal responsibility of the defendant on a Likert scale ranging from 1 (*Not responsible)* to 7 (*Fully responsible*). Second, they provided an ordinal decision of criminal responsibility: full responsibility, diminished responsibility, not responsible. In line with Dutch practice, this decision affected whether punishments and measures could be combined. Lastly, participants indicated to what extent they expected the defendant to commit a similar offense in the future on a Likert scale from 1 (*No recidivism*) to 7 (*Absolutely recidivism*). The survey ended with a few questions on demographics (gender, age, study course, university, and year of studies).

4.2.3 Analytical procedure

The control condition (condition 1; see Table 4.1) could not be used in the analyses with the TBS measure, because it is legally impossible to impose TBS if an FMHR is completely absent. This control condition was therefore only used in the analyses with the prison sentence. The two hypotheses in this study

13 Conform Dutch criminal law (section 39 CC), when participants determined that the defendant was not criminally responsible, they could not impose punishment and only impose a treatment measure. Legally, it is also possible to impose a TBS measure when a cooperating defendant is determined to have full criminal responsibility. However, in practice this hardly occurs and in an effort to optimize ecological validity, we filtered out the option to impose a TBS measure when the cooperating defendant was found fully responsible.

were tested using two outcome measures: 1) a binary variable of whether TBS was imposed (no/yes),[14] and 2) a variable reflecting the unsuspended prison sentence in months. To test the first hypothesis, a Chi-square analysis was used to determine whether the choice for TBS differed between the uncooperative and cooperative defendant. We therefore compared condition C2 to a combination of the conditions C3 up to C8 (see Figure 4.1 and Table 4.1). To test the second hypothesis, we used a non-parametric Mann-Whitney test to determine whether the prison sentence differed between the uncooperative (condition C2) and cooperative defendant (combination of conditions C3 up to C8).[15] For the explorative analyses concerning the effects of disorder and risk, Chi square analyses were used for the TBS variable. A two-way ANOVA with Helmert contrasts and a more robust Welch's ANOVA with Games- Howell post-hoc tests were used for the prison sentence.

4.3 Results

4.3.1 Descriptives

There were no significant differences between the conditions regarding sex, age and year or type of studies of the participants. In accordance with the manipulations, participants assessed the criminal responsibility as significantly lower in the conditions with a cooperating defendant and therefore an advice of diminished responsibility (M = 5.20, SD = 1.10), compared to when this advice was not present due to refusal to cooperate (M = 6.61, SD = 0.54, $p <$ .001) or when no FMHR was present (M = 6.52, SD = 0.54, $p <$ .001; Welch's F (2, 117.301) = 117.790, $p <$ .001). All participants across all conditions concluded that the defendant was either diminished, or fully responsible for the offense. Participants also assessed the recidivism risk of the defendant significantly higher in the conditions in which the defendant was predicted to a have high recidivism risk (M = 5.80, SD = 0.96) compared to having a low recidivism risk (M = 4.46, SD = 1.48, $p <$. 001; Welch's F (2, 158.070) = 23.516, $p <$ .001). Recidivism risk in the conditions without information on this risk was assessed as significantly higher compared to when a low indication of risk was provided (M = 5.44, SD = 1.28, $p <$ .001). There was no significant difference in the perception of recidivism risk between the conditions without information on

14 Participants had the opportunity to impose TBS with conditions or TBS with forced care. For analytical purposes, these were combined because the criteria for imposing either one are almost the same.

15 A non-parametric test was performed because assumptions of normality were violated (based on visual inspection, values of Kolmorogov-Smirnov tests and values of kurtosis and skewness and even after removal of outliers (n = 7) based on z-scores > 3 standard deviations of the mean).

recidivism risk and when a high indication of risk was provided (p = .099).[16] The median prison sentence imposed was 24 months (M = 25.1 SD = 12.90, Min = 1 Max = 72, N = 346).

4.3.2 TBS measure

4.3.2.1 Hypothesis 1: When a defendant is uncooperative with a forensic mental health evaluation, imposition of TBS is less likely than when a defendant cooperates

To examine the first hypothesis, we compared the condition of the uncooperative defendant (n = 41) with all the conditions with a cooperative defendant (n = 237). In case of an FMHR with an uncooperative defendant, significantly fewer TBS measures were imposed (7.3%, n = 3) than when an FMHR was present with a cooperative defendant (55.7%, n = 132; $\chi^2(1) = 32.751$, $p < .001$, $\varphi = .343$), supporting our first hypothesis.[17]

4.3.2.2 TBS according to type of disorder and recidivism risk

We further explored differences in TBS between type of disorder and recidivism risk. Table 4.2 presents the proportions of TBS for each condition. There is a main effect of type of disorder. In case of schizophrenia, the proportion of TBS is significantly higher than in case of APD (respectively 68.8% and 44.5%, $\chi^2(1) = 14.060$, $p < .001$, $\varphi = .244$, N = 237). Additionally, we explored the effects of recidivism risk. The overall model was significant ($\chi^2(2) = 6.904$, $p = .034$, $\varphi = .171$, N = 237). Inspection of the adjusted standardized residuals for each level of risk showed that the proportion of TBS was significantly lower for a low risk assessment (45.6%) compared to when no information about recidivism risk was provided (66.3%). The conditions with a high risk did not significantly differ from the other conditions. Further examination of the effect of recidivism risk within the different types of disorder, shows that risk only affected the proportions of imposed TBS measures in case the defendant suffered from APD ($\chi^2(2) = 6.940$, $p = .030$, $\varphi = .233$, N = 237): when information

16 The perceptions of criminal responsibility and recidivism risk show that manipulations were successful. We also used a number of factual stimulus checks in the questionnaire. However, because the main analyses did not differ between the sample with these checks and the sample without checks, we reported the analyses with the full sample to optimize power (cf. Gurley & Marcus 2008; Simmons et al., 2011).

17 Sample sizes were unequal in this analysis (n = 41 versus n = 237). The chi-square test is robust against unequal sample sizes, because the statistics are based on proportions of expected values. The test is valid as long as less than 20% of cells have an expected cell count < 5, which was the case in this analysis (Field. 2013). The effect size of .343 shows a medium strong effect based on the sample size of 278.

about risk was absent with an APD, the proportion of imposed TBS was significantly higher (61.5%) than in the low risk condition.

Table 4.2: Proportion of TBS per type of disorder and level of risk

	Schizophrenia % (*n*)	*APD* % (*n*)	*Total* % (*n*)
Low risk	62.5% (20)	34% (16)	45.6% (36)
High risk	72.2% (26)	40.5% (17)	55.1% (43)
No info on risk	70.7% (29)	61.5% (24)	66.3% (53)
Total	68.8% (75)	44.5%) (57)	55.7% (132)

These results suggest that a disorder of schizophrenia leads to TBS more often than an APD, regardless of a risk assessment. In case of APD, information about risk assessment seems to mitigate the chances of receiving TBS, since in the condition without any information about risk, the proportion of TBS was significantly higher.

4.3.3 Prison sentence

4.3.3.1 Hypothesis 2: In case TBS is not imposed, an uncooperative defendant will receive a longer prison sentence than a cooperative defendant

The second hypothesis in this study focused on the effect of an uncooperative defendant on the length of a prison sentence if TBS was not imposed. Because it was hypothesized that the prison sentence was longer in such cases, we ran the analyses on a subsample of participants who did not combine a prison sentence with TBS (N = 143).[18]

The non-parametric Mann-Whitney test shows that in case of an uncooperative defendant, the prison sentence was significantly longer (M = 29.05, SD = 11.13, Mdn = 30) than when a defendant cooperated (M = 25.79, SD = 13.65, Mdn = 24) (U = 1515.500, z = -2.223, p = .026, r = -0.19, N = 143). To examine if refusing to cooperate aggravates a prison sentence, we compared all conditions to a control condition in which *no* FMHR was present (all else being equal). Although the average prison sentence in the control condition was lower (M = 27.27, SD = 13.79, Mdn = 30) than in the condition with the uncooperative defendant, a non-parametric Kruskall-Wallis test showed that the control condition did not significantly differ from the condition with an uncooperative defendant or the conditions with a cooperative defendant (H(2)

18 This subsample did not differ in demographic characteristics compared to the larger sample of 278.

= 5.550, p =.062, N = 199). This result shows that information in an FMHR about a cooperative defendant is a mitigating factor on the length of a prison sentence, but only when compared to the uncooperative defendant. Refusing to cooperate is thus not used to justify a longer prison sentence (see Figure 4.2).

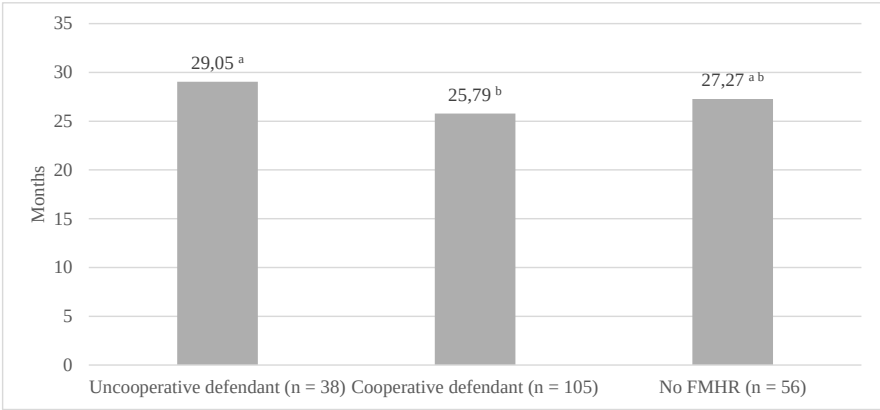

Figure 4.2: Mean prison sentence in months for uncooperative defendant, cooperative defendant, and control condition (no FMHR) when TBS was not imposed

4.3.3.2 *Prison sentence according to type of disorder and recidivism risk when TBS was not imposed*

We further explored whether the effect of an FMHR on the prison sentence differed according to type of disorder within the group that did not impose TBS (N = 105). Those who imposed TBS and those who did not were analyzed separately to reduce any confounding effects of the combination of TBS and a prison sentence. A 2 (Disorder: schizophrenia; APD) x 3 (Recidivism risk: low risk; high risk; no information provided) ANOVA showed a main effect for type of disorder (F(1, 99) = 5.815, p = .018, η_p^2 = .055). The prison sentence was longer in case the defendant suffered from schizophrenia (M = 30.53 months, SD = 19.47) than when he suffered from an APD (M = 23.52 months, SD = 9.42). Neither a main effect of level of recidivism risk (F(2, 99) = 1.021, p = .364, η_p^2 = .020) nor an interaction effect between type of disorder and recidivism risk was found (F(2, 99) = 0.258 p = .773, η_p^2 = .005; see. The left part of Table 4.3 shows an overview of the average prison sentence per condition). Because the assumption of homogeneity of variances was violated for the type of disorder (p < .001) and group sizes were not equal, we also ran a robust Welch's ANOVA to determine whether the main effect of type of disorder was still significant. Welch's ANOvA showed similar results, but only

approached significance (F (1, 40.002) = 3.992, p = .053). Therefore the effect of type of disorder should be interpreted with caution.

4.3.3.3 Prison sentence according to type of disorder and recidivism risk when TBS was imposed

Finally, to explore whether participants who *did* impose a TBS measure adjusted their prison sentence because of diminished criminal responsibility, we ran a 2 (schizophrenia; APD) x 3 (no info on risk; low risk; high risk) ANOvA for this group (N = 132). First, the average prison sentence was not significantly lower when TBS had been imposed (M = 23.28, SD = 12.13, see right part of Table 4.3) than when no TBS was imposed (M = 25.79, SD = 13.65; see left part of Table 4.3, U = 6209.500, z = -1.399, p = .162). The analysis of variance showed no effects for type of disorder (F (1, 126) = 0.998, p = .320, η_p^2 = .008) or information on risk (F (2, 126) = 0.544, p = .582, η_p^2 = .009), nor an interaction effect (F (2, 126) = 1.875, p = .158, η_p^2 = .029; see right part of Table 4.3 for an overview of means per condition).

Table 4.3: Mean prison sentence in months per type of disorder and level of risk when TBS was (not) imposed (M = mean; SD = standard deviation)

	TBS was not imposed (N = 105)			*TBS was imposed (N = 132)*		
	Schizophrenia M (SD)	*APD M (SD)*	*Total M (SD)*	*Schizophrenia M (SD)*	*APD M (SD)*	*Total M (SD)*
Low risk	26.50 (18.03)	22.32 (8.51)	23.49 (11.85)	20.40 (7.16)	23.69 (12.50)	21.86 (9.87)
High risk	32.00 (20.46)	24.48 (9.70)	26.63 (13.75)	26.12 (11.22)	23.24 (10.00)	24.98 (10.72)
No info on risk	33.33 (21.00)	24.40 (9.42)	28.37 (15.96)	25.97 (15.87)	19.13 (11.72)	22.87 (14.43)
Total	*30.53 (19.47)*[a]	23.52 (9.06)[b]	25.79 (13.65)	24.53 (12.54)	21.63 (11.47)	23.28 (12.13)

Note. Significant differences (p = .05) are in italics. Different superscript letters indicate significant differences between conditions.

4.4 DISCUSSION

The aim of the current study was to explore the effects of FMHRs on sentencing decisions in the Dutch legal context. Using an experimental vignette study, we focused on the effects of presence and content of FMHRs on imposing 1) TBS and/or 2) a prison sentence. In accordance with legal practice and based on the scarcely available literature, we first hypothesized that when a defendant is uncooperative with a forensic mental health evaluation, TBS is less likely to be imposed than when a defendant cooperates. Second, we hypothesized that in case TBS is not imposed, an uncooperative defendant will receive a longer prison sentence than a cooperative defendant. Another object-

ive of the current study was to expand upon international research and explore whether different disorders, schizophrenia and APD, as well as information about recidivism risk might affect sentencing differently.

Supporting the first hypothesis, results demonstrated that significantly fewer TBS measures were imposed in case of an uncooperative defendant compared to a cooperative defendant. Apparently, conclusions about the presence of a mental disorder and dangerousness were harder to make when experts could not conclude anything about presence of a mental disorder, criminal responsibility, and risk. The explorative analyses showed that defendants suffering from schizophrenia received TBS more often than defendants suffering from an APD, irrespective of the level of recidivism risk. The level of recidivism risk did matter for defendants suffering from an APD: in this group a low level of risk mitigated the likelihood of receiving TBS.

As was expected in the second hypothesis, when TBS was not imposed, the uncooperative defendant received a significantly longer prison sentence than the cooperative defendant. It should be noted though, that this difference was a little over three months, and the effect size was relatively small (cf. Cohen, 1988). The mean prison sentence of the uncooperative defendant (without a TBS measure) did not differ from the control condition in which an FMHR was absent, indicating that refusing to cooperate was not used as a factor to justify a longer prison sentence. Rather, cooperation to an FMHR serves to mitigate the prison sentence when TBS is not imposed. Furthermore, the results showed no substantial significant differences in prison sentences for defendants suffering from schizophrenia or defendants suffering from APD, regardless of whether TBS was imposed and regardless of the level of recidivism risk. These are contrasting results compared to earlier international studies (from the United States) that found a mitigating or excusing effect of psychotic disorders and an important role for recidivism risk (e.g. Barnett et al., 2004; Berryessa & Wohlstetter, 2019; Blais, 2015; Cox et al., 2010; Edens et al., 2005; Edens et al., 2004; Gurley & Marcus, 2008; Kelley et al., 2019; Mowle et al., 2016; Rice & Harris, 1990; Saks et al., 2014; Weiner, 2010; see Chapter 2). From our findings it appeared that schizophrenia is *not* a mitigating, but even an aggravating factor in sentencing as compared to APD. These results must however be interpreted with caution because the difference only approached significance and only when no TBS was imposed. The sample size for these analyses was lower than the full sample, which may have affected power to detect an effect. Lack of an effect of recidivism risk could also be explained by the lower power in this analysis. Yet another, more substantial, explanation for the lack of such an effect in this study might be the seriousness of the crime in the vignette. This seriousness may have activated more retributive purposes of punishment instead of preventative aims based on risk assessment. Future

research would therefore benefit from varying the type and severity of crimes to test these assumptions.

The exploratory findings further suggest that students deemed defendants with a disorder of schizophrenia and convicted for a violent offense more in need of treatment than defendants suffering from an APD, regardless of the level of risk. Even in the schizophrenia/low risk condition almost two thirds (62.5%) of the participants imposed TBS, even though low recidivism risk can be a contraindication of a TBS measure (section 37a sub 1 CC; Van Spaendonck, 2021). This effect of type of disorder is interesting because in legal practice the specific classification of the behavioral symptoms (e.g. in terms of DSM-5, American Psychiatric Association, 2013) does not play a specific role in decisions about TBS.[19] Yet prior international research has indicated that mock jurors judged that defendants suffering from schizophrenia should spend their sentence in treatment rather than prison (Finkel et al., 1985). Moreover, the idea that defendants suffering from schizophrenia are a danger to society and need to be incapacitated is compatible with studies among the general public that indicate a (stereotypical) association between schizophrenia and perceived dangerousness and violence and subsequent desire to segregate these individuals (Angermeyer & Dietrich, 2006; Corrigan et al., 2003; Link et al., 1999; Pescosolido et al., 1999).

Our study demonstrates that by refusing to cooperate with a forensic mental health evaluation, a defendant can avoid a TBS measure. The absence of TBS is hardly compensated by a prison sentence: the prison sentence of an uncooperative defendant is significantly longer compared to a cooperative defendant, but the difference is a little over three months. The duration of TBS, in comparison, is at least two years, often in addition to a prison sentence (Raad voor Strafrechtstoepassing en Jeugdbescherming, 2020). Even so, avoiding TBS is ill-advised from a societal viewpoint, as an offender with suspected mental health problems associated with criminal behavior is ultimately released untreated.

Results from the current study demonstrate the reluctance to impose TBS when a recent substantive assessment by an expert is completely absent (cf. also Nagtegaal et al., 2018; Van der Wolf et al., 2018). Scholars have questioned whether it is even legitimate for a judge to determine that a mental disorder is present, especially when qualified forensic mental health experts were not able to (Mackor, 2012). An explanation for absence of specific diagnostic information is that forensic psychologists and psychiatrists are not only bound by regulations in the Dutch Criminal Code and Code of Criminal Procedure, but also by their respective professional codes. These professional codes can

19 See Dutch Supreme Court 18 December 2012, ECLI:NL:HR:2012:BY5355.

make experts hesitant to provide tentative information about an uncooperative defendant because disciplinary actions can be taken against them if they do not adhere to these professional codes (Nagtegaal et al., 2018). Nonetheless, there are indications that in the past 10 years judges have increasingly used their discretionary power to establish a disorder and impose TBS when they perceive substantial societal risk and a recent specific diagnosis is absent (Kooijmans & Meynen, 2017; Ligthart et al., 2019; Van der Wolf et al., 2018). The imposition of TBS increased the more substantive information about a mental disorder, criminal responsibility and treatment advice forensic mental health experts are able to provide (Nagtegaal et al., 2018). This emphasizes the importance for experts to provide as much expert information about the mental state of the defendant and the effect this state had on the offense to assist the judge in making the best informed and appropriate sentencing decision (Kempes & Van der Wolf, 2018).

4.4.1 Limitations

Interpretation and generalizability of the results of the current study are subject to several limitations. First, some analyses were done using a subsample. These selections could have affected the power to detect certain effects. As such, some results in this study could be underestimated. Second, as in most inquisitorial legal systems, including the Netherlands, sentencing decisions are made by professional judges. However, it is extremely difficult to obtain permission to approach sufficient judges for (experimental) research in the Netherlands (cf. Bosma & Buisman, 2018; Van Spaendonck, 2021). The experimental design in the current study required a large sample size. Permission to recruit sufficient professional judges for this study was unfortunately denied. We therefore used a sample of university law and criminology students as proxies in a first attempt to isolate specific effects of FMHRs in sentencing decisions. Law and criminology students appear more representative for professional judges than other student populations (e.g. psychology students). To control for the potential lack of knowledge of sentencing practices, we provided participants with an overview of the general legal provisions relevant in the case used in the current study. However, we do not argue that these findings can be directly generalized to professional judges. Therefore, external validity of the results is affected. Professional judges have multiple years of training and therefore may decide differently than students. Our findings on the uncooperative defendant are generally in line with results from previous studies who surveyed actual judicial cases (Jongeneel, 2017; Nagtegaal et al., 2018; Van der

Wolf et al., 2018). Nonetheless, these findings need further rigorous study to determine if these can be generalized to professional judges.

As with much experimental research, the external (ecological) validity of our study is further affected by using a vignette study (Atzmüller & Steiner, 2010; Sniderman & Grob, 2003). The simplified stimulus materials (i.e., a case vignette with a shortened FMHR) and research context (i.e., online) do not correspond with practice in the Dutch legal system in which judges carefully deliberate and incorporate many factors (e.g., severity of the crime, criminal record, other personal circumstances) in their sentencing decisions. However, the use of a vignette enables us to systematically observe (causal) effects of an FMHR and the information presented in these reports on sentencing decisions (Hughes & Huby, 2004). This type of research optimizes internal validity and is a valuable addition to the scarcely available retrospective case analyses. Despite the use of simplified vignettes, all information was representative of a violent criminal case and FMHRs in the Netherlands. As such, this study serves as a first (explorative) start of further empirical research on decision-making on sentencing decisions in cases with a mentally ill defendant in the Netherlands.

4.4.2 Recommendations for future research

We propose a number of recommendations for future research. First and foremost, it is necessary to determine whether our findings can be generalized to professional judges in the Netherlands, but also to other similar (European) civil law systems. The current study provides a first step to further (comparative) research on the use and effects of forensic mental health information on complex decisions about punishment and/or treatment measures. Moreover, further research is needed to address *how* judges exactly use the FMHR and the variety of information in these reports in their decision-making. Based on the current research method and design we cannot determine which specific information in an FMHR is most valuable to decision-makers and how information in an FMHR interacts with other important and unique factors in a case (e.g. severity of the crime, criminal record, treatment history) to reach a final sentencing decision. Qualitative research using interviews or focus groups can provide more insight into this complex decision-making process and (penal) attitudes and motivations that underpin these decisions (cf. De Keijser, 2011; Van Spaendonck, 2021).

Second, the current study focused on one specific treatment measure: TBS. The Netherlands has a wider array of measures available to use when mental health problems contributed to the offense. More recently, the Forensic Care

Act came into force providing the court with the authority to divert defendants out of the criminal justice system and into mental health care at any point during the criminal proceeding (e.g. care authorization; section 2.3 Forensic Care Act). The focus of current study was not on these (civil) measures. Future research should incorporate these novel provisions to gain more insight in the dynamic and evolving sentencing practice concerning offenders with mental health problems.

Third, the aforementioned debate about the discretionary power of judges on establishing a mental disorder in an uncooperative defendant requires further research (Nauta, 2021). The current study focused on a fully uncooperative defendant, so experts did not provide any information about disorder or risk. Prior research found that the frequency with which TBS is imposed in case of an uncooperative defendant depends on the level of non-cooperation and thus the amount of information about a mental disorder, criminal responsibility, and advised treatment options forensic mental health experts are able to provide (Nagtegaal et al., 2018). Hence, future (experimental) research might benefit from varying in *the extent* of uncooperativeness, and thus the degree of available information that experts can provide (cf. Kempes & Van der Wolf, 2018 who showed that experts differ in substantive conclusions they can provide about a uncooperative defendant). Such studies can provide insight into the minimum amount of information considered necessary by decision-makers to impose TBS when a defendant is not cooperating, This is relevant given recent initiatives to gain more information about the mental health problems of uncooperative defendants. These include a special ward to observe the behavior of uncooperative defendants more elaborately, and expansion of legal authority to receive medical information without the defendants' consent (section 37a sub 6-9 CC) (Nagtegaal et al., 2018).

Finally, our explorative analyses showed that type of disorder diagnosed in an FMHR affects decisions concerning TBS even though the diagnostic label is of less importance in such decisions. This finding signals the need to incorporate this result in future research, but more importantly to adequately educate legal professionals about the complex interaction between mental illness and (criminal) behavior. It is important that sentencing decisions are based on accurate forensic psychiatric assessment and not on (stereotypical) perceptions about a defendant's (future) behavior. An optimal informed decision contributes to the credibility and thus legitimacy of judicial decisions in these serious and much publicized cases.

4.4.3 Concluding remarks

This study is the first to experimentally investigate the effects of FMHRs and the information in these reports on sentencing decisions in the Netherlands. Our study demonstrated that by refusing to cooperate with a forensic mental health evaluation, a defendant can avoid a TBS measure and that this is only compensated by a slightly longer prison sentence. Findings also seem to suggest that a stereotypical association between certain mental disorders (i.e. schizophrenia) and dangerousness can have an effect on sentencing. However, the conclusions are tentative and further research is essential. Despite regular use of FMHRs in courts, empirical research on how these reports are used in judicial decisions is still in its infancy. We hope that insights from this study generate new avenues of research to be explored. Research among legal professionals is necessary to test findings from the current study and explore this topic even further. Expanding our knowledge can be used to optimize the use of FMHRs in sentencing decisions to accommodate both needs of a mentally ill offender and society to prevent future harm.

5 Opening the black box of judicial decision-making in Dutch cases with forensic mental health reports

A qualitative study

ABSTRACT

Forensic mental health reports (FMHRs) can be informative regarding criminal responsibility, risk assessment and treatment options, but are formally irrelevant for decisions about guilt (in terms of *actus reus*). In the Netherlands, a criminal trial is not bifurcated into a guilt and sentencing phase. Consequently, the court has the FMHR in the case file before the trial starts. Important gaps remain in our understanding of the judicial decision-making process in cases with FMHRs. In five focus groups, 17 judges were interviewed about how expert information in FMHRs plays a role in their decision-making about guilt and sentencing. Using thematic analysis, results showed that evaluation of recidivism risk is influential in decisions about treatment. Conclusions about criminal responsibility inform decisions about the prison sentence length. Although not used deliberately, judges could not rule out that an FMHR contributes to their conviction of guilt. Implications for research and practice are discussed.

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5.1 INTRODUCTION

Mental disorders are overrepresented among individuals in the criminal justice system (Dirkzwager et al., 2021; Dorn et al., 2014; Favril & Dirkzwager, 2019; Fazel & Danesh, 2002; Fazel et al., 2016). Crimes can be committed under the influence of a mental disorder. Therefore, forensic mental health reports (FMHRs) are an important source of information for judicial decision-makers. In the Netherlands both judges and prosecutors can request a forensic mental health evaluation. Such pre-trial evaluations inform the court and the public prosecution office about the presence of a mental disorder and whether this disorder is associated with the behavior and decision-making of the defendant at the time of the offense. The report also contains a risk assessment of whether and how the disorder might affect future (criminal) behavior. The forensic mental health evaluation is based on biographical information, statements about the alleged offense(s), health and addiction histories, forensic psychological/psychiatric assessments including psychological testing and on social network analyses. When the evaluation takes place in a forensic observation clinic (instead of on an outpatient basis), the report also contains information from (group) observations. Based on the evaluation, conclusions are drawn about criminal responsibility and risk, and advice is given on treatment options with appropriate regulations (Hummelen & Van der Wolf, 2018; Koenraadt, 2010; Van Marle et al., 2013). In most cases (between 86% and 90%) judges decide in line with the expert advice about criminal responsibility and treatment options in these FMHRs (Boonekamp et al., 2008; Harte et al., 2005; Nagtegaal et al., 2018). However, Dutch judges have considerable discretionary power when determining appropriate sanctions, especially in cases when an FMHR is involved. The law does not prescribe how information from an FMHR should be used in judicial decisions. As such, the Netherlands presents an informative case to understand how judges use this discretion in cases with forensic mental health information.

An FMHR in a criminal case can have far reaching consequences for the defendant. When a mental disorder is present, and the defendant poses a significant danger to society, it is possible to impose a TBS measure (*terbeschikkingstelling* in Dutch): (involuntary) commitment to a high security forensic psychiatric hospital (section 37a, 37b and section 38 CC). TBS has two variations: TBS with conditions (section 38 CC) and TBS with forced care (section 37b CC). When a TBS measure with conditions is imposed, the offender has to abide to specific treatment conditions without being forced to receive care. A more invasive option is a TBS measure with forced care. The offender is placed in a (maximum) secured forensic psychiatric treatment facility to be treated for mental illness for (at least) two years. The measure can be repeatedly extended with one- or two-year increments in the case of very serious index offences (sections 38d sub 2 and 38e sub 1 CC). A TBS measure can be imposed either without or in combination with a prison sentence.

Hence, an FMHR is relevant in decisions about sentencing, which is confirmed by limited research using case analysis and experimental vignette studies among students (e.g. Claessen & De Vocht, 2012; see the review in Chapter 2). Some studies further suggest that an FMHR may even have an unwarranted effect on legal decisions about guilt in the Netherlands, although research on this unintentional effect among professional judges is scarce (see Chapter 3; Rassin, 2017b; Van Es et al., 2020). The current study is aimed to understand how judges use information from an FMHR in their decisions in a criminal trial and what information in FMHRs is considered particularly important.

5.1.1 Forensic mental health evaluation at trial

In the Netherlands, prior to trial the judges receive a case file containing all information collected during the pre-trial phase. This information includes the FMHR(s). In the Netherlands decisions about guilt, criminal responsibility and sentencing are all discussed in a single-phase trial. Serious offenses (i.e. an offense which is punishable by at least 12 months of imprisonment) are tried by panels of three professional judges. The court first determines the question whether the alleged behavior was committed by the defendant. Second, it is determined whether the conduct constitutes a criminal act. Then the court proceeds to determine whether the defendant is blameworthy and therefore criminally responsible. Finally, the court decides on the appropriate sanctions, which can consist of punishment (e.g. a prison sentence) and/or additional measures (e.g. TBS measure) (section 350 CCP; Keiler et al., 2017). Both prosecution and defense can appeal these decisions at a court of appeal in which three justices try the case.

5.1.1.1 Decision-making about guilt

Information about mental health in an FMHR is not relevant as evidence to determine guilt (in terms of *actus reus:* act or omission that make up physical elements of the crime) of the defendant. Although not prohibited by law, guidelines for forensic mental health experts caution that information from an FMHR should not contribute to the evidence against the defendant and decision-making about guilt (Beukers, 2011; Nederlands Instituut voor Forensische Psychiatrie en Psychologie, 2022; Nederlandse Vereniging voor Psychiatrie, 2013). Contrary to the Dutch criminal procedure, in some jurisdictions the criminal trial is bifurcated into a guilt and a sentencing phase to prevent irrelevant information from being used in decisions about guilt. However, the structure of the Dutch criminal procedure, means *a priori* exposure to all information in the casefile relevant to make decisions about guilt, criminal responsibility, and sanctions. Moreover, judges hold substantial discretionary

power in the evaluation and combination of available evidence (Dubelaar, 2014). From a psychological perspective on decision-making it can be argued that the structure of the criminal procedure may elicit cognitive biases in favor of a guilty verdict in cases in which guilt may be doubtful (Bodenhausen & Lichtenstein, 1987; Charman et al., 2019; Epstein, 1994; Gunnell & Ceci, 2010; Kalven & Zeisel, 1966; Tversky & Kahneman, 1974). Theories which propose that evidence is evaluated in a holistic manner (e.g. Pennington & Hastie, 1992; Pennington & Hastie, 1993; Simon, 2004), suggest that information about mental health of a defendant in an FMHR can, by providing context, affect the evaluation and integration of available evidence (see Neal & Grisso, 2014; Rassin, 2017b, 2020). This might be especially the case if the disorder provides a plausible explanation for the crime (e.g. a disorder that may explain sudden aggressive behavior when suspected of a violent crime; Berryessa & Wohlstetter, 2019; Mossière & Maeder, 2015). Under such circumstances, this information can be prejudicial and bias decisions towards a guilty verdict. Despite a few (explorative) quantitative studies suggesting such an unintentional effect (see Chapter 3; Mowle et al., 2016; Rassin, 2017b; Van Es et al., 2020), it remains unclear *how* information from an FMHR can have a role in the decision-making process regarding decisions about guilt and whether decision-makers are actually aware that unwarranted effects can occur.

5.1.1.2 Decision-making regarding sentencing decisions

With respect to sentencing decisions, the FMHR can be informative regarding criminal responsibility, risk assessment and treatment options (i.e. measures). Contrary to many other legal systems, criminal responsibility in the Netherlands is not dealt with as a binary construct (i.e. the defendant is considered either responsible or not guilty by reason of insanity), but rather on a scale. Up until recently five degrees of criminal responsibility were used. Currently only three degrees are used (full responsibility, diminished responsibility, no responsibility) (Nederlandse Vereniging voor Psychiatrie, 2013). Conclusions about criminal responsibility and assessment of risk entail information on two important factors in sentencing decisions: blameworthiness of the offender and dangerousness of the offender related to community protection (Berryessa, 2018; Steffensmeier et al., 1998). On the one hand, diminished criminal responsibility can lead to a milder sentence, most likely a shorter prison sentence. On the other hand, high recidivism risk may be used to justify longer incapacitation of the offender in order to protect society. In such situations, Dutch legislation allows judges to combine punishments with measures, such as TBS. In practice, punishment (e.g. a prison sentence) is then considered proportionate to the severity of the offense and to the blameworthiness of the defendant, whereas the additional measure is used to protect society. Measures do not need to be proportional to severity and blameworthiness because they are not intended to be punitive and inflict suffering. Therefore measures can

easily exceed what is considered proportional from a retributive perspective (De Keijser, 2000; De Keijser, 2011; Hart, 2008; Steffensmeier et al., 1998; Von Hirsch, 2009). Empirical research on the decision-making process regarding sentencing by professional judges in cases with FMHRs is, however, scarce. In the Dutch context specifically, explorative case analysis showed that conclusions about diminished responsibility can indeed mitigate the length of a prison sentence, but the magnitude of this mitigation is unclear (Claessen & De Vocht, 2012). Furthermore, other case factors (e.g. circumstance and severity of the crime) can affect this mitigation. Consequently, it remains unknown *how* judges incorporate information from an FMHR and other case factors in their decision-making process regarding sentencing in the Netherlands.

5.1.2 The current study

While a few (quantitative) studies have focused on the role of FMHRs in decisions about guilt and sentencing (see Chapters 2, 3 and 4), important gaps remain in our understanding of the decision-making process in cases with FMHRs. Moreover, most prior research used mock jurors or students to study these decisions (see Chapters 2, 3 and 4), while in practice professional judges decide on appropriate sentences and, in most civil law systems, on decisions about guilt. This study aims to provide an in-depth qualitative account of the extent and the manner in which information in FMHRs play a role in judicial decision-making about guilt, punishment and (TBS) measures in Dutch criminal proceedings. While specifically studied in the Dutch context, the current study also provides a more general insight in factors relevant in the judicial decision-making process in cases with forensic mental health information. To address these topics, we interviewed 17 judges in five focus groups about their decision-making regarding guilt and sentencing and the specific aspects of a forensic mental health evaluation (i.e. the report and the experts) judges find important to inform their decisions. The methodology in this study is described in paragraph 5.2. Paragraph 5.3 reports the results from the focus groups before these are discussed in paragraph 5.4.

5.2 Method

5.2.1 Focus group design

The current study used focus groups to allow interaction and discussion about the participants' experiences with and views on FMHRs. Using the digital audiovisual communication platform Microsoft Teams, five focus groups were held with a total of 17 professional judges. The discussions had an average

length of 78 minutes. Data saturation was reached after the fourth session. The groups consisted of 3 or 4 participants, with the exception of one in which only two judges participated due to last minute attrition (see Table 5.1). In-person focus groups usually require a minimum of 4 participants (Krueger & Casey, 2000). However, for online focus groups using audiovisual conference technology, it is recommended to assign fewer participants to each group to optimize interaction among participants and to ensure manageability of the conversations (Dos Santos Marques et al., 2021; Krueger & Casey, 2015). Furthermore, professionals tend to contribute more freely to a focus group, so a smaller group is preferred when conducting focus groups with professionals (Finch & Lewis, 2003; Tuttas, 2015). Purposive sampling was used to ensure homogeneity of the groups. Participants were required to have experience as a criminal law judge in panels of three judges at a district court or court of appeal. To optimize heterogeneity in experiences and perspectives in each focus group, experience with FMHRs was not a sampling criterion. The moderator (first author) engaged the participants in active discussion and notes were taken by a research assistant.

5.2.2 Procedure

This study was approved by the Dutch Council for the Judiciary and the Committee of Data and Ethics of Leiden Law School. The first author signed a confidentiality agreement with the Council about the processing and use of collected data. After permission was obtained by the Council of the Judiciary, participants were recruited by the National Consultation of Criminal Law (NCCL; in Dutch: *Landelijk Overleg Vakinhoud Strafrecht*) and the personal networks of the researchers. A recruitment message containing information about the purpose and design of the study was distributed among criminal law judges by the NCCL. When participants were interested, their contact information was shared with the first author and the focus group was scheduled via e-mail. Participants were assigned to a group based on agenda availability. In three out of five groups, at least two participants knew each other professionally.

All participants signed a consent form after being informed about the content and purpose of the study, their rights regarding their participation, audio- and videorecording of the conversation and protection of their privacy and data. This consent was also verbally confirmed before recording started. No incentives for participation were given. All focus groups were conducted in Dutch and recorded with audio and video in Microsoft Teams as well as with a remote audio recorder. The focus groups were held between April 2021 and June 2021.

A semi-structured interview protocol with open-ended questions was used as topic guide to allow participants to discuss how they approach an FMHR,

which aspects of the FMHR they find most important and how they use the information in an FMHR in their decision-making process (e.g. 'for which decisions do you use information from an FMHR?'; 'in what manner does an FMHR contribute to sentencing decisions?'; 'to what extent does criminal responsibility or recidivism risk play a role in sentencing decisions?'; 'to what extent do you think that information in an FMHR contributes to decisions about guilt?') (see Appendix C). Follow-up questions were used to prompt and stimulate discussion. The topic guide was tested in a pilot session with five deputy judges. Data were anonymized during transcription and were stored and accessed according to the university's Code of Conduct and the General Data Protection Regulation. After analysis, participants were able to check the results for any factual inaccuracies.

5.2.3 Participants

A total of 17 judges from different districts participated in five focus groups. Table 5.1 shows the distribution of participants and relevant demographics across the five groups. Seven judges (41.2%) from district courts and ten justices from courts of appeal (58,8%) participated. There was an even distribution of male and female participants (52.9% male). Experience as a criminal law judge ranged from 6 months to over 20 years. Participants with less experience as a judge had prior (long) experiences as a criminal lawyer or prosecutor. Two participants had recently retired. All participants had previous experience with FMHRs at trial and about half of the participants (n = 8) mentioned they had other relevant (prior) occupations related to FMHRs or forensic psychiatry, or that they specialized in court hearings regarding extensions of involuntary commitment to forensic psychiatric hospitals or the recently introduced Forensic Care Act.[1]

1 The Forensic Care Act provides judges with the possibility to divert defendants out of the criminal justice system into civil mental health care.

Table 5.1: Participants per focus group

	Participants
FG 1 (n = 4)	· R1, court of appeal, female · R2, court of appeal, female · R3, district court, male · R4, district court, female
FG 2 (n = 2)	· R1, district court, male · R2, district court, male
FG 3 (n = 4)	· R1, court of appeal, male · R2, court of appeal, male · R3, district court, female · R4, district court, female
FG 4 (n = 3)	· R1, court of appeal, female · R2, court of appeal, male · R3, district court, male
FG 5 (n = 4)	· R1, court of appeal, female · R2, court of appeal, male · R3, court of appeal, male · R4, district court, female

Note. FG = focus group; R = respondent. These abbreviations are also used to reference the quotations.

5.2.4 Data coding and analysis

The discussions were transcribed by the first author using the computer-assisted qualitative analysis tool ATLAS.ti (ATLAS.ti Scientific Software Development GmbH 9). Transcripts were coded using a hybrid approach (Fereday & Muir-Cochrane, 2006) of data-driven inductive coding (Boyatzis, 1998) and a more deductive approach based on prior research and theory (Crabtree & Miller, 1999). Data were coded in three stages: open, axial and selective coding (Strauss & Corbin, 1998). Codes were grouped into categories and analyzed using a thematic approach to identify patterns within the data (Braun & Clarke, 2006; Nowell et al., 2017). Important themes that emerged were the specific sources of information in a case with an FMHR (i.e. the case file, the FMHR, expert testimony), the need for information about specific attributes (i.e. criminal responsibility, dangerousness) and the use of information in specific decisions (i.e. guilt, prison sentence and TBS). The research assistant independently coded 20% of the data using a protocol of codes and themes to check the validity of the themes. Any discrepancies were resolved in a consensus meeting.

In what follows, we outline the results from the focus groups. First, we describe how judges generally approach an FMHR in a case (paragraph 5.3.1).

Then paragraph 5.3.2 discusses if and how information in an FMHR contributes to decisions about guilt. Paragraph 5.3.3 discusses the decision-making regarding sentencing. In paragraph 5.3.3.1 the evaluation of dangerousness of the offender is discussed and how this specifically contributes to imposition of the TBS measure. In this regard the role of the forensic mental health expert at trial is also discussed. Paragraph 5.3.3.2 describes the evaluation of criminal responsibility and how this contributes to decisions about appropriate punishment (also in combination with TBS).

5.3 RESULTS

5.3.1 General approach of an FMHR

To explore the manner in which judges generally use FMHRs in their decision-making, they discussed the (expert) information they can receive about a defendant and how they approach the expert information in a case file. On the one hand, all judges expressed that they usually read the full FMHR carefully and critically. On the other hand, the volume of most reports is quite large due to a lot of repetition. Since judges experience a lot of time constraints in their profession, this sometimes encourages judges to selectively read the report to search for the information they need. There was a lot of variety in aspects in the report that they choose to read (carefully), and consider important for their decisions, such as information about a defendant's childhood, the relation between disorder and behavior, psychological tests, and treatment history. Interestingly, some aspects were considered to be very important by some judges, while others regarded the same aspects as less or least informative (i.e. information about early childhood). In general, they agreed that the quality of FMHRs is usually good and has certainly improved over the years. In this regard, judges also discussed how perceived quality of the report affects interpretation of its content. When the conclusions and advice follow logically from the report, most judges adopt the conclusions and advice in the FMHR more easily. Finally, the experience of the reporting experts appears to be important for judges to evaluate the validity and credibility of the report. This assessment was specifically mentioned when a case involves counter-expertise. All judges agree that information about the diagnosis of the disorder and how this relates to conclusions about criminal responsibility and risk is important for their decisions. We more elaborately discuss how these concepts contribute to their decision-making process regarding sentencing in the paragraphs that follow (see Figure 5.1 for an overview of key findings).

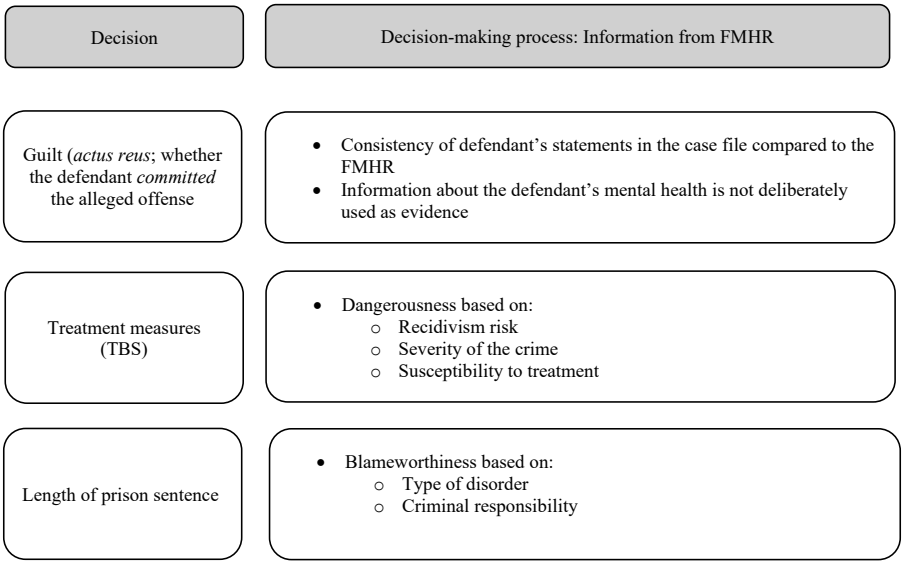

Figure 5.1: Visualization of key findings

5.3.2 Decision-making regarding guilt

The decision whether the defendant committed the alleged offense is the first decision which judges have to make in a trial. Strictly speaking, information about the mental health of a defendant in an FMHR is irrelevant for such decisions (in terms of *actus reus:* act or omission that make up physical elements of the crime). The majority of judges indeed did not promptly mention the FMHR in association with decisions about guilt. A number of judges did mention that they check the interview by the psychologist and/or psychiatrist about the offense for discrepancies with the defendant's statements during the police interviews. If major discrepancies are noticed, judges may confront the defendant at trial with these discrepancies. In such situations information in an FMHR is used as a starting point for further questioning about the offense during trial.

Participants were also asked to reflect on prior research (e.g. Chapter 3, Van Es et al., 2020), which showed that information about mental health in an FMHR biased decisions towards a guilty verdict. Judges unanimously expressed that they do not deliberately use information about the defendant's mental health from the FMHR as evidence:

> 'No, I cannot really imagine that. It is just like R1 said, maybe it creates the impression of a dangerous man and that can be important when you believe there are indications for a measure. But for the allegations, yes then you really focus on the

> evidence and if the evidence is not there, it is unfortunate if the man is dangerous. You sometimes acquit someone who you think is very dangerous. I do not believe that that influences your conviction. I have never experienced that' [FG 1, R4].

Judges believe that their professionalism and the manner in which the Dutch criminal procedure is structured, protect them against biases in their decision-making. When they study the case file prior to the trial, most judges claim to adhere to the order in which they have to make the specific decisions about guilt, criminal responsibility and sentencing (as dictated by section 350 of the CCP).[2] Therefore, they usually start with the evidence and circumstances of the offense before continuing with the personal circumstances of the offender and thus the FMHR. A number of judges mentioned that strictly adhering to this order, helps them to approach each case unbiased and with an open mind. Moreover, the FMHR is often added to the case file later on: 'You usually receive that at the last minute and then you have already reviewed the case file and established a judgement, more or less, independently, about how to proceed' [FG 1, R1].

The order in which the case file is read is thus important for understanding judges' appraisal of whether information about a mental disorder in a defendant can potentially bias evaluation of evidence and decisions about guilt. Judges could imagine that such information in an FMHR might subconsciously contribute to their evaluations of evidence and other aspects of the case:

> 'I can imagine when you conduct such a study [*experimental vignette study, RvE*] among professional judges, especially when a mental disorder is congruent with the allegation, [R1 nods] that it provides a final push for the conviction even though this is completely subconscious. I think that applies to us as well.' R1: "I do not rule it out no"' [FG 3, R3/R1].

This mechanism was further illustrated by a number of fictitious examples they came up with in which such an effect could occur. For example, a case with limited evidence, no criminal record and a mental disorder which provides a plausible explanation for the offense. These examples bear similarities with case vignettes used in prior experimental research on this effect (see Chapter 3, Van Es et al., 2020; Rassin, 2017b):

> 'Well, I was thinking of an example in which someone is suspected of stalking and denies. There is not much more than the police report. If you have an FMHR that concludes that the defendant has abandonment issues and a compulsive disorder

2 Section 350 CCP, states that the court deliberates, on the basis of the indictment and the hearing at trial, on the question whether it has been proven that the defendant committed the criminal offense, and, if so, which criminal offense the judicial finding of fact constitutes under the law. If the offense is punishable and the defendant criminally responsible, punishment or measure shall be imposed.

or something like that, then I think this may play a small part in your conviction and consequently the evaluation of the evidence' [FG 5, R3].

5.3.3 Decision-making regarding sentencing

Conclusions about criminal responsibility and assessment of risk in an FMHR informed judges in the current study about two important factors in sentencing decisions: blameworthiness of the offender and dangerousness of the offender related to community protection. More specifically, judges discussed how certain case and offender factors as presented in the FMHR contribute to their evaluation of dangerousness, which plays a role in decisions about treatment measures. Furthermore, they discussed how certain case factors contribute to their evaluation of blameworthiness, which plays a role in decisions about punishment (whether or not in combination with treatment measures).

5.3.3.1 The role of offender dangerousness in decisions about treatment measures

The case factors judges deem useful in their evaluation of dangerousness are the risk assessment in an FMHR and the severity of the crime. In general, these factors, and the role they play in the evaluation of dangerousness, are taken into account when deciding about treatment measures. Susceptibility to treatment to reduce risk, is also a factor that is taken into consideration when judges decide on appropriate treatment measures. Several judges believed that some disorders are not suitable for ambulatory treatment:

'And I think that you will always have a small group of individuals who you'd rather keep from society for safety reasons. Such as persistent pedophiles; that is also a disorder that will never go away. [R1 and R2 nod in agreement.] And when that disorder leads to violent behavior, you cannot take that risk' [R2 nods] [FG 1, R4].

When an offender poses a significant danger to society, a TBS measure is usually considered the most suitable sanction. Offenders often experience TBS as a severe and invasive sanction. For most serious offenses, TBS with forced care can be repeatedly extended with one- or two-year increments (sections 38d sub 2 and 38e sub 1 CC). Judges are aware of this potential indefinite deprivation of liberty. Such incapacitation is understandably deemed necessary in cases with dangerous offenders. However, judges expressed, both explicitly and implicitly, that principles of proportionality and subsidiarity of the measure are considered when deciding to impose TBS, especially when the offense is less severe but still qualifies as a TBS-worthy crime:

'I think that for example a less severe index offense can be a reason to refrain from imposing TBS *[with forced care, RvE]*. Because of the uncertain perspective that

> someone is possibly 'detained' for an extended period, maybe his entire life. [R4 shakes her head] For some offenses, you can question whether the offense justifies [R4 motions a balancing act] that prospect. [R4 nods]. Even if there is an advice to impose a TBS measure' [FG 5, R2].

Yet, sometimes judges experience practical constraints when they want to take principles of proportionality and subsidiarity into consideration when deciding between TBS with forced care or with conditions. Such constraints can be a lack of cooperation between other actors in the criminal justice system when judges contemplate less severe treatment options. For example, the option of TBS with conditions instead of forced care is only possible with support from the probation service, because they are responsible for monitoring and control (sections 68-71 Regulation for care for TBS patients). If the probation service disapproves this option, TBS with forced care often remains the only option. Such situations prompt summoning experts to testify in court.

While judges unanimously agreed that experts should be summoned to court more often, experts rarely testify in court in the Netherlands. A practical explanation for this was that an FMHR is often added at a late stage to the case file. Therefore, there often is no time to request the expert to testify in court. Judges also unanimously agreed that testimony by the expert is very valuable to clarify the findings in a report, to critically evaluate the information and ask questions that arise during trial.

5.3.3.2 The role of criminal responsibility in decisions about prison sentences

The extent to which experts consider an offender criminally responsible for the offense, informs judges whether he is punishable, and if so what the appropriate severity of this punishment should be. Judges discussed several factors, both in the FMHR and other aspects in a case, that influence the decision-making about the appropriate punishment, in most cases a prison sentence.

Judges use the conclusions about criminal responsibility in FMHRs to inform and establish their own evaluation of criminal responsibility. When judges decide that criminal responsibility is diminished, this generally mitigates the prison sentence because they argue that less punishment is deserved. As said, currently criminal responsibility is assessed in three degrees: no responsibility, diminished responsibility, full responsibility. Multiple judges in different discussions expressed that this scale makes it difficult to accurately determine the extent to which the mental disorder affected the behavior of the defendant. They expressed that they prefer the use of the scale of five degrees of responsibility (i.e. no responsibility, severe diminished responsibility, diminished responsibility, slight diminished responsibility, full responsibility) that was used in the past. According to them, the reduction of degrees makes it difficult to decide how a broad category of 'diminished responsibility' can be translated into the prison sentence:

> 'Well…. I realized that we recently moved from five degrees to three degrees. And I find that an impoverishment of the reports. Especially concerning the question about the extent to which it [*criminal responsibility, RvE]* should affect sentencing. [R4 nods] It may be less of a problem when a TBS measure is also imposed, but whether someone is strongly diminished responsible or slightly diminished responsible, is very relevant when you determine the length of a prison sentence. It is currently very black and white, so I do miss those five degrees' [FG 5, R2].

Furthermore, judges mentioned that sometimes specific types of disorders can affect evaluation of criminal responsibility and thus the extent to which it mitigates the prison sentence. A few judges claimed that it is only meaningful to know *whether* a disorder was present at the time of the offense. Others, usually with more experience with cases with FMHRs, expressed that certain disorders (e.g. psychotic disorders) impair criminal responsibility more than others (e.g. personality disorders). They also look at the congruency between the criminal behavior and the disorder more specifically:

> 'I mean, another example: there was someone with an intellectual disability, at least that was what the tests concluded. At the same time, the offense was a very complicated extortion. And not once, but twice. So we thought: you need to be a very smart guy to pull that off. And when the conclusions state intellectual disability and slightly diminished responsibility, you start asking questions about how those things align. When someone with an IQ of below, far below 70, comes up with a very complicated scheme… Yes, well those are all questions that arise and that you pose' [FG 2, R1].

Even within some specific disorders, more specifically substance abuse, the extent to which such a disorder could diminish criminal responsibility was addressed differently by the respondents. Similar to the scholarly debate about whether substance abuse is considered a disorder that can impair criminal responsibility (see e.g. Goldberg, 2022; Kennett et al., 2015; Morse, 2013), some said that the contribution of substance use to the offense does not diminish criminal responsibility because of the principle of prior fault (*culpa in causa*). Others argued that substance abuse is classified as a disorder by experts in the FMHR and the DSM-5 (American Psychiatric Association, 2013). Therefore they should also view it as a disorder that can diminish criminal responsibility:

> 'You sometimes encounter, for example with an addiction, that other factors, such as moral judgment, affect the legal judgement about responsibility. To what extent can you expect that someone asks for help [*with addiction, RvE*]? [R2 and R4 nod.] This can create tension with behavioral experts who have done more research over the years on how addiction works, also biologically. But that does not mean that this is weighted heavily in legal decisions about responsibility. [R2 and R4 nod.] So in that case, the type of disorder matters' [FG 1, R3].

An additional factor that can mitigate a prison sentence is the urgency with which an offender needs to be treated for mental health problems according to the experts. Such considerations are relevant in case a prison sentence is combined with a treatment measure such as TBS. In the Netherlands a prison sentence is executed before the TBS measure commences. If the court concludes that the offender urgently needs to be treated, this will mitigate the length of the prison sentence when combined with TBS:

> 'I have been involved as chair in a case in which a prison sentence of 4 years and TBS was imposed for homicide. Because we agreed that treatment was needed so urgently that we should not wait too long. And you risk that the prosecutor appeals your decisions. But when you explain it correctly, the prosecutor won't appeal. But you have to realize that such a decision is sometimes necessary and needs to be made' [FG 4, R3].

Because a TBS measure with forced care can be extended repeatedly, an offender can remain in custody for a long period after the prison sentence has been executed. This was sometimes mentioned as a reason to reduce a prison sentence when combined with TBS. However, a number of judges remarked other aspects in a case that can trump this mitigation. In severe cases in which a prison sentence is combined with TBS, the prison sentence is explicitly intended as retribution for the offense. 'No, I think that especially with severe offenses, the length of a prison sentence generally functions as a justification to society [R2 nods: "Yes"] The potential length of TBS does not play a large role in such cases, I think' [FG 3, R3].

5.4 Discussion

This study aimed to provide an in-depth qualitative account of the manner in which information in FMHRs plays a role in judicial decision-making about guilt and sentencing. To address this, 17 Dutch judges were interviewed in five focus groups about their decision-making process and the specific aspects of a forensic mental health evaluation (i.e. the report and the experts) they find important to inform their decisions. This study is one of the first to gain a deeper understanding of judicial decision-making processes in the Netherlands in cases with an FMHR using an ecologically valid sample (but see Van Spaendonck, 2021 for a qualitative study on TBS extension decisions by the court). Such insight enriches the (scarce) prior quantitative research on the effects of FMHRs on judicial decisions with convenience samples (e.g. students). This study also more generally contributes to the knowledge base about decision-making in criminal law, since empirical research on decision-making among professional judges in criminal law is still quite scarce.

Results showed that judges claim to not consciously use information from the FMHR in decisions about guilt (in terms of *actus reus*). They believe that

their professionalism and the order in which they approach a case file protects them against such biases. However, it is also possible that they have a blind spot and do not recognize their own vulnerability to cognitive bias (Pronin et al., 2002). This blind spot has indeed been found in samples of forensic mental health professionals (Kukucka et al., 2017; Neal & Brodsky, 2016; Zapf et al., 2018; Zappala et al., 2017). Introspection about cognitive processes is very difficult (Dhami & Belton, 2017; Nisbett & Wilson, 1977). Nonetheless, they admitted they could not rule out that information in an FMHR may provide an unintended "extra push" in their conviction in complex cases with limited evidence. This reflection is in line with findings from prior experimental vignette studies which demonstrated that information about the mental health of defendants increased the likelihood of a guilty verdict (see Chapter 3; Rassin, 2017b; Van Es et al., 2020). Consequently, while such information is supposedly not used deliberately, awareness and education about cognitive bias in (legal) decision-making remains necessary. Especially since no legal regulations are in place to explicitly prohibit or prevent any effects of an FMHR on decisions about guilt.

While information from an FMHR about the mental health of a defendant is not deliberately used in decisions about guilt, a number of judges mentioned that they sometimes use the conversation between the experts and the defendant about the alleged offense in the FMHR to check for any discrepancies with the police interview. If such discrepancies are noticed, they will confront the defendant at trial. As such, the FMHR can be used as an anchor point to question the defendant about the offense during trial and can thus contribute to the evidence in a case (see section 339 CCP). This particular use of information from an FMHR is debatable for a number of reasons. On the one hand, prior to evaluation, the defendant is instructed by the forensic mental health experts that all information they gather is added to the case file and thus available to the judges. A conversation with the defendant about the offense is an essential part of the mental health evaluation to establish motives, emotions and behavior at the time of the offense. A defendant also has the right to read the FMHR before it is sent to the court. Therefore, he knows which information is in the FMHR and presented to the court (Nederlands Instituut voor Forensische Psychiatrie en Psychologie, 2022). On the other hand, the Supreme Court decided that information about the offense in reports purposed to inform the court about personal circumstances of the defendants, may not be used as evidence in decisions about guilt (Supreme Court, 18 September 2007, ECLI:NL:HR:2007:BA3610). The conversation between the experts and the defendant about the offense does not serve investigative purposes and is thus not protected by the same legal rights as an official police interview. For example, the expert has the discretion to decide whether the lawyer is permitted to be present during the evaluation and whether audio recording is allowed when requested by the defendant (Nederlands Instituut voor Forensische Psychiatrie en Psychologie, 2022). Also, an expert is not a trained police

investigator. Yet guidelines for forensic mental health evaluation encourage the expert to be critical of the defendant's statement and confront him with discrepancies with his statements during the police interview or statements provided by victims (Nederlands Instituut voor Forensische Psychiatrie en Psychologie, 2022). This will make it difficult for judges to assess the reliability of statements about the offense in an FMHR. However, when the defendant is confronted with his statements during trial and decides to answer, these answers can be used as evidence. Therefore, experts should be aware of the potential impact of such information in an FMHR and lawyers should also critically monitor this process.

With regard to the decision-making process about punishment and measures, evaluation of dangerousness and criminal responsibility of the offender seems to play an important role. Judges argued that high recidivism risk is the most important factor when imposing TBS in cases in which the defendant suffers from a mental disorder. The type of mental disorder is less important in this consideration but can provide some insight into the contribution of the disorder to recidivism risk and how successful treatment can be in limiting this risk. These findings are in contrast with results from an (explorative) experimental vignette study among students who imposed TBS significantly more often when the offenders suffered from schizophrenia than when he suffered from an antisocial personality disorder (see Chapter 4). This discrepancy suggests that professional judges evaluate information about a specific mental disorder differently than students. Judges are also aware of the severity of a TBS measure and therefore apply principles of proportionality and subsidiarity. This decision-making process (partially) resembles the decision-making process in TBS-extension hearings (cf. Van Spaendonck, 2021).

In the decision-making process about the appropriate length of a prison sentence, the evaluation of criminal responsibility is an important factor. The prison sentence can be mitigated by the evaluation of criminal responsibility and by urgency for treatment (if the prison sentence is combined with a (TBS) measure). However, severity of the crime and societal expectations about punishment are also important factors in these decisions and can negate mitigation (cf. Claessen & De Vocht, 2012). Certain disorders (i.e. substance abuse) can complicate decisions about criminal responsibility even further. Whether such disorders can affect criminal responsibility is sometimes viewed differently between the disciplines of criminal law and forensic psychiatry. Independent of the conclusions in the FMHR, a number of judges mentioned that they evaluate themselves whether the alleged criminal behavior is compatible with the diagnosed disorder to determine the degree of criminal responsibility. Such remarks illustrate the autonomy of judges in relation to the expert advice.

Other discrepancies between the two disciplines that were highlighted in the discussions, relate to the scale of criminal responsibility. While there is no legal or empirical support for either the three or five degrees scales (Dal-

huisen, 2013), judges prefer the five degrees to three degrees in practice because it provides more insight in the extent to which a prison sentence should potentially be mitigated. Yet the Dutch Society of Psychiatry recommends the use of three degrees in their guidelines, because these five degrees wrongfully implied scientific accuracy (Hummelen & Aben, 2015).[3] The rationale behind the use of three degrees is that it would improve the inter-rater reliability between experts in their conclusions about criminal responsibility (Hummelen, 2021). However, judges argue that this forces them to rely more on their discretionary power than they would like. The different perspectives on a number of important issues by the disciplines of criminal law and forensic psychiatry requires further dialogue and communication. Such communication can be optimized when experts are summoned to testify in court more often than is currently practiced or desired, since participants unanimously expressed the value of expert testimony.

All in all, the results in the current study provide a first insight in the judicial decision-making process about guilt and sentencing in cases with an FMHR. While this is a study in the Dutch legal context, it does provide a more general understanding of factors related to the use of forensic mental health information which are considered important in judicial decisions, such as criminal responsibility and recidivism risk. The Dutch legal context forms an especially interesting case because Dutch professional judges have a lot of discretionary power, especially related to defendants with mental health problems. Therefore, this study illustrates how aspects of forensic mental health expertise contribute to decisions-making when this is less formalized by law (compared to the jurisdictions in which certain disorders are prohibited from affecting sentencing decisions or in which a trial is bifurcated). Given the (international) prevalence of mental illness in the criminal justice system (Dirkzwager et al., 2021; Dorn et al., 2014; Favril & Dirkzwager, 2019; Fazel & Danesh, 2002; Fazel et al., 2016), this study may serve as encouragement to further study judicial decision-making regarding defendants with mental health problems, both in the Netherlands and in other jurisdictions.

5.4.1 Limitations

The current study has some limitations. First, the analyses are confined to judges who actively chose to participate in this study. Many of the participants had (prior) experience with respect to the field of forensic psychiatry. While

3 In the most recent published guideline (April 2022) from the Dutch Institute of Forensic Psychiatry and Psychology, psychologists are permitted to explicate their conclusions about criminal responsibility using the five degrees despite the recommended three degrees in the standard questions format (Nederlands Instituut voor Forensische Psychiatrie en Psychologie, 2022).

these experiences made them more knowledgeable and critical about the use of FMHRs in general, this potential selection effect affects the interpretation of the findings. Although the sample size was limited due to difficulty in approaching and obtaining sufficient participants, the data reached saturation. Notwithstanding these limitations, sufficient heterogeneity of experiences and attitudes within and between focus groups enriched and deepened the discussions.

Second, as is the case with most (qualitative) research, the discussions may have suffered from response bias by social desirability, especially when discussing more controversial topics such as unintended effects of FMHRs in decision-making. While such bias can never be fully eliminated, the variability in answers, critical notes, and detail of answers within and between groups, combined with rich examples from practice, provided an indication that participants were not inclined to respond in a socially desirable way (Bergen & Labonté, 2020).

A third limitation concerns the online setting in which the focus groups took place. A general limitation associated with web-conference, synchronous focus groups is lack of non-verbal cues and communication (Collard & Van Teijlingen, 2016; Steenhout, 2021; Tates, 2010). The use of webcam technology partially reduced this limitation by showing participants' face and upper body. This allowed non-verbal communication through facial expressions (Tuttas, 2015). Another limitation of web-conference focus groups is potential lack of attention or engagement due to environmental distractors at the location from which the respondents participate in the research (usually from home). Remote participation in a group interview may enhance distancing from the discussion (Tuttas, 2015). Despite these potential problems associated with the virtual setting, the respondents were attentive and engaged in the discussion with similar participation of each respondent. They were all involved in the discussion, interacted with each other and their non-verbal attitudes indicated they were listening attentively. The use of web-conference focus groups provides a flexible and cost-efficient method to conduct research among a geographically distributed and occupied population. Moreover, prior research comparing quality of online focus groups with face-to-face focus groups did not find meaningful differences in data quality (i.e. Kite & Phongsavan, 2017; Menary et al., 2021; Reid & Reid, 2005; Tates, 2010; Woodyatt et al., 2016).

5.4.2 Recommendations for future research

While the current study used professional judges as a sample, prior (international) research mostly made use of convenience samples (e.g. students) to study judicial decision-making (see the review in Chapter 2), even though sentencing decisions are commonly made by judges. Therefore, more systematic and (internationally) comparative research among this population is necessary

to expand our knowledge about factors that contribute to judicial decision-making in cases with an FMHR.

Recent legal developments in the Dutch forensic psychiatry field, such as the implementation of the Forensic Care Act and Compulsory Mental Health Care Act, changed sanction options significantly (i.e. the introduction of the care authorization[4] that can be imposed throughout multiple stages in the criminal procedure). These sanction options may require a different decision-making process because other legal professionals are involved. For example, the prosecutor has an important role in decisions regarding care authorization. The current study showed that the involvement and interaction with other criminal justice actors in judicial decision-making is not always optimal. Therefore, future research should explore such interactions even further and include other decision-making processes during the criminal justice procedure.

Another complex and prominent issue revolves around the high number of defendants who refuse cooperation with a forensic mental health evaluation to avoid a TBS measure (see Nagtegaal et al., 2018). This subject remained relatively unexplored in the current study. When a defendant is uncooperative, it is difficult for experts to adequately inform judges about mental health problems, criminal responsibility, and risk. Yet information needs concerning these uncooperative defendants are similar to cooperative defendants (cf. Nagtegaal et al., 2018). Recent initiatives have been introduced to gain more information about the mental health problems of offenders. These include a special ward to observe the behavior of uncooperative defendants more elaborately, and expansion of legal authority to receive medical information without the defendants' consent (Nagtegaal et al., 2018; section 37a sub 6-9 CC). Future research should explore whether these initiatives supply the amount of information necessary for judges to make adequate decisions about sanctions in such cases.

5.4.3 Conclusion

The current study provides a first qualitative understanding of the decision-making process about guilt and sentencing in the Netherlands when an FMHR is involved. While further (comparative) research is essential, this study shows that judges value expert information about the mental health of the defendant to evaluate the criminal responsibility and dangerousness in order to impose appropriate sanctions. Despite the reliance on conclusions of the experts, judges do critically assess the information in the report and the expert's professional

4 Until January 1st 2020, when a defendant was considered not criminally responsible (insanity), they could also be placed in a psychiatric hospital. From 2020 onwards, this measure has been replaced by the civil measure of a care authorization (section 2.3 Forensic Care act) to divert these defendants out of the criminal justice system and into psychiatric care.

experience. Cooperation between criminal law and forensic psychiatry also results in diverging perspectives on issues about mental disorder, principles of criminal responsibility, dangerousness, and treatment. More communication and education within and between the two disciplines will benefit both the forensic mental health evaluation and the understanding and use of this expertise in criminal law. This will further improve legitimacy and equality of decisions in severe cases which frequently generate a lot of public and political attention.

6 General conclusion

6.1 Background

In 2021, about 1 in 4 criminal cases involving a severe offense (i.e. an offense which is punishable by at least 12 months of imprisonment[1]) contained a forensic mental health report (FMHR).[2] Despite this prevalence, empirical knowledge about the role these FMHRs have in judicial decisions about guilt and sentencing in the Netherlands is almost non-existent. This absence of research is problematic because an FMHR contains a lot of important information about the defendant (e.g. information about mental illness, recidivism risk, etc.). It is generally accepted that defendants who commit offenses under the influence of mental disorder should not be dealt with in the same way as sane defendants. As such, presence of an FMHR in a criminal trial can have significant consequences for the defendant. Insight into the role of FMHRs regarding the most important judicial decisions, decisions about guilt and sentencing, is important with respect to principles of a fair trial and consistency and equality of sentencing decisions. Therefore, the aim of this dissertation was to do a first empirical exploration of how an FMHR is used in judicial decision-making in the Netherlands and what the effects of these reports are on decisions about guilt and sentencing. The two principal research questions were:

1) *To what extent and in what manner does an FMHR affect decisions about guilt?*
2) *To what extent and in what manner does an FMHR affect sentencing decisions?*

A mixed-method approach consisting of a systematic literature review, two experimental vignette studies and focus groups was used to answer these questions. Using a triangulation of methods, this dissertation aimed to present a first comprehensive understanding of the extent and manner in which FMHRs contribute to judicial decision-making in the Netherlands.

This final chapter is structured as follows: first, the research methods and key findings of the studies in this dissertation are discussed in paragraph 6.2.

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1 Cases tried by a three-judge panel (in Dutch: *meervoudige kamer*).

2 Personal communication with Dutch Institute for Forensic Psychiatry and Psychology (NIFP) in October 2022.

Strengths and limitations of this doctoral research are discussed in paragraph 6.3. Recommendations for future research, policy and practice are described in paragraph 6.4 before presenting the conclusion of this dissertation in paragraph 6.5. The key findings per chapter are also presented in Table 6.1.

6.2 Key findings

6.2.1 Decisions about guilt (chapters 2, 3 and 5)

6.2.1.1 Effects of FMHR on decisions about guilt

To explore an effect of an FMHR on decisions about guilt, a first necessary step was to gain insight into this effect as obtained in prior research. *Chapter 2* presented a systematic literature review of the available (international) empirical research (k = 27) on the role of forensic mental health expertise (e.g. psychological, neuropsychological, psychiatric) on judicial decision-making about guilt (both *actus reus* and *mens rea*[3]) and sentencing (see paragraph 6.2.2). With respect to decisions about guilt, most studies researched the effects of forensic mental health expertise regarding an insanity defense, and thus focused on the element of *mens rea* (or guilty mind) of an offense. This is not surprising since almost all studies in the review were conducted in the United States where forensic mental health expertise is often requested to help the court assess the criteria of an insanity defense. Use of forensic mental health expertise in decisions about whether the defendant *committed* the alleged offense (guilt in terms of *actus reus*), is scarce in the Anglo-American systems because trials of serious offenses are bifurcated into a guilt phase and a sentencing phase. This bifurcation should prevent any prejudicial effects of information irrelevant for decisions about guilt, such as forensic mental health expert information (Mueller & Besharov, 1968). The review thus revealed that only two (experimental vignette) studies focused on the use of forensic mental health expertise on decisions about whether the defendant committed the alleged crime (*actus reus*) (Mowle et al., 2016; Rassin, 2017b). Findings from these studies showed that specifically the type of disorder in an FMHR mattered in the conviction of guilt. In case of psychopathy or antisocial personality disorder the proportion of guilty verdicts increased significantly compared to when this diagnosis was absent (Rassin, 2017b) or compared to the diagnosis of schizophrenia (Mowle et al., 2016). The lack of research and diverging effects of different disorders underlined the importance of further research and shaped

3 A criminal offense requires both a criminal act (also known as *actus reus;* act or omission that make up physical elements of the crime) and a criminal intention (also known as *mens rea* or the guilty mind component). Absence of *mens rea* results in a successful insanity plea in many jurisdictions. See Grossi & Green (2017) for an international comparison.

the experimental vignette study on the effects of an FMHR on decisions about guilt in Chapter 3.

In *Chapter 3* we conducted an online experimental vignette study among 200 law and criminology students to explore the potential prejudicial effect of an FMHR on decisions about guilt (in terms of *actus reus*). Several models of evidence evaluation suggest that irrelevant factors, like information in an FMHR, can affect evidence evaluation because evidence is evaluated in a holistic manner (e.g. Pennington & Hastie, 1992, 1993; Simon, 2004). This might especially be the case if information about the defendant provides a plausible explanation for the crime (e.g. a disorder that may explain sudden aggressive behavior when suspected of a violent crime; Berryessa & Wohlstetter, 2019; Mossière & Maeder, 2015). Under such circumstances, this information can be prejudicial and bias decisions towards a guilty verdict by creating an incriminating context in which the evidence is evaluated (Neal & Grisso, 2014; Rassin, 2020).

The vignette was based on a case of aggravated assault and contained sufficient, but weak and circumstantial, evidence (i.e. a denying suspect with limited other evidence) to create doubt about the defendant's guilt (see Appendix A). The manipulated variables in this experiment were 1) presence of an FMHR, 2) mental disorder and 3) recidivism risk. Prior research indicated that the scarcely available studies focused on effects of schizophrenia and antisocial personality disorder or psychopathy. Results of these studies showed differences in effects of these disorders (see Chapter 2; Mowle et al., 2016; Rassin, 2017b). Also, these disorders are prevalent in forensic and prison populations, including the Dutch forensic population (e.g. Dienst Justitiële Inrichtingen, 2021; Fazel & Danesh, 2002; Kempes & Gelissen, 2020; Vinkers et al., 2011). Manipulation of recidivism risk was added to assess whether an effect of mental disorder could be explained by associations with risk assessment and dangerousness (Mossière & Maeder, 2015; Termeer & Szeto, 2021). Participants were randomly assigned to one of the 8 conditions in this experiment: a 2 x 3 between-subjects design in which type of mental disorder (antisocial personality disorder; schizophrenia) and recidivism risk (no info; low risk; high risk) were manipulated. The final two conditions consisted of a control condition without an FMHR and a condition with an uncooperative defendant. This condition contained an FMHR, but without any substantial information about the mental health of the defendant or whether he posed a risk for society (see Figure 6.1 for an overview).

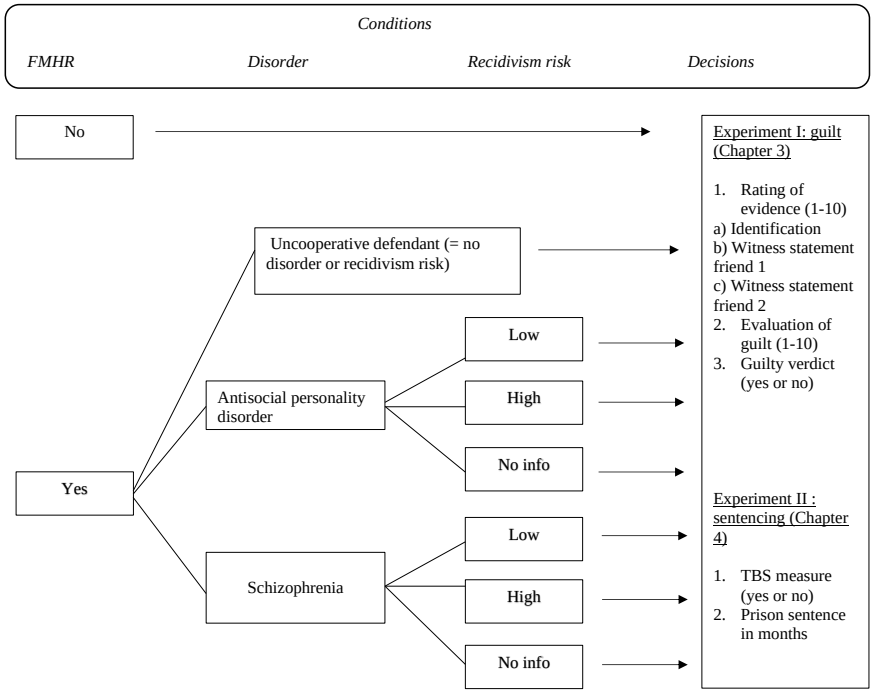

Figure 6.1: Experimental designs in Chapters 3 and 4

The first hypothesis in the study in Chapter 3 was that the mere presence of an FMHR would increase the proportion of guilty verdicts compared to when an FMHR was absent. Aligning with the theoretical models of evidence evaluation and integration, it was also tested whether an FMHR inflated the perceived incriminating value of evidence. Second, we hypothesized that the presence of a disorder (irrespective of its nature) would increase the perceived incriminating value of evidence and lead to more guilty verdicts compared to when a diagnosis was absent (due to an uncooperative attitude). Finally, based on findings from prior research (Mowle et al., 2016; Rassin, 2017b), we expected that an antisocial personality disorder would increase the incriminating value of evidence and lead to more guilty verdicts compared to a diagnosis of schizophrenia. For this final hypothesis we explored whether an effect of type of disorder varied according to information about recidivism risk.

The results showed that two thirds (66,7%) of the participants assigned to the control condition without an FMHR convicted the defendant. The mere presence of an FMHR (regardless of the presence of a disorder) significantly increased this proportion of guilty verdicts by 18.3%. This effect could not be explained by the diagnosis of a specific type of disorder and neither by inflation of the perceived incriminating value of evidence, because no signi-

ficant effects were found. These results suggest that if a mental disorder provides a plausible explanation for the alleged offense (e.g. aggravated assault can be explained by symptoms of either an antisocial personality disorder or schizophrenia), this can act as general incriminating context information. The results did not support our expectation that this context effect was explained by the evaluation and assimilation of the evidence, as suggested by evidence evaluation models (e.g. coherence-based reasoning model by Simon, 2004).

6.2.1.2 Decision-making process about guilt with FMHRs

While experiments using large samples are useful to isolate subconscious effects on legal decisions, *how* these decisions are achieved remains a black box in quantitative research. Furthermore, legal students in this experiment served as proxies for professional judges, so these results cannot be directly generalized to the population of professional judges who have had years of training and experience. To understand how judges decide in cases with an FMHR and to explore whether and to what extent the effects found in the experiment in Chapter 3 are recognized in practice, *Chapter 5* reported a qualitative study of five focus groups conducted with 17 criminal law judges who discussed the role of an FMHR in their decision-making process. One of the decisions they discussed was the decision about guilt.

Across all five focus groups, judges claimed that they do not use information from an FMHR deliberately. Yet they could not rule out that such information subconsciously contributes to their evaluation of guilt. Introspection about cognitive processes is difficult (Dhami & Belton, 2017; Nisbett & Wilson, 1977). If information in an FMHR is to influence judges' decisions about guilt, they believe this occurs subconsciously and when mental health problems are congruent with the alleged offense. This described congruency between a mental disorder and criminal behavior may serve as an explanation of the effect found among students in Chapter 3.

6.2.1.3 Preliminary conclusion

The results in this dissertation show that presence of an FMHR (regardless of content) significantly increased the proportion of guilty verdicts if tested in a controlled experimental setting among Dutch law and criminology students. Yet the effect could not be explained by the inflation of the incriminating value of the evidence. The focus groups with professional judges presented a plausible explanation for such an unwarranted effect by suggesting that congruency between any disorder and the alleged criminal behavior may subconsciously distort judgment. This generates a new hypothesis suggesting that a general incriminating context effect can provide an adequate explanation for (potential) bias by an FMHR. Such expectations need rigorous (experimental) testing to determine whether professional judges may be susceptible to such factors in

decisions about guilt (Berthet, 2022; Dror et al., 2006; Kalven & Zeisel, 1966; Neal & Grisso, 2014; Rassin, 2020; Robbennolot, 2005). Nevertheless, this dissertation presents a first insight into unintentional effects that FMHRs may have on decisions about guilt. Although the research is partially exploratory and conclusions are merely tentative, these results may be considered problematic. Even though an FMHR can provide context information to explain *why* the defendant would display certain behavior, this is not evidence that proves that the defendant has indeed committed the alleged offense in a specific case. Such an effect undermines the important principle of the presumption of innocence and thus a fair trial, because irrelevant factors about the personality of the defendant contribute to the conviction.

6.2.2 Sentencing decisions (chapters 2, 4 and 5)

6.2.2.1 Effects of FMHR on sentencing decisions

In the event the court is convinced of the defendant's guilt, the next steps are to determine whether the act constitutes a punishable criminal offense, whether the defendant is criminally responsible for this act and, if so, what sentence is appropriate. Findings from the systematic review in *Chapter 2* showed that the vast majority of available studies focused on the role of forensic mental health expertise in sentencing decisions. These studies were all conducted in Anglo-American systems and focused on the length of sanctions or recommendations for the death penalty. Most of these studies had an experimental design among mock jurors or students. Research from civil law systems and studies carried out among professional judges were almost absent. Results from these studies were inconsistent with regard to the role of forensic mental health expertise (e.g., psychological, psychiatric, neuropsychological) in decisions about the length of sanctions and the death penalty. Both mitigating and aggravating effects were demonstrated depending on the type of disorder, recidivism risk and perceptions of behavioral control and treatability of the illness. However, because this research was mostly done in the United States, these results are difficult to generalize to the Dutch system. The Dutch system has different sentencing options, especially for defendants with mental health problems which contributed to the offense (see Chapter 1). This lack of (comparable) research, inconsistent effects on sentencing, and the large discretionary power Dutch judges have in sentencing decisions, inspired the second experimental vignette study on the effects of FMHRs on sentencing decisions in Chapter 4.

Chapter 4 presented the results of the second experimental vignette study in this dissertation. The design was similar to the design in Chapter 3 (see Figure 6.1). Again, mental disorder and recidivism risk were manipulated because these two factors are important to inform concerns of blameworthiness

and necessity of community protection (Albonetti, 1991; Berryessa, 2018; Steffensmeier et al., 1998). In turn, these concerns are useful to explain disparities in sentencing decisions (Kramer & Steffensmeier, 1993; Steffensmeier et al., 1993; Steffensmeier et al., 1998; Ulmer, 1997).

In the experiment in Chapter 4, law and criminology students (N = 355) were presented with a case of aggravated assault (see Appendix B). The defendant was convicted for the offense and the participants had to decide on an appropriate sanction. They had to decide on the length of a prison sentence and could combine this with treatment measures, as is in line with Dutch legislation and practice. Participants were randomly assigned to one of the 8 conditions in this experiment: a 2 x 3 between-subjects design in which type of mental disorder (antisocial personality disorder; schizophrenia) and recidivism risk (no info; low risk; high risk) were manipulated. The other two conditions consisted of a control condition without an FMHR and a condition with an uncooperative defendant. This condition contained an FMHR, but without any substantial information about the mental health of the defendant or whether he posed a risk for society.

One aim of this experiment was to explore if refusing to cooperate with a forensic mental health evaluation affected the likelihood of receiving a TBS measure. TBS is initially imposed for two years with the possibility to be extended repeatedly with one- or two year increments (section 38d CC). A large number of defendants refuse to cooperate with a forensic mental health evaluation to prevent a TBS measure from being issued in the first place, a problem which is unique to the Dutch criminal justice system (Nagtegaal et al., 2018; Van Dijk et al., 2012). An FMHR about an uncooperative defendant might not contain (much) information about possible mental disorders, criminal responsibility, and advice on appropriate sanctions. Consequently, it may be difficult for the court to determine whether the criteria for a TBS measure (i.e. presence of a mental disorder at the time of the offense; significant danger to society) have been met. When these criteria are not met, the court is usually restricted to imposing a prison sentence. We thus expected that in a case with an uncooperative defendant, the proportion of TBS would be lower compared to the cooperative defendant. Second, we expected that when TBS was not imposed in the case with an uncooperative defendant, the prison sentence would be longer to incapacitate a potentially dangerous offender and because no mitigating circumstance in the FMHR were available.

Indeed, the results showed that significantly fewer TBS measures were imposed in the case of an uncooperative defendant. Contrary to our expectations, absence of a TBS measure was only marginally compensated by a longer prison sentence: the uncooperative defendant received a prison sentence that was – on average – a little over three months longer compared to a prison sentence of the cooperative defendant (29.05 months versus 25.79 months). This suggests that refusing to cooperate with an evaluation can be beneficial in terms of time spent incarcerated, at least in case of an aggravated assault

charge. On the other hand, when compared to a control condition without an FMHR, the prison sentence of a cooperative defendant was not significantly lower (27.27 months and 25.79 months respectively) suggesting a limited mitigating effect of an FMHR. A possible explanation for the absence of this effect might be the severity of the offense and the injuries of the victim. Retributive purposes of the sentence may have played a role in deciding on the length of the prison sentence. This possibility requires further research.

In Chapter 4 it was also explored whether sentencing decisions differed if the (cooperative) defendant suffered from schizophrenia, versus when he suffered from an antisocial personality disorder. Prior research suggested disparate effects of these disorders because behavior is attributed differently for these disorders in terms of controllability (see Chapter 2; Barnett et al., 2007; Edens et al., 2005; Weiner, 2010), which may have consequences for perceptions of blameworthiness, risk and treatability among others (Corrigan et al., 2003; Weiner et al., 1997). For example, symptoms associated with psychotic disorders (e.g. hallucinations, delusions, etc.) are considered to be beyond someone's control. Symptoms of certain (antisocial) personality disorders (e.g. lying, manipulative behavior etc.) are considered to be more controllable (Edens et al., 2005; Weiner, 2010). As such, different effects of these disorders can be expected.

The results in chapter 4 showed a difference in whether a treatment measure was imposed. The proportion of imposed TBS measures was almost 25% higher in case of schizophrenia than in case of antisocial personality disorder, even when the defendant was presented as a low future risk (which can be considered a contraindication for TBS). On the one hand, these results imply the perceived need for treatment in case of schizophrenia compared to an antisocial personality disorder. On the other hand, the result that even with a low recidivism risk, the proportion of TBS was still significantly higher for the case of schizophrenia than for antisocial personality disorder, suggests that incapacitation was perceived to be necessary. Otherwise, participants could have opted for other (ambulatory) treatment options. This latter explanation is in line with the result that no substantial differences were found for the prison sentence, regardless of whether this was combined with a TBS measure. Prior international research generally reports a mitigating or excusing effect for psychotic disorders because of diminished (or absence of) criminal responsibility (see Chapter 2; Barnett et al., 2004; Berryessa & Wohlstetter, 2019; Gurley & Marcus, 2008; Kelley et al., 2019; Mowle et al., 2016; Rice & Harris, 1990; Saks et al., 2014; Weiner, 2010). This makes the results in the current experiment somewhat counterintuitive even though the Dutch law does not regulate whether specific types of disorders should affect sentencing decisions differently. Judges in the focus groups in Chapter 5 also did not recognize the specific effects in Chapter 4 in practice. The results in the experiment seem to suggest an association between schizophrenia and violence or dangerousness: people might automatically assume a schizophrenic person

to be violent. Such stereotypical ideas are generally found among the public (Angermeyer & Dietrich, 2006; Link et al., 1999; Pescosolido et al., 2019; Pescosolido et al., 1999). As such, these effects may not be directly representative of decision-making in cases with an FMHR in practice. These findings demonstrate that research among an ecologically valid sample is vital, which we did in Chapter 5.

6.2.2.2 Decision-making process regarding sentencing decisions with FMHRs

The experiment in Chapter 4 allowed for isolation of specific factors (e.g. cooperation with an FMHR or not, type of disorder, recidivism risk) that affect sentencing decisions. However, an FMHR consists of many aspects (e.g. diagnosis, recidivism risk, advice on criminal responsibility, advice on treatment) which the court can incorporate in their decision-making. As such, studying these decisions also requires a qualitative approach to open the black box of *how* these decisions are reached. *Chapter 5* consisted of five focus group discussions with professional judges about their decision-making process in sentencing decisions. The results suggested that specific aspects from an FMHR have different roles in the final decision. Assessment of recidivism risk appeared to be influential in decisions about treatment. This recidivism risk is informed by the risk assessment in the FMHR, but judges also consider severity of the offense and whether the defendant is susceptible to treatment. Community protection is thus an important concern for them (Berryessa, 2018; Steffensmeier et al., 1998; Van Spaendonck, 2021). Conclusions about (diminished) criminal responsibility in the FMHR primarily informed decision makers about the length of a prison sentence (cf. Claessen & De Vocht, 2012). Judges' evaluations of criminal responsibility could also be affected by perceived congruency between symptoms of the diagnosed disorder in the FMHR and the offense (e,g. an intellectual disability when suspected of repeated, complicated extortion: judges found it unlikely that this disability contributed to the offense). Conclusions about diminished responsibility generally mitigated the length of a prison sentence. Judges expressed difficulties in converting an abstract conclusion about diminished responsibility into a numerical reduction of the prison sentence. Imposition of a TBS measure with forced care and high treatment urgency were also arguments for judges to mitigate a prison sentence. These findings contrast with the results in Chapter 4. Students, as legal proxies, applied no mitigation of the prison sentence when they imposed a TBS measure in comparison to the students who did not impose TBS.

6.2.2.3 Preliminary conclusion

This dissertation shows the important role of multiple aspects of an FMHR in sentencing decisions, but emphasizes the complexity and ambiguity in the use of these reports. Decision-makers have a lot of discretionary power regard-

ing sentencing, and this was reflected in the variety of aspects in an FMHR that appeared useful or influential for different decisions (i.e. prison sentence or treatment). Disparities in findings between legal students and professional judges emphasize the need to further study sentencing decisions, quantitatively and qualitatively, among an ecologically valid sample. While we can speculate about the explanations (i.e. associations with controllability of behavior, perceived dangerousness) underlying these disparities in sentencing with FMHRs, further research is necessary to unravel and test these mechanisms. Therefore, the explorative insight in the potential use and effects of FMHRs serves as a first start of further empirical research on decision-making on sentencing decisions in cases with a mentally ill defendant in the Netherlands.

Table 6.1: Main findings per chapter

	Decision	*Chapter*	*Method*	*Main findings*
To what extent and in what manner does (information in) an FMHR affect judicial decision-making about guilt and sentencing in the Netherlands?	Guilt Sentencing (type and length of sanction)	2	Systematic literature review (k = 27)	• Majority of studies are from the United States using an experimental vignette design among mock jurors. • Most studies compared FMHE about psychotic disorders (such as schizophrenia) to psychopathic disorders (including APD). • Psychotic disorders led to more NGRI verdicts than psychopathic disorders. • An effect of FMHE on sentencing is affected by type of disorder, perceived behavioral control, treatability of the disorder, or recidivism risk. • Research on prejudicial effects on decisions about guilt is almost non-existent.
	Guilt	3	Experimental vignette study (N = 200): (2 x 3 between-subjects design with 2 control conditions)	• The proportion of guilty verdicts increased with 18.3% when an FMHR was present compared to when this report was absent, irrespective of the type of disorder (schizophrenia or APD) or level of recidivism risk (low or high) in the report. • This effect could not be explained by incriminating assimilation of other available evidence.
	Sentencing (TBS measure and prison sentence)	4	Experimental vignette study (N = 355): (2 x 3 between-subjects design with 2 control conditions)	• An uncooperative attitude with a FMHR reduces the likelihood of a TBS measure being imposed. • When TBS was not imposed, an uncooperative attitude does not result in a substantial longer prison sentence compared to a cooperative defendant or a healthy defendant. • A diagnosis of schizophrenia increased the likelihood of a TBS measure being imposed compared to a diagnosis of APD, regardless of level of recidivism risk. • Type of mental disorder or level of recidivism risk did not substantively affect the length of a prison sentence, regardless of whether this was combined with a TBS measure.
	Guilt Sentencing (punishment, measures)	5	Focus group interviews (N = 17 in 5 groups)	• Although not used deliberately, judges could not rule out that mental health information in an FMHR subconsciously contributes to their evaluation of guilt. • Different aspects of the FMHR inform sentencing decisions: assessment of recidivism risk is influential in decisions about treatment. Conclusions about criminal responsibility and treatment urgency inform decisions about the length of a prison sentence.

Note. FMHE = forensic mental health expertise; NGRI = not guilty by reason of insanity; FMHR = forensic mental health report; APD = antisocial personality disorder.

6.3 Strengths, limitations and directions for future research

6.3.1 Strengths

This dissertation is one of the first systematic and empirical study of judicial decision-making in cases with FMHRs in the Netherlands (cf. Van Esch, 2012; Van Spaendonck, 2021). The aim was to present a comprehensive insight into the role of FMHRs in decisions about guilt and sentencing, including the decision-making *process*. The use of a mixed-methods approach complements the interdisciplinary character of this topic. Using mixed methods combats limitations related to internal and external validity often associated with a single-method approach in legal decision-making research (see Dhami & Belton, 2017). On the one hand, extensive experimental vignette studies among large samples – characterized by a strong internal validity – isolated the effects of (parts of) an FMHR on decisions about guilt and sentencing. Although the external validity is limited, the vignette was based on an actual criminal case file (see De Keijser & Van Koppen, 2004; 2007). The condensed FMHR was based on actual FMHRs both in content and language. On the other hand, a qualitative study with an ecologically valid sample was used for in-depth understanding of the decision-making processes and assess whether findings from the experiments were (externally) valid. This triangulation of methods resulted in a preliminary though comprehensive understanding of the extent and manner in which an FMHR plays a role judicial decision-making about guilt and sentencing in the Netherlands.

In addition to a general exploration of the role of FMHRs in judicial decision-making in the Netherlands, the research in this dissertation also expanded upon prior international studies by studying the effects of two mental disorders common in the forensic population (i.e. antisocial personality disorder and schizophrenia) and explore whether associations with risk could account for certain effects. Up and until now, this had never been studied in the Dutch legal system, even though these two factors are principal components of FMHRs which can impact guilt and sentencing decisions without specific regulations.

6.3.2 Limitations

The research in this dissertation has some limitations as well. Despite rather realistic case materials, both experiments used a vignette with condensed materials (i.e. a case vignette with a shortened FMHR) and were done in an online research setting. In practice, each case contains unique characteristics and circumstances, and three judges carefully deliberate before their final decisions. As such, these two studies are an abstraction of the actual Dutch legal practice. This affects external, ecological validity of the experimental vignette studies. A second limitation also concerns ecological validity. Law

and criminology students served as proxies for professional judges. It is often inevitable to resort to a student sample for quantitative research on legal decision-making in the Netherlands. Permission to recruit sufficient criminal law judges is often denied in the Netherlands because the Council of Judiciary acts as a very strict gatekeeper to prevent overload of courts (cf. Bosma & Buisman, 2018; Van Spaendonck, 2021). The elaborate experimental designs required large samples to power the analyses and therefore permission to conduct these two experiments among professional judges was unfortunately denied. Because of their education and as prospective legal professionals, legal students in the Netherlands may be more representative of professional judges than other types of students often used in this research (cf. Chapter 2). However, findings among such samples cannot be directly generalized to the population of professional judges who have had years of training and experience.

Third, only two types of mental disorder (i.e. schizophrenia and antisocial personality disorder) common in the forensic population were studied in the experiments in Chapters 3 and 4. Yet this is by no means a representation of the full array of complex, often comorbid, psychopathology defendants suffer from (see for example Appelman et al., 2021; Jankovic ì et al., 2021; Kempes & Gelissen, 2020; Van der Veeken et al., 2015; Van Nieuwenhuizen et al., 2011; Vinkers et al., 2011 for more elaborate characteristics of the Dutch forensic population). A similar limitation relates to the type of crime the defendant in the vignette was tried for (i.e. assault with serious bodily harm). Many FMHRs are requested in cases with a violent offense (Dienst Justitiële Inrichtingen, 2021; Vinkers et al., 2011), but it might be possible that effects of an FMHR depend on the type and severity of the offense. For example, unintentional effects of an FMHR on decisions about guilt might be explained by the congruency of the crime with (symptoms of) the mental disorder (see Chapter 3). Studying other offenses prevalent among the forensic population (i.e. arson, sex crimes, Vinkers et al., 2011) can shed light on whether bias by an FMHR depends on this congruency. Similarly, the lack of an effect of recidivism risk on imprisonment decisions in Chapter 4 could also be explained by this seriousness of the offense in the vignette.

A final limitation concerns the specific emphasis on the TBS measure (see Chapters 4 and 5). While the presence of an FMHR is a prerequisite to impose a TBS measure, most defendants with mental health problems receive care or treatment by being sentenced to special conditions tied to a conditional prison sentence (Leenderts et al., 2016; Van der Wolf, 2018). Moreover, in 2020 the new Forensic Care Act come into force. This act provides the court with the authority to divert the defendants out of the criminal justice system and into civil mental health care at any point during the criminal proceedings (care authorization, section 2.3. Forensic Care Act). Therefore, this dissertation does not cover the (future) effects that FMHRs may have on a variety of other interventions in cases with mentally ill defendants.

6.4 Recommendations for research and practice

6.4.1 Recommendations for future research

Based on the results and limitations of this dissertation, a number of recommendations for future research can be provided. First and foremost, future research among judges is crucial to gain further insight into legal decision-making in cases with an FMHR. Experimental studies can determine if professional judges are susceptible to (subconscious) bias by an FMHR in decisions about guilt and which aspects of an FMHR are influential in their decisions. Alternatively, the focus groups in this dissertation provided insight into general decision-making approach in cases with an FMHR. Future qualitative research can use case vignettes to study and compare how judges decide in an identical (fictitious) case (cf. Van Spaendonck, 2021). Many questions about the underlying mechanisms of certain effects of FMHRs are still unanswered. Future research can shed light on these new questions and hypotheses that arose.

A second recommendation concerns expanding the current research to other types of disorders and offenses prevalent in the forensic population. This expansion is necessary to determine whether a prejudicial effect of an FMHR on decisions about guilt depends on the (perceived) congruency of a disorder and (the severity of) the offense. Furthermore, judges discussed that the type of disorder and the congruency between a disorder and the offense affected their decisions about criminal responsibility, which in turn can affect sentencing decisions. Specifically, substance abuse and addiction should be investigated in future research. Many evaluated defendants suffer from (comorbid) substance abuse (Dienst Justitiële Inrichtingen, 2021), but this disorder was not studied in the current dissertation. The role of this disease in decisions about criminal responsibility and sentencing is subject of discussion among scholars and legal professionals: it can be argued that substance abuse constitutes a disorder which can impair criminal responsibility, but others argue that it does not diminish criminal responsibility because of the principle of prior fault (*culpa in causa*) (see Chapter 5 and cf. Goldberg, 2022; Kennett et al., 2015; Morse, 2013). These different perspectives can cause disparities in how this information is used in sentencing decisions, depending on an individual decision maker's attitude regarding substance abuse and addiction. Including this factor in future research may provide more understanding about how (comorbid) substance abuse as diagnosed in an FMHR plays a role in sentencing decisions.

Other recommendations relate to the context in which the research of this dissertation took place. As already mentioned, during this doctoral research the new Forensic Care Act came into force. This Act has significant consequences for the array of interventions available to legal professionals in various stages of the criminal proceeding, including the possibility to divert mentally disordered defendants out of the criminal justice system into civil mental health care. Such developments tap into discussions about care instead

of punishment. Future research should incorporate this variety of (novel) interventions to gain more insight in the evolving practice concerning defendants with mental health problems and how an FMHR plays a role in this practice. Research into this practice should also address the influence of current capacity problems in (forensic) mental health care in the Netherlands and the shortages in forensic mental health experts (De Kogel et al., 2021; Van Kordelaar, 2020). These issues could affect the implementation of these (new) provisions.[4] Such research also requires extending the scope beyond the decisions made at trial, because some interventions can be imposed at pre-trial stages in a criminal proceeding.

Expanding the scope of research beyond material decisions at trial is also relevant to understand which defendants eventually end up at trial with an FMHR. On several moments during the criminal proceeding, other actors (e.g. police officers, prosecution, NIFP) make decisions about defendants with (potential) mental illness. In an early stage of the criminal investigation, a decision has to be made about whether a defendant should be evaluated by forensic mental health experts. There are a number of indicators for a forensic mental health evaluation (e.g. brutality of the crime, history of mental health problems, abnormal behavior in custody; Van Kordelaar, 2002). Nonetheless, these decisions are subjected to extensive discretion. This discretion is illustrated by the recently implemented structural deliberation between the NIFP and the Prosecution's office as a result of shortages of forensic mental health experts. It is used to determine in which cases a forensic mental health evaluation is warranted (Van Kordelaar, 2020). It is currently unknown which factors determine the outcome of this deliberation process. These gaps make it important to know more about the sequence of decisions in a criminal procedure in a case with a defendant with mental health problems. This helps to further understand the role of forensic mental health expertise at trial and beyond.

Another significant change in legislation which should be incorporated in future research is the implementation of the Punishment and Protection Act in July 2021. This act has changed the execution of prison sentences considerably. In the past, conditional release could occur after two thirds of the sentence had been completed. This new act limits this conditional release to two years before the prison sentence is fully served. As a result, inmates with a sentence of more than 6 years, are incarcerated for a longer period of time than before this act come into force. Specifically applied to cases with a mentally ill defendant, this new act has significant consequences for when a TBS measure can commence when this is combined with a long (> 6 years) prison

4 See for example a recent case in which the defendant was excused from punishment because he could not be evaluated by forensic mental health experts due to shortages. See https://www.nu.nl/binnenland/6031694/verdachte-krijgt-geen-straf-door-capaciteitstekort-forensische-psychiatrie.html.

sentence. An offense needs to be quite severe (punishable by a prison sentence of at least 4 years) to qualify for a TBS measure. Because of this severity, it is not uncommon that such offenses are punished with prison sentences to which this new act applies. TBS is executed *after* a prison sentence has been served. It is currently unknown whether this new act might affect cooperation with a forensic mental health evaluation and the role of an FMHR in current sentencing decisions.

6.4.2 Recommendations for policy and practice

The explorative nature of this dissertation primarily generates recommendations for future research. However, a number of recommendations for policy and practice can be made resulting from the findings in this dissertation. This dissertation suggests that an FMHR can have unintentional effects on decisions about guilt, especially in complex cases. Guidelines directed at forensic mental experts already caution that information from an FMHR should not contribute to the evidence against the defendant and decision-making about guilt (Beukers, 2011; Nederlands Instituut voor Forensische Psychiatrie en Psychologie, 2022; Nederlandse Vereniging voor Psychiatrie, 2013). However, these guidelines cannot prevent legal professionals from being subconsciously biased by this information anyway. Because bias by an FMHR most likely occurs subconsciously, codified regulations will not be very effective. Therefore, a first step is to use training sessions to adequately educate legal professionals about the (cognitive) pitfalls that may encourage biased decision-making and especially how stereotypes about associations between mental illness and crime can distort their judgment in a case. Creating awareness is a first step to be able to recognize which criminal cases might be vulnerable to bias by an FMHR (Croskerry et al., 2013; Neal et al., 2022; Neal & Brodsky, 2016). Based on this dissertation certain case factors can be distinguished to provide legal professionals with tools to screen cases that may be vulnerable to bias. This dissertation suggests that at least complex cases with a severe offense, a denying suspect and limited other probative evidence may be vulnerable to bias by an FMHR (see the fictitious case in Chapter 3, but also the case of Sjonny W. in the introduction of this dissertation for examples). The uncertainty about whether the defendant committed the alleged crime is high in such cases, making them more vulnerable to bias (Bodenhausen & Lichtenstein, 1987). Unintentional variability in judgment may be the result (Kahneman et al., 2021 refer to this variability as 'noise'). A more radical solution would be to bifurcate a trial into a separate guilt and sentencing stage to prevent factors relevant for sentencing (i.e. FMHRs, but also reports from the Probation Office, criminal record) from affecting decisions about guilt (Van Dijk et al., 2012). The FMHR is then added at the sentencing stage to inform the judge about defendant characteristics relevant for sentencing (a similar approach to *linear*

sequential unmasking in forensic science; see Dror et al., 2015). This bifurcation would drastically alter the contemporary criminal procedure in the Dutch system. However, findings from this dissertation may contribute to the discussion about the feasibility of this approach, which was recently renewed because of the fear of unintended and undesirable effects of victim impact statements on decisions about guilt.[5]

Other aspects which judges should be continuously educated about, is basic and state-of-the-art principles of forensic psychiatry. The findings in this dissertation about the use of FMHRs in sentencing decisions show that deciding on an appropriate sentence in a case with an FMHR is complex. Potentially stereotypical associations between disorders and (violent) crime can easily seep into these decisions because of time and information constraints (Steffensmeier & Demuth, 2006; Steffensmeier et al., 1998). Furthermore, judges find it difficult to apply expert information about mental health, criminal responsibility, and risk into a legal decision. Nonetheless, in about one-fourth of more severe cases, FMHRs are present. As such, continuous education is important to adequately understand the contents of FMHRs. This could also lead to courts specializing in cases with an FMHR, akin to special courts who decide on the extension of TBS measures. Education will improve appreciation and understanding of the information in an FMHR because decision-makers will have more knowledge to understand and assess the expert information. This understanding will help judges incorporate forensic mental health information into a sentence. Improved knowledge will also help judges in their motivation when they explicitly divert from the expert's advice. An improved understanding and application of the information in an FMHR ultimately contributes to more informed decision-making. Yet, it can also be questioned whether we expect too much of the judge. He requires expert information about the mental health of the defendant, but at the same time he has the responsibility and discretion to assess, evaluate and incorporate this information into his decisions. Discretion and responsibility which have been expanded over the years (e.g. recent developments such as judgment by the ECtHR in case of an uncooperative defendant, the new Forensic Care Act, the reductions of the degrees of criminal responsibility). More possibilities and information to consider, could produce more overload of information which can even backfire and result in potential unintended effects when judges try to cognitively deal with this (Steffensmeier & Demuth, 2006; Steffensmeier et al., 1998).

5 The political debate about a bifurcated trial was recently renewed because of the implementation of the act to extend the rights of victims, including the delivery of a victim impact statement (Kamerstukken I, 2020/2021, 35349, nr. 34.; Weerwind, 2022).

6.5 Conclusion

To conclude, this dissertation presents a first integrated insight into the role of an FMHR in decisions about guilt and sentencing in the Netherlands. Under controlled circumstances, FMHRs can make the (unintended) difference between conviction and acquittal. Furthermore, judges use information about criminal responsibility in these reports to mitigate the length of a prison sentence and decide on commitment to a maximum secured forensic psychiatric hospital. The role of an FMHR in a criminal trial is thus significant, but at the same time complex. An FMHR is a source of information which helps to adjust a sentence to an individual's needs, but also to protect society from harm. While providing a preliminary understanding of potential use and effects of FMHRs in decisions about guilt and sentencing, the findings in this dissertation mostly generate new avenues of research. Such new research should aim to step up in terms of ecological validity, and should aim to incorporate the consequences of recent changes in regulations and policies regarding individuals with mental health problems who enter the criminal justice system. Optimization of the intended use of FMHRs in practice will ultimately lead to decisions that recognize the needs of a mentally ill defendant, but with respect for principles of equality, consistency and the right to a fair trial.

Samenvatting (Dutch summary)

De psyche in de rechtszaal
Over pro Justitia-rapportages in rechterlijke beslissingen over bewijs en straf in Nederland

1 Achtergrond en doel

In het strafproces staat een aantal beslissingen centraal: allereerst dient te worden vastgesteld of de verdachte het ten laste gelegde feit heeft begaan (de bewijsbeslissing). Vervolgens dient te worden bepaald welk strafbaar feit dit oplevert en of de verdachte strafbaar (toerekenbaar) is. Indien al deze vragen positief worden beantwoord, dient te worden besloten welke straf daarop moet volgen (straftoemetingsbeslissing). Rechters kunnen bij deze beslissingen gebruikmaken van informatie uit het strafdossier en hun bevindingen tijdens de zitting. Eén van de informatiebronnen is een pro Justitia-rapportage. Dit gedragskundig rapport bevat veel informatie over de persoon van de verdachte. Een pro Justitia-rapportage wordt aangevraagd indien het vermoeden bestaat dat de verdachte ten tijde van het ten laste gelegde delict leed aan een psychische stoornis en deze stoornis een aandeel kan hebben gehad in de totstandkoming van het delict. De rapportage wordt toegevoegd aan het strafdossier dat voorafgaand aan de behandeling van de zaak beschikbaar is voor de rechtbank of het gerechtshof.

In het gedragskundig onderzoek wordt door experts, meestal psychologen en psychiaters, gesproken met de verdachte over hun gedachten, emoties en gedrag ten tijde van het ten laste gelegde feit. Er kunnen (neuro)psychologische testen worden afgenomen en er wordt gesproken met het sociale netwerk van de verdachte. Na deze grondige evaluatie worden in de rapportage conclusies gepresenteerd met betrekking tot de aanwezigheid van een psychische stoornis, of deze stoornis aanwezig was ten tijde van het ten laste gelegde feit, en of de stoornis doorgewerkt heeft in de beslissingen en handelingen van de verdachte tijdens het delict. Met andere woorden: kan het delict aan de verdachte worden toegerekend? Ten slotte bevat een pro Justitia-rapportage een advies over het recidiverisico en een advies over mogelijke (behandel)maatregelen (Nederlands Instituut voor Forensische Psychiatrie en Psychologie, 2022). In 2021 werd in ongeveer één op de vier strafzaken met een ernstig

misdrijf (dat wil zeggen: een misdrijf waarop een maximum gevangenisstraf van ten minste 12 maanden wordt geëist) een pro Justitia-rapportage verzocht.

Een pro Justitia-rapportage is vooral een belangrijke informatiebron voor de rechter als het gaat om beslissingen over toerekenbaarheid en passende sancties. De rapportage speelt formeel geen rol bij de bewijsbeslissing. Ondanks het feit dat dit soort rapportages regelmatig voorkomt in strafzaken en een belangrijke functie heeft, is empirisch onderzoek naar de rol van deze rapportages bij rechterlijke beslissingen over bewijs en straf in het Nederlandse strafrechtssysteem tot op heden vrijwel afwezig geweest. Dit is problematisch omdat het gebruik van deze rapportage in een zaak grote consequenties kan hebben voor de verdachte. Eén van de fundamentele beginselen binnen het strafrecht is dat verdachten die onder invloed van een psychische stoornis een misdrijf begaan niet op dezelfde manier moeten worden bestraft als verdachten waarbij dit niet aan de orde is.[1] Inzicht in de rol van pro Justitia-rapportages bij belangrijke beslissingen over bewijs en straf is dan ook relevant in het kader van beginselen over een eerlijk proces, rechtsgelijkheid en rechtszekerheid.

Deze dissertatie betreft een exploratief onderzoek naar de rol en effecten van een pro Justitia-rapportage bij beslissingen over bewijs en straf. Om deze effecten verder te begrijpen, is ook het beslisproces dat ten grondslag ligt aan beslissingen over bewijs en straf onderzocht. In deze dissertatie is gebruikgemaakt van verschillende onderzoeksmethoden, een systematische literatuurstudie (hoofdstuk 2), twee experimentele vignettenstudies (hoofdstukken 3 en 4) en focusgroepen (hoofdstuk 5), om de volgende twee onderzoeksvragen te beantwoorden:

1. *In hoeverre en op welke manier speelt een pro Justitia-rapportage een rol bij de bewijsbeslissing?*
2. *In hoeverre en op welke manier speelt een pro Justitia-rapportage een rol bij de straftoemetingsbeslissing?*

2 BEVINDINGEN

2.1 Bewijsbeslissing (hoofdstukken 2, 3 en 5)

Een pro Justitia-rapportage wordt opgesteld om de rechter te adviseren over passende sancties voor een verdachte met mogelijke psychische problematiek. Een pro Justitia-rapportage is niet relevant bij de vraag of de verdachte het delict dat hem of haar ten laste wordt gelegd ook daadwerkelijk heeft begaan.

1 Zie ook artikel 39 Wetboek van Strafrecht: "Niet strafbaar is hij die een feit begaat, dat hem wegens de psychische stoornis, psychogeriatrische aandoening of verstandelijke handicap niet kan worden toegerekend."

Vanuit een rechtspsychologisch perspectief kan een effect van een pro Justitia-rapportage op de bewijsbeslissing echter niet worden uitgesloten (zie bijvoorbeeld Simon, 2004). Informatie over een bij de verdachte aanwezige stoornis en diens recidiverisico kan de rechter namelijk beïnvloeden in diens overtuiging dat de verdachte het ten laste gelegde strafbare feit heeft gepleegd (Dror et al., 2006; Neal & Grisso, 2014; Rassin, 2017b). Onderzoek naar dit mogelijke effect is echter zeer beperkt. Een overzicht van beschikbare onderzoeken is gegeven in de systematische literatuurstudie in hoofdstuk 2. Slechts twee (internationale) studies hebben onderzocht in hoeverre informatie in een gedragskundige rapportage van invloed is op de bewijsbeslissing. Deze studies toonden aan dat de diagnose van bepaalde psychische stoornissen van invloed was op de bewijsbeslissing: in het geval van psychopathie of een antisociale persoonlijkheidsstoornis bij een verdachte steeg het aantal veroordelingen ten opzichte van verdachten zonder stoornis (Rassin, 2017b) of wanneer sprake was van schizofrenie (Mowle et al., 2016). Het gebrek aan onderzoek en de verschillende effecten van verschillende typen stoornissen onderschrijven het belang van nader onderzoek. De inzichten uit deze overzichtsstudie hebben geholpen bij het vormgeven van de experimentele vignetstudies in de hoofdstukken 3 en 4.

De experimentele vignetstudie in hoofdstuk 3 is uitgevoerd onder 200 rechten- en criminologiestudenten en had als doel te onderzoeken in hoeverre de aanwezigheid en de inhoud van een pro Justitia-rapportage (namelijk: type stoornis en recidiverisico) van invloed kunnen zijn op de overtuiging van schuld, en dus de bewijsbeslissing, in een (fictieve) zaak over zware mishandeling. De uitkomsten van deze studie laten zien dat wanneer een pro Justitia-rapportage niet aanwezig was, tweederde (66,7%) van de respondenten de verdachte veroordeelde. Wanneer een pro Justitia-rapportage wel aanwezig was (ongeacht de inhoud hiervan), steeg dit percentage significant tot 85%. Deze toename kon niet worden verklaard doordat participanten op een andere manier naar de bewijsmiddelen keken. Een mogelijke verklaring voor de stijging van het aantal veroordelingen kan zijn dat de psychische stoornissen (antisociale persoonlijkheidsstoornis of schizofrenie) in de pro Justitia-rapportage een plausibele verklaring hebben geboden voor het delict (dat wil zeggen: symptomen passend bij beide stoornissen kunnen leiden tot plotseling agressief gedrag) waardoor dit (onbewust) als belastende contextinformatie in de zaak werd gebruikt.

De mogelijke rol van een pro Justitia-rapportage bij de bewijsbeslissing is verder onderzocht door middel van focusgroepen met in totaal 17 rechters en raadsheren. De resultaten daarvan zijn beschreven in hoofdstuk 5. De rechters gaven unaniem aan dat zij de informatie uit een pro Justitia-rapportage niet bewust gebruiken bij hun overtuiging van schuld. Ze konden echter niet uitsluiten dat het rapport onbewust toch een (kleine) rol kan spelen. Zij stelden ook dat deze invloed verklaard zou kunnen worden indien de gediagnosticeerde psychische stoornis past bij het type delict (dat wil zeggen: wanneer symp-

tomen van een stoornis een verklaring kunnen bieden voor het vertoonde (delinquente) gedrag). Deze verklaring past ook bij de resultaten die in hoofdstuk 3 zijn beschreven, maar behoeft nader onderzoek.

2.2 Straftoemetingsbeslissing (hoofdstukken 2, 4 en 5)

Als de rechter overtuigd is van de schuld van de verdachte, zijn de volgende stappen in het beslismodel om vast te stellen of sprake is van strafbaar feit, of dit feit aan de verdachte kan worden toegerekend en, indien dit het geval is, welke sancties passend en geboden zijn (zie art. 350 Wetboek van Strafvordering). De rechter heeft een aanzienlijke discretionaire ruimte om te bepalen welke sancties passend zijn in een zaak. Een model dat veelvuldig wordt aangehaald om inzichtelijk te maken welke factoren een rol kunnen spelen in die straftoemetingsbeslissing, is het *focal concerns*-model (o.a. Kramer & Steffensmeier, 1993; Steffensmeier et al., 1993; Steffensmeier et al., 1998; Ulmer, 1997). Volgens dit model kunnen verschillende factoren die de rechter meeneemt in zijn afweging over de straftoemeting teruggebracht worden tot drie centrale belangen (*focal concerns*): 1) verwijtbaarheid van de dader; 2) bescherming van de maatschappij; en 3) praktische of bureaucratische bezwaren (bijvoorbeeld tijds- en werkdruk binnen een gerecht, maar ook detentiegeschiktheid van een veroordeelde). De *focal concerns* over verwijtbaarheid en bescherming van de maatschappij zijn de twee belangen waarbij een gedragskundige rapportage vooral informatief kan zijn. In de rapportage wordt immers advies gegeven over de toerekenbaarheid van het delict aan de verdachte en over het recidiverisico. Deze informatie kan worden gebruikt om de verwijtbaarheid van de verdachte en het gevaar dat deze persoon vormt voor de samenleving in te schatten.

De systematische literatuurstudie uit hoofdstuk 2 laat zien dat het merendeel van eerder (internationaal) onderzoek naar effecten van gedragskundige rapportages gericht is op de straftoemeting. De bevindingen waren niet erg consistent: gedragskundige informatie kon bijdragen aan een minder zware of juist een zwaardere straf. Dit was afhankelijk van het type stoornis, recidiverisico en percepties over gedragscontrole en behandelbaarheid van de stoornis. Dit onderzoek werd vrijwel uitsluitend uitgevoerd in Noord-Amerika waardoor deze studies niet representatief zijn voor het Nederlandse strafrechtssysteem. Het Nederlandse systeem kent namelijk specifieke sancties voor verdachten die een delict begaan waarbij een psychische stoornis een rol heeft gespeeld. De meest ingrijpende sanctie is de maatregel terbeschikkingstelling (tbs-maatregel) met dwangverpleging. Bij oplegging van deze maatregel wordt de veroordeelde voor ten minste twee jaar in een gesloten forensisch psychiatrisch centrum geplaatst (art. 37a Wetboek van Strafrecht). Deze maatregel kan vervolgens na twee jaar met telkens één of twee jaar worden verlengd door de rechtbank (art. 38d lid 2 en 38e lid 1 Wetboek van Strafrecht). Wanneer

geen sprake is van volledige ontoerekenbaarheid, kan deze maatregel ook gecombineerd worden met een gevangenisstraf (art. 39 Wetboek van Strafrecht). Vanwege het ingrijpende karakter van deze maatregel, en omdat op voorhand geen duidelijkheid bestaat over de beëindiging ervan, weigeren veel verdachten hun medewerking aan het pro Justitia-onderzoek om de kans te verkleinen dat een tbs-maatregel wordt opgelegd. De discretionaire ruimte die de rechter heeft in het bepalen van passende sancties en de ingrijpende gevolgen ervan voor zowel de verdachte als de maatschappij, benadrukken de noodzaak van empirisch onderzoek in de Nederlandse context.

In hoofdstuk 4 worden de resultaten beschreven van een tweede experimentele vignetstudie onder 355 rechten- en criminologiestudenten. In deze studie is de rol van een pro Justitia-rapportage bij de straftoemetingsbeslissing onderzocht. Met eenzelfde soort casus als de studie in hoofdstuk 3, was het eerste doel van dit experiment te bekijken of weigering van de verdachte om mee te werken aan een pro Justitia-onderzoek de kans op een tbs-maatregel beïnvloedt. Daarbij werd ook gekeken of het niet-opleggen van een tbs-maatregel gecompenseerd werd met een langere gevangenisstraf. Uit de resultaten kwam naar voren dat de kans op een tbs-maatregel inderdaad kleiner was wanneer de verdachte weigerde mee te werken aan het pro Justitia-onderzoek. Dit werd slechts beperkt gecompenseerd met een langere gevangenisstraf: de straf viel gemiddeld 3 maanden langer uit dan bij een meewerkende verdachte. Weigeren lijkt dus te lonen als het gaat om de duur van de sanctie, omdat de duur van tbs substantieel langer is dan drie maanden. Het tweede doel van dit experiment was te exploreren in hoeverre de oplegging van een tbs-maatregel, al dan niet in combinatie met een gevangenisstraf, beïnvloed werd door het type stoornis (antisociale persoonlijkheidsstoornis of schizofrenie) en/of door recidiverisico (hoog risico, laag risico of geen informatie over risico). De resultaten lieten zien dat het aantal tbs-maatregelen 25% hoger was in geval van schizofrenie dan in geval van een antisociale persoonlijkheidsstoornis, ook al was het ingeschatte recidiverisico laag (wat een contra-indicatie voor een tbs-maatregel kan zijn). Er waren geen substantiële verschillen tussen de twee stoornissen voor wat betreft de lengte van de gevangenisstraf ongeacht of dit gecombineerd was met een tbs-maatregel. Deze bevindingen zijn niet helemaal in overeenstemming met internationaal onderzoek, waarin vaak een strafverminderend effect wordt gevonden indien sprake is van een psychotische stoornis, zoals schizofrenie. De bevindingen in dit experiment suggereren dat de (onjuiste) perceptie bestaat dat een verdachte met schizofrenie gewelddadiger of gevaarlijker is dan een verdachte met een (antisociale) persoonlijkheidsstoornis en daarom uit de maatschappij moet worden gehouden.

Om meer zicht te krijgen op de rol van pro Justitia-rapportages bij straftoemetingsbeslissingen in de rechtspraktijk, zijn hierover vragen voorgelegd aan rechters in vijf focusgroepen. De resultaten hiervan zijn in hoofdstuk 5 beschreven. Uit deze groepsgesprekken kwam naar voren dat informatie over het recidiverisico (op basis van risicotaxatie-instrumenten, maar ook de ernst van

het delict en behandelbaarheid van de stoornis) cruciaal is bij beslissingen over het opleggen van een tbs-maatregel. Advies over toerekeningsvatbaarheid wordt vooral meegewogen in de beslissing over de lengte van de gevangenisstraf. Verminderde toerekenbaarheid leidt over het algemeen tot een lagere straf. Daarbij wordt niet alleen gekeken naar het advies van de gedragskundigen, maar ook naar de congruentie van de stoornis met het ten laste gelegde delict. Een combinatie van een gevangenisstraf en een tbs-maatregel was ook een aanleiding voor rechters om de gevangenisstraf wat te verlagen, vooral wanneer ze het noodzakelijk achtten dat de veroordeelde spoedig behandeld zou worden.

2.3 Hoofdstukken samengevat

Samengevat laat deze dissertatie zien dat verschillende onderdelen van een pro Justitia-rapportage een rol spelen bij beslissingen over bewijs en straf. Hoewel de studies in deze dissertatie vooral exploratief zijn en er slechts voorzichtige en voorlopige conclusies kunnen worden getrokken, laten de resultaten wel zien dat er mogelijk een onbedoeld en ongewenst effect van een pro Justitia-rapportage kan zijn op de bewijsbeslissing, ondanks dat rechters dit in de praktijk niet lijken te ervaren of zich ervan bewust zijn. Een effect van een pro Justitia-rapportage op de bewijsbeslissing is ongewenst, omdat het rapport niet wordt opgesteld om informatie te verschaffen voor de bewijsbeslissing, maar ook omdat een verklaring *waarom* een verdachte bepaald gedrag zou kunnen vertonen geen bewijs kan zijn dat hij of zij een delict ook daadwerkelijk heeft gepleegd. Een dergelijk effect kan ondermijning van de onschuldpresumptie en het recht op een eerlijk proces tot gevolg hebben. Tevens toont deze dissertatie aan dat verschillende componenten van een pro Justitia-rapportage een rol spelen in straftoemetingsbeslissingen, en laat het onderzoek zien dat deze beslissingen complex en niet altijd eenduidig zijn. Daarbij laten de verschillen tussen de studies met studenten (hoofdstukken 3 en 4) en de rechters (hoofdstuk 5) zien dat verder onderzoek nodig is onder professionele juristen. Deze dissertatie biedt eerste inzichten in de rol van een pro Justitia-rapportage in rechterlijke beslissingen, maar nader onderzoek in de Nederlandse rechtspraktijk is essentieel.

3 Aanbevelingen voor onderzoek en praktijk

3.1 Aanbevelingen voor toekomstig onderzoek

Op basis van de resultaten van deze dissertatie kan een aantal aanbevelingen voor toekomstig onderzoek worden gedaan. Allereerst is van belang dat meer onderzoek naar het gebruik van pro Justitia-rapportages bij rechterlijke beslis-

singen wordt uitgevoerd onder rechters. Daarbij kunnen kwantitatieve, experimentele studies inzicht geven in mogelijke (onbedoelde en ongewenste) effecten van pro Justitia-rapportages op rechterlijke beslissingen en de onderdelen die hierbij doorslaggevend zijn. Tevens is nog veel onduidelijk over *hoe* bepaalde effecten van pro Justitia-rapportages op rechterlijke beslissingen verklaard kunnen worden en welke mechanismen daaraan ten grondslag liggen. Toekomstig (kwalitatief) onderzoek dient hier meer inzicht in te geven.

Een volgende aanbeveling is gericht op uitbreiding van het huidige onderzoek naar andere soorten delicten en verschillende typen stoornissen die voorkomen binnen de forensische populatie. Voor zowel de bewijsbeslissing als de straftoemetingsbeslissing lijkt namelijk de congruentie tussen (symptomen) van een stoornis en de aard en ernst van het delict van belang. Een concreet voorbeeld betreft de aanwezigheid van middelenmisbruik of een verslaving. Een groot deel van de onderzochte verdachten kampt met (comorbide) verslaving (Dienst Justitiële Inrichtingen, 2021). Zowel in de wetenschap als in het recht bestaat discussie over de mate waarin verslaving als een ziekte of stoornis moet worden beschouwd en daardoor van invloed kan zijn op de toerekenbaarheid, of dat verslaving het resultaat is van een eigen keuze (*culpa in causa*) en dus geen rol speelt bij de beoordeling van de verwijtbaarheid van de verdachte (zie onder andere Goldberg, 2022; Kennett et al., 2015; Morse, 2013). Een verschil in opvattingen kan leiden tot ongelijkheid in straftoemeting. De wet en rechtspraak bieden namelijk weinig tot geen handvatten voor wat precies als 'psychische stoornis' geclassificeerd kan worden (Beukers, 2017; Gröning et al., 2020; Ligthart et al., 2019; Mevis & Vegter, 2011; zie bijvoorbeeld dit arrest van de Hoge Raad, 18 december 2012, ECLI:NL:HR:2012:BY5355).[2] Toekomstig onderzoek dient meer inzicht te bieden in de rol van (comorbide) middelenmisbruik en verslaving in rechterlijke beslissingen.

Overige aanbevelingen richten zich op de juridische context waarbinnen het onderzoek in deze dissertatie is uitgevoerd. Ten tijde van dit onderzoek zijn de nieuwe Wet forensische zorg, de Wet verplichte geestelijke gezondheidszorg en de Wet zorg en dwang in werking getreden. Deze wetswijzigingen hebben flinke consequenties gehad in het speelveld aan zorgmogelijkheden die toegepast kunnen worden in verschillende fases van het strafproces. Eén van deze mogelijkheden is het plaatsen van een verdachte in de civiele geestelijke gezondheidszorg in plaats van de forensische zorg, door middel van een zorgmachtiging. Dergelijke mogelijkheden spelen in op discussies over zorg en behandeling in plaats van bestraffing. Toekomstig onderzoek dient deze nieuwe mogelijkheden logischerwijs mee te nemen om te bekijken hoe de omgang met individuen met psychische problematiek in het strafrecht zich ontwikkelt en welke rol een pro Justitia-rapportage hierin heeft of kan hebben.

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2 In dit arrest wordt nog gesproken over een 'gebrekkige ontwikkeling of ziekelijke stoornis van de geestvermogens'. Deze terminologie werd tot 1 januari 2020 gehanteerd om een psychische stoornis aan te duiden.

Toekomstig onderzoek dient zich ook verder uit te strekken dan enkel de beslissingen die tijdens de terechtzitting worden genomen. Dit is niet alleen relevant omdat bepaalde nieuwe maatregelen ook al in de fase van de vervolging kunnen worden opgelegd, maar ook om inzicht te krijgen in welke individuen met welke problematiek door de hele strafrechtsketen bewegen en uiteindelijk op zitting komen. Verschillende actoren (o.a. politie, Openbaar Ministerie, NIFP) komen op verschillende momenten in aanraking met een verdachte met mogelijke psychische problematiek. Ten aanzien van deze personen dienen bepaalde keuzes te worden gemaakt: wordt deze persoon wel of niet gedragskundig onderzocht? Ondanks dat er verschillende indicatoren zijn die een gedragskundig onderzoek wenselijk maken, heeft het Openbaar Ministerie discretionaire ruimte om te bepalen in welke zaak een gedragskundig onderzoek noodzakelijk wordt geacht. Het is op dit moment nog onbekend welke factoren een doorslaggevende rol spelen in dergelijke beslissingen. Meer kennis over dit soort factoren biedt meer inzicht in de type verdachten die uiteindelijk pro Justitia onderzocht worden en met een rapportage in het dossier op zitting verschijnen, maar ook welke invloed dat kan hebben op beslissingen en de executie ervan.

Ten slotte heeft de inwerkingtreding van de Wet straffen en beschermen in 2021 de executie van straffen en maatregelen drastisch veranderd. Vóór juli 2021 kwamen veroordeelden na het uitzitten van tweederde van hun gevangenisstraf in aanmerking voor voorwaardelijke invrijheidsstelling. Met de nieuwe wet is deze periode verkort naar maximaal twee jaar voor het einde van de straf. Dit heeft als gevolg dat veroordeelden met een straf van meer dan 6 jaar, langer vastzitten dan onder de oude regeling. In het kader van dit onderzoek, heeft deze nieuwe wet grote gevolgen voor het moment waarop een tbs-maatregel kan aanvangen wanneer deze gecombineerd is met een (lange) gevangenisstraf. De tbs-maatregel wordt namelijk pas uitgevoerd nadat de gevangenisstraf is voltooid. Vanwege de ernst van de delicten[3] waarvoor tbs veelal wordt opgelegd, is het niet ongebruikelijk dat gecombineerde straffen vaak de 6 jaar te boven gaan, waardoor deze nieuwe wet van toepassing is. Op dit moment is het nog onbekend in hoeverre deze nieuwe wet de medewerkingsbereidheid met een pro Justitia-onderzoek beïnvloedt en wat de rol van een pro Justitia-rapportage nu is bij straftoemetingsbeslissingen, met name wanneer een combinatie van een gevangenisstraf met een tbs-maatregel in de lijn der verwachting ligt. Het is mogelijk dat rechters in de straftoemeting hierop gaan anticiperen door de strafmaat te verlagen zodat behandeling eerder kan aanvangen. Dergelijke potentiële consequenties dienen nader onderzocht te worden.

3 Een tbs-maatregel is enkel een optie bij misdrijven waarop naar de wettelijke omschrijving een (maximum) gevangenisstraf van vier jaren of meer is gesteld (art. 37 Wetboek van Strafrecht).

3.2 Aanbevelingen voor beleid en praktijk

Gebaseerd op de bevindingen kan ook een aantal aanbevelingen voor beleid en praktijk worden gedaan. De resultaten van het huidige onderzoek suggereren een onbedoeld effect van informatie in een pro Justitia-rapportage bij de bewijsbeslissingen. Richtlijnen voor gedragskundigen waarschuwen hen al dat informatie in een pro Justitia-rapportage niet zelfstandig dient bij te dragen aan het bewijs en de bewijsbeslissing. Dit soort richtlijnen zijn echter niet gericht aan rechters en kunnen niet voorkomen dat rechters toch (onbedoeld en onbewust) beïnvloed worden door die informatie. Omdat denkfouten vooral onbewust plaatsvinden, zijn richtlijnen niet heel effectief in het voorkomen ervan. Een eerste stap zou moeten zijn dat rechters en juristen door middel van cursussen bekend worden gemaakt met de mogelijke oorzaken van denkfouten in beslissingen. In dit geval zou het specifiek moeten gaan over de mogelijke ongewenste effecten die een pro Justitia-rapportage kan hebben en hoe (stereotype) percepties over de relatie tussen psychische stoornissen en delinquentie beslissingen kunnen beïnvloeden. Deze bewustwording is een eerste stap in het herkennen van zaken die vatbaar zijn voor denkfouten die gevoed worden door pro Justitia-rapportages (Croskerry et al., 2013; Neal et al., 2022; Neal & Brodsky, 2016). Deze dissertatie laat zien dat bepaalde kenmerken van een zaak de kwetsbaarheid voor denkfouten kan vergroten, bijvoorbeeld wanneer de onzekerheid over de schuld van de verdachte groter is. Dit is het geval wanneer sprake is van een complexe zaak met een ontkennende verdachte en onomstotelijk bewijs ontbreekt. Een meer radicale oplossing is het opdelen van het strafproces in twee fasen: een fase voor de bewijsbeslissing en een fase voor de straftoemeting. Op deze manier kan informatie die van belang is voor de straftoemeting, maar niet voor de bewijsbeslissing, pas in de tweede aparte fase in het proces worden ingebracht. Op deze manier kan dergelijke informatie niet (onbedoeld) gebruikt worden bij de bewijsbeslissing (Van Dijk et al., 2012). De bevindingen van deze dissertatie kunnen bijdragen aan de discussie over de toepasbaarheid van dit systeem.[4]

Andere aspecten waarover rechters en juristen continu bijscholing zouden moeten hebben, is de meest actuele basiskennis in de forensische psychiatrie over psychische stoornissen en de relatie met delinquent gedrag. Mogelijke stereotype opvattingen over de relatie tussen psychische stoornissen en crimineel gedrag kunnen eenvoudig doordringen in beslissingen door de tijds- en informatiedruk waar veel rechters en strafzaken onder gebukt gaan. De bevindingen in deze dissertatie laten zien dat straftoemetingsbeslissingen in zaken met een pro Justitia-rapportage ingewikkeld zijn. Daarbij vinden rechters het moeilijk om de deskundigeninformatie over stoornissen, toerekeningsvatbaarheid en recidiverisico te vertalen naar een juridische beslissing. Omdat in

4 Minister Weerwind van Rechtsbescherming heeft eind 2022 nog een (voorlopig) einde gemaakt aan deze discussie die werd gevoerd vanwege de uitbreiding van het spreekrecht.

ongeveer één op de vier zaken bij de meervoudige kamer een pro Justitia-rapportage aanwezig is, is het belangrijk dat rechters adequaat geschoold worden om de inhoud van die rapportages te begrijpen. Een dergelijke scholing zou ook kunnen leiden tot rechtbanken gespecialiseerd in dit soort zaken, vergelijkbaar met rechtbanken voor tbs-verlengingen. Meer kennis zal bijdragen aan meer begrip voor en waardering van informatie in een pro Justitia-rapportage. Dit zal leiden tot beter geïnformeerde beslissingen.

4 Conclusie

Deze dissertatie suggereert dat pro Justitia-rapportages beslissingen over bewijs en straf in het Nederlandse strafrecht beïnvloeden, zowel bedoeld als onbedoeld, en daarmee ook gewenst en ongewenst. In een gecontroleerde, experimentele setting lijkt een pro Justitia-rapportage een onbedoeld effect te hebben op de bewijsbeslissing. Hierbij kan de rapportage een verschil maken tussen veroordeling of vrijspraak. Informatie over de toerekenbaarheid en het recidiverisico van de verdachte speelt een belangrijke rol bij beslissingen over straffen en maatregelen. Een pro Justitia-rapportage in een strafzaak is dus invloedrijk, maar maakt beslissingen ook ingewikkelder. De informatie in het rapport maakt het mogelijk om de straf toe te spitsen op de individuele behoeften van de veroordeelde en de samenleving te beschermen, maar de informatie over de psychische gesteldheid kan ook een rol spelen in beslissingen waarin deze informatie geen invloed zou moeten hebben. Deze dissertatie biedt een eerste inzicht in de mogelijke effecten van een pro Justitia-rapportage bij beslissingen over bewijs en straf, maar biedt vooral aanknopingspunten voor nieuw onderzoek. Dit nieuwe onderzoek dient recht te doen aan de beperkingen van de deelstudies die zijn opgenomen in deze dissertatie en daarbij ook de recente verandering in wet- en regelgeving in acht te nemen betreffende individuen met psychische problematiek in de strafrechtsketen. Optimaal gebruik van pro Justitia-rapportages in de praktijk zal uiteindelijk leiden tot beslissingen die recht doen aan de behoeften van individuen met psychische problemen, waarmee ook de beginselen van rechtsgelijkheid, rechtszekerheid en het recht op een eerlijk proces worden gediend. Uiteindelijk zullen zowel de verdachten als de samenleving hier het meeste baat bij hebben.

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Appendices

Appendix A

Experimental design Chapter 3

1) Control condition (case vignette)

Zaak tegen:
Sebastiaan Johannes van Veen, geboren te 's-Gravenhage, op 16 januari 1997, thans gedetineerd in het Huis van Bewaring te Scheveningen.

Loopproces-verbaal
Door mij, Klaas Terschuur, brigadier van politie, regio Haaglanden, wordt het volgende verklaard:

Mishandeling
Op maandag 2 september 2019, omstreeks 02:20 uur vond op de Tesselaarstraat te 's-Gravenhage een geval van ernstige mishandeling plaats. Het slachtoffer, Anton de Koning, is daardoor naar het zich laat aanzien blijvend invalide geworden.

Melding
Op maandag 2 september 2019 belde om 02:32 uur de vriendin van het slachtoffer, Corine de Jong, naar de meldkamer. Ik ben met collega Kees van Dam direct ter plaatse gegaan. Het slachtoffer was inmiddels per ambulance vervoerd naar het Westeinde Ziekenhuis te Den Haag.

Verklaring Corine de Jong (vriendin slachtoffer)
De vriendin van het slachtoffer werd op 2 september 2019, omstreeks 06.30 uur gehoord in het Westeinde Ziekenhuis te Den Haag. Zij verklaarde:
Dat zij om 02.10 uur met haar vriend Anton de Koning uit café De Lachende Kater kwam. Dat zij daarbij liepen langs een groepje van vermoedelijk drie jongens. Dat één van die jongens iets naar hen riep, dat Anton in het voorbijgaan iets terugzei, maar zij doorliepen. Dat kort daarna Anton in de rug geduwd werd door een jongen. Dat deze jongen Anton sloeg. Anton viel en de jongen bleef hem schoppen, tegen de borst en tegen het hoofd. Hij bleef doorschoppen, ook toen Anton niet meer bewoog. Daarna rende de dader weg. Dat de dader waarschijnlijk dezelfde jongen is als de persoon die kort daarvoor iets had geroepen. Corine de Jong heeft daarop 112 gebeld.

Buurtonderzoek op en rond Tesselaarstraat
In de middag van 2 september 2019 is op en in de directe omgeving van de Tesselaarstraat (PD) buurtonderzoek verricht. Dit leverde geen bruikbare aanwijzingen op.

Verklaring getuige Joesef Mohamed Abdullah
Op 3 september 2019 meldt zich vrijwillig bij het politiebureau Joesef Mohamed Abdullah. Hij verklaart:
Dat hij zich meldt naar aanleiding van het bericht in de lokale krant over de mishandeling van Anton de Koning. Dat hij met twee andere jongens van de sportschool waar hij altijd traint op kroegentocht was gegaan. Dat een van hen Bas van Veen was, wiens vriendin net die dag hun relatie had beëindigd. Dat de ander Sjon Tegelaar heet. Dat zij na de laatste kroeg een beetje op straat rondhingen. Dat Bas van Veen een woordenwisseling had met een jongen en een meisje die voorbijliepen. Dat Bas van Veen duidelijk woedend was over hetgeen teruggezegd werd. Dat zij enkele minuten daarna uit elkaar gingen om naar huis te gaan. Dat Abdullah en Tegelaar samen een taxi naar huis namen. Dat het hem niet zou verbazen als Bas van Veen betrokken was bij de mishandeling. Dat Bas van Veen woont op de Lodewijkstraat 23 te 's-Gravenhage.

Verklaring getuige Sjon Tegelaar
Op 3 september 2019 omstreeks 12.30 uur hoorden wij als getuige Sjon Tegelaar. Hij verklaart:
Dat hij op 1 september 's middags in de sportschool was geweest. Dat hij daarna met een groepje jongens van die sportschool is gaan eten. Dat hij samen met Joesef Abdullah en Bas van Veen nog op kroegentocht is gegaan. Dat die Bas van Veen zich opgefokt gedroeg omdat hij door zijn vriendin was gedumpt. Dat hij zich herinnert dat ze na de laatste kroeg met zijn drieën nog even op straat stonden. Dat ze moesten lachen om iets wat een voorbijlopende jongen tegen Bas van Veen zei. Dat hij zich daar verder niet veel van herinnert omdat hij veel bier op had. Dat hij samen met Joesef Abdullah vervolgens in een taxi naar huis is gegaan. Dat hij niet meer weet hoe laat hij thuis was.

Aanhouding verdachte Van Veen
Op 3 september 2019, omstreeks 13.30 uur, is buiten heterdaad na daartoe verkregen toestemming van officier van Justitie mr. A.W. Bada, in zijn woning aangehouden

Sebastiaan Johannes Van Veen
Geboren te 's-Gravenhage op 16 januari 1997,
Wonende te Lodewijkstraat 23 te 's-Gravenhage
Hij is ingesloten in het Bureau van Politie te Den Haag.

Eerste verhoor verdachte Van Veen
Op 3 september 2019, omstreeks 15.00 uur, verhoorde ik, Klaas Terschuur, brigadier van politie, regio Haaglanden de verdachte Van Veen samen met collega Kees van Dam, agent van politie eerste klas, regio Haaglanden. Hij verklaarde:
Dat hij met een paar jongens shoarma was gaan eten en daarna gaan stappen. Dat hij daarbij 7 of 8 biertjes gedronken heeft. Dat hij in de ochtend van 1 september met zijn vriendin ruzie had gekregen die daarop de relatie beëindigde. Dat hij en zijn vrienden na 02.00 uur nog even op straat stonden. Dat toen een jongen en een meisje arm in arm voorbij liepen. Dat hij een grapje tegen het meisje maakte. Dat de jongen wat terugzei over zijn vriendin en de anderen daarom moesten lachen. Dat Van Veen

zich voor lul gezet voelde. Dat hij kort daarna naar huis is gelopen. Dat hij zich niet herinnert langs welke weg hij naar huis is gelopen. Dat hij niks met de mishandeling van De Koning te maken heeft en ook niks gezien of gehoord heeft.

Meervoudige fotoconfrontatie getuige Corine de Jong met verdachte
Op 4 september 2019, omstreeks 14.30 uur, werd getuige Corine de Jong geconfronteerd met tien foto's waaronder een foto van verdachte Van Veen. Na aanvankelijke aarzeling en twijfel tussen twee foto's, herkende zij de foto van verdachte als de man die Anton de Koning geslagen en geschopt had.

Tweede verhoor verdachte Van Veen
Op 4 september 2019, omstreeks 16.00 uur, verhoorde ik, Klaas Terschuur, brigadier van politie, regio Haaglanden de verdachte Van Veen samen met collega Kees van Dam, agent van politie eerste klas, regio Haaglanden. Hij verklaarde:
Dat hij bij zijn verhaal blijft en onschuldig is. Dat hij in de vroege ochtend van 2 september 2019 op weg naar huis niet door de Tesselaarstraat is gelopen. Dat als hij bij de fotoconfrontatie herkend is door de getuige, dat een vergissing is.

Verklaring neuroloog
Neuroloog Boersma stelde het volgende letsel vast bij Anton de Koning:
Het geconstateerde letsel is consistent met het soort van trauma dat kan volgen uit het hard trappen tegen betreffende lichaamsdelen en bestaat uit het volgende:
Halswerveltrauma met als direct gevolg dat patiënt lijdt aan onherstelbare en blijvende verlamming van de onderste extremiteiten vanaf de navel. Letsel in het links frontaal gedeelte van de hersenen van patiënt met uitval van het spraakvermogen als gevolg. Bovenste twee linkse ribben zijn gebroken. Ten gevolge van het trauma, lijdt patiënt aan post-traumatische amnesie. Patiënt heeft geen herinnering van het trauma.

Tenlastelegging
Aan verdachte is ten laste gelegd dat hij op of omstreeks 2 september 2019 te 's-Gravenhage, aan een persoon genaamd Anton de Koning, opzettelijk zwaar lichamelijk letsel (te weten halswervelfractuur en/of hersenletsel en/of gebroken ribben) heeft toegebracht, door opzettelijk die Anton de Koning tegen het hoofd en/of lichaam te slaan/stompen en/of te schoppen/trappen, terwijl dat feit blijvende invaliditeit (te weten verlamming vanaf de navel en/of permanent verlies van het spraakvermogen) tengevolge heeft gehad.
[artikel 302 van het Wetboek van Strafrecht]

2) Condition with uncooperative defendant: case vignette under 1 + addition:

Pro Justitia rapportage
Gelet op de omstandigheden van het delict (plotseling agressief gedrag tegen een onbekende) besluit de rechter-commissaris om verdachte pro Justitia te laten onderzoeken. De verdachte weigerde alle medewerking. Om deze reden is hij in het Pieter Baan Centrum geplaatst voor observatie voor een periode van zes weken. Betrokkene werd onderzocht door een multidisciplinair team dat bestond uit een psychiater,

psycholoog, een forensisch milieuonderzoeker en een groepsleider. Vanwege de weigering konden de gedragskundigen geen uitspraken doen over de mogelijke doorwerking van een eventuele stoornis in het ten laste gelegde delict (indien bewezen) en toerekenbaarheid, het recidiverisico en eventuele behandeladviezen.

3) *Condition with antisocial personality disorder and low risk: case vignette under 1 + forensic mental health report:*

Gelet op de omstandigheden van het delict besluit de rechter-commissaris om verdachte pro Justitia te laten onderzoeken.

Pro Justitia rapportage
Betrokkene werd onderzocht door een multidisciplinair team dat bestond uit een psychiater en een psycholoog. De deskundigen vonden aanwijzingen voor een in aanleg tenminste laaggemiddelde intelligentie. Betrokkene geeft soms signalen af dat hij zich onveilig of bedreigd voelt, ook zonder dat er reële conflicten bestaan. Opeens kan betrokkene zich oninvoelbaar en onberekenbaar agressief opstellen. Er bestaan sterke aanwijzingen dat het beperkte functioneren van betrokkene en de agressieve impulsproblemen door onderliggende persoonlijkheidsproblematiek worden veroorzaakt: er zijn functiebeperkingen op het gebied van agressieregulatie, impulscontrole, frustratietolerantie, geweten en empathie. Daarom wordt de problematiek van betrokkene geclassificeerd als een persoonlijkheidsstoornis met antisociale trekken.

Toerekenbaarheid
De genoemde psychische stoornis in de juridische zin van art. 39 Sr. is al langere tijd aanwezig. Ook ten tijde van het plegen van het ten laste gelegde (indien bewezen) was deze aanwezig. Doordat betrokkene het ten laste gelegde ontkent (ook in de verhoren bij de politie of de rechter-commissaris), is niet bekend geworden wat er vlak daarvoor en tijdens het ten laste gelegde in hem omging. Het slachtoffer was een voor betrokkene onbekend persoon. In de periode voorafgaand aan en tijdens het ten laste gelegde werd betrokkene niet behandeld voor zijn stoornis. Gelet op het ontbreken van nadere informatie over het ten laste gelegde vanuit betrokkenes oogpunt, is een precieze kwalificatie van de toerekenbaarheid niet aan te geven, ondanks het gegeven dat ten tijde van de delictpleging (indien bewezen), hij op basis van zijn stoornis/gebreken geacht kan worden minder in staat te zijn geweest om inzicht te hebben in de wederrechtelijkheid van zijn gedrag en de gevolgen ervan voor het slachtoffer. Ook kan op basis daarvan geacht worden dat hij in mindere mate in staat was om zijn impulsen te beheersen. Onderzoekers zien wel redenen om betrokkene als verminderd toerekenbaar te achten ten tijde van het plegen van het ten laste gelegde (indien bewezen).

Risicotaxatie
Met behulp van een gestructureerd klinisch instrument gericht op risicotaxatie van gewelddadig gedrag (HCR-20v3) kwam naar voren dat er een lage kans is op toekomstig geweld.

Behandeladvies
Doordat betrokkene het ten laste gelegde ontkent, wordt geen advies gegeven over het juridisch kader waarin mogelijke interventies kunnen plaatsvinden.

4) Condition with antisocial personality disorder and high risk: case vignette under 1 + forensic mental health report:

Gelet op de omstandigheden van het delict besluit de rechter-commissaris om verdachte pro Justitia te laten onderzoeken.

Pro Justitia rapportage
Betrokkene werd onderzocht door een multidisciplinair team dat bestond uit een psychiater en een psycholoog. De deskundigen vonden aanwijzingen voor een in aanleg tenminste laaggemiddelde intelligentie. Betrokkene geeft soms signalen af dat hij zich onveilig of bedreigd voelt, ook zonder dat er reële conflicten bestaan. Opeens kan betrokkene zich oninvoelbaar en onberekenbaar agressief opstellen. Er bestaan sterke aanwijzingen dat het beperkte functioneren van betrokkene en de agressieve impulsproblemen door onderliggende persoonlijkheidsproblematiek worden veroorzaakt: er zijn functiebeperkingen op het gebied van agressieregulatie, impulscontrole, frustratietolerantie, geweten en empathie. Daarom wordt de problematiek van betrokkene geclassificeerd als een persoonlijkheidsstoornis met antisociale trekken.

Toerekenbaarheid
De genoemde psychische stoornis in de juridische zin van art. 39 Sr. is al langere tijd aanwezig. Ook ten tijde van het plegen van het ten laste gelegde (indien bewezen) was deze aanwezig. Doordat betrokkene het ten laste gelegde ontkent (ook in de verhoren bij de politie of de rechter-commissaris), is niet bekend geworden wat er vlak daarvoor en tijdens het ten laste gelegde in hem omging. Het slachtoffer was een voor betrokkene onbekend persoon. In de periode voorafgaand aan en tijdens het ten laste gelegde werd betrokkene niet behandeld voor zijn stoornis. Gelet op het ontbreken van nadere informatie over het ten laste gelegde vanuit betrokkenes oogpunt, is een precieze kwalificatie van de toerekenbaarheid niet aan te geven, ondanks het gegeven dat ten tijde van de delictpleging (indien bewezen), hij op basis van zijn stoornis/gebreken geacht kan worden minder in staat te zijn geweest om inzicht te hebben in de wederrechtelijkheid van zijn gedrag en de gevolgen ervan voor het slachtoffer. Ook kan op basis daarvan geacht worden dat hij in mindere mate in staat was om zijn impulsen te beheersen. Onderzoekers zien wel redenen om betrokkene als verminderd toerekenbaar te achten ten tijde van het plegen van het ten laste gelegde (indien bewezen).

Risicotaxatie
Met behulp van een gestructureerd klinisch instrument gericht op risicotaxatie van gewelddadig gedrag (HCR-20v3) kwam naar voren dat er een hoge kans is op toekomstig geweld.

Behandeladvies
Doordat betrokkene het ten laste gelegde ontkent, wordt geen advies gegeven over het juridisch kader waarin mogelijke interventies kunnen plaatsvinden.

5) *Condition with antisocial personality disorder and no information on risk: case vignette under 1 + forensic mental health report:*

Gelet op de omstandigheden van het delict besluit de rechter-commissaris om verdachte pro Justitia te laten onderzoeken.

Pro Justitia rapportage
Betrokkene werd onderzocht door een multidisciplinair team dat bestond uit een psychiater en een psycholoog. De deskundigen vonden aanwijzingen voor een in aanleg tenminste laaggemiddelde intelligentie. Betrokkene geeft soms signalen af dat hij zich onveilig of bedreigd voelt, ook zonder dat er reële conflicten bestaan. Opeens kan betrokkene zich oninvoelbaar en onberekenbaar agressief opstellen. Er bestaan sterke aanwijzingen dat het beperkte functioneren van betrokkene en de agressieve impulsproblemen door onderliggende persoonlijkheidsproblematiek worden veroorzaakt: er zijn functiebeperkingen op het gebied van agressieregulatie, impulscontrole, frustratietolerantie, geweten en empathie. Daarom wordt de problematiek van betrokkene geclassificeerd als een persoonlijkheidsstoornis met antisociale trekken.

Toerekenbaarheid
De genoemde psychische stoornis in de juridische zin van art. 39 Sr. is al langere tijd aanwezig. Ook ten tijde van het plegen van het ten laste gelegde (indien bewezen) was deze aanwezig. Doordat betrokkene het ten laste gelegde ontkent (ook in de verhoren bij de politie of de rechter-commissaris), is niet bekend geworden wat er vlak daarvoor en tijdens het ten laste gelegde in hem omging. Het slachtoffer was een voor betrokkene onbekend persoon. In de periode voorafgaand aan en tijdens het ten laste gelegde werd betrokkene niet behandeld voor zijn stoornis. Gelet op het ontbreken van nadere informatie over het ten laste gelegde vanuit betrokkenes oogpunt, is een precieze kwalificatie van de toerekenbaarheid niet aan te geven, ondanks het gegeven dat ten tijde van de delictpleging (indien bewezen), hij op basis van zijn stoornis/gebreken geacht kan worden minder in staat te zijn geweest om inzicht te hebben in de wederrechtelijkheid van zijn gedrag en de gevolgen ervan voor het slachtoffer. Ook kan op basis daarvan geacht worden dat hij in mindere mate in staat was om zijn impulsen te beheersen. Onderzoekers zien wel redenen om betrokkene als verminderd toerekenbaar te achten ten tijde van het plegen van het ten laste gelegde (indien bewezen).

Behandeladvies
Doordat betrokkene het ten laste gelegde ontkent, wordt geen advies gegeven over het juridisch kader waarin mogelijke interventies kunnen plaatsvinden.

6) Condition with schizophrenia and low risk: case vignette under 1 + forensic mental health report:

Gelet op de omstandigheden van het delict besluit de rechter-commissaris om verdachte pro Justitia te laten onderzoeken.

Pro Justitia rapportage
Betrokkene werd onderzocht door een multidisciplinair team dat bestond uit een psychiater en psycholoog. De deskundigen vonden aanwijzingen voor een in aanleg tenminste laaggemiddelde intelligentie. Betrokkene heeft in het verleden herhaaldelijk psychotische episoden doorgemaakt met hallucinaties en wanen die ineens en kortdurend kunnen verergeren. Betrokkene geeft soms signalen af dat hij zich onveilig of bedreigd voelt, ook zonder dat er reële conflicten bestaan. De psychische ontregelingen bij betrokkene zijn daarom veelal voor de omgeving niet evident duidelijk en moeilijk zichtbaar. Herhaaldelijk toonde betrokkene agressief gedrag waarvan de precieze oorzaak onbekend is. Er bestaan sterke aanwijzingen dat het beperkte functioneren van betrokkene, de realiteitstoetsingsproblemen en de agressieve impulsproblemen door onderliggende psychopathologie worden veroorzaakt: bij betrokkene is sprake van een chronisch psychotisch proces. Daarom worden de frequente realiteitstoetsingsproblemen van betrokkene geclassificeerd als een ongespecificeerde schizofreniespectrumstoornis of andere psychotische stoornis.

Toerekenbaarheid
De genoemde psychische stoornis in de juridische zin van art. 39 Sr. is al langere tijd aanwezig. Ook ten tijde van het plegen van het ten laste gelegde (indien bewezen) was deze aanwezig. Doordat betrokkene het ten laste gelegde ontkent (ook in de verhoren bij de politie of de rechter-commissaris), is niet bekend geworden wat er vlak daarvoor en tijdens het ten laste gelegde in hem omging. Het slachtoffer was een voor betrokkene onbekend persoon. In de periode voorafgaand aan en tijdens het ten laste gelegde werd betrokkene niet behandeld voor zijn stoornis. Gelet op het ontbreken van nadere informatie over het ten laste gelegde vanuit betrokkenes oogpunt, is een precieze kwalificatie van de toerekenbaarheid niet aan te geven, ondanks het gegeven dat ten tijde van de delictpleging (indien bewezen), hij op basis van zijn stoornis/gebreken geacht kan worden minder in staat te zijn geweest om inzicht te hebben in de wederrechtelijkheid van zijn gedrag en de gevolgen ervan voor het slachtoffer. Ook kan op basis daarvan geacht worden dat hij in mindere mate in staat was om zijn impulsen te beheersen. Onderzoekers zien wel redenen om betrokkene als verminderd toerekenbaar te achten ten tijde van het plegen van het ten laste gelegde (indien bewezen).

Risicotaxatie
Met behulp van een gestructureerd klinisch instrument gericht op risicotaxatie van gewelddadig gedrag (HCR-20v3) kwam naar voren dat er een lage kans is op toekomstig geweld.

Behandeladvies
Doordat betrokkene het ten laste gelegde ontkent, wordt geen advies gegeven over het juridisch kader waarin mogelijke interventies kunnen plaatsvinden.

7) Condition with schizophrenia and high risk: case vignette under 1 + forensic mental health report:

Gelet op de omstandigheden van het delict besluit de rechter-commissaris om verdachte pro Justitia te laten onderzoeken.

Pro Justitia rapportage
Betrokkene werd onderzocht door een multidisciplinair team dat bestond uit een psychiater en psycholoog. De deskundigen vonden aanwijzingen voor een in aanleg tenminste laaggemiddelde intelligentie. Betrokkene heeft in het verleden herhaaldelijk psychotische episoden doorgemaakt met hallucinaties en wanen die ineens en kortdurend kunnen verergeren. Betrokkene geeft soms signalen af dat hij zich onveilig of bedreigd voelt, ook zonder dat er reële conflicten bestaan. De psychische ontregelingen bij betrokkene zijn daarom veelal voor de omgeving niet evident duidelijk en moeilijk zichtbaar. Herhaaldelijk toonde betrokkene agressief gedrag waarvan de precieze oorzaak onbekend is. Er bestaan sterke aanwijzingen dat het beperkte functioneren van betrokkene, de realiteitstoetsingsproblemen en de agressieve impulsproblemen door onderliggende psychopathologie worden veroorzaakt: bij betrokkene is sprake van een chronisch psychotisch proces. Daarom worden de frequente realiteitstoetsingsproblemen van betrokkene geclassificeerd als een ongespecificeerde schizofreniespectrumstoornis of andere psychotische stoornis.

Toerekenbaarheid
De genoemde psychische stoornis in de juridische zin van art. 39 Sr. is al langere tijd aanwezig. Ook ten tijde van het plegen van het ten laste gelegde (indien bewezen) was deze aanwezig. Doordat betrokkene het ten laste gelegde ontkent (ook in de verhoren bij de politie of de rechter-commissaris), is niet bekend geworden wat er vlak daarvoor en tijdens het ten laste gelegde in hem omging. Het slachtoffer was een voor betrokkene onbekend persoon. In de periode voorafgaand aan en tijdens het ten laste gelegde werd betrokkene niet behandeld voor zijn stoornis. Gelet op het ontbreken van nadere informatie over het ten laste gelegde vanuit betrokkenes oogpunt, is een precieze kwalificatie van de toerekenbaarheid niet aan te geven, ondanks het gegeven dat ten tijde van de delictpleging (indien bewezen), hij op basis van zijn stoornis/gebreken geacht kan worden minder in staat te zijn geweest om inzicht te hebben in de wederrechtelijkheid van zijn gedrag en de gevolgen ervan voor het slachtoffer. Ook kan op basis daarvan geacht worden dat hij in mindere mate in staat was om zijn impulsen te beheersen. Onderzoekers zien wel redenen om betrokkene als verminderd toerekenbaar te achten ten tijde van het plegen van het ten laste gelegde (indien bewezen).

Risicotaxatie
Met behulp van een gestructureerd klinisch instrument gericht op risicotaxatie van gewelddadig gedrag (HCR-20v3) kwam naar voren dat er een hoge kans is op toekomstig geweld.

Behandeladvies
Doordat betrokkene het ten laste gelegde ontkent, wordt geen advies gegeven over het juridisch kader waarin mogelijke interventies kunnen plaatsvinden.

8) *Condition with schizophrenia and no information on risk: case vignette under 1 + forensic mental health report:*

Gelet op de omstandigheden van het delict besluit de rechter-commissaris om verdachte pro Justitia te laten onderzoeken.

Pro Justitia rapportage
Betrokkene werd onderzocht door een multidisciplinair team dat bestond uit een psychiater en psycholoog. De deskundigen vonden aanwijzingen voor een in aanleg tenminste laaggemiddelde intelligentie. Betrokkene heeft in het verleden herhaaldelijk psychotische episoden doorgemaakt met hallucinaties en wanen die ineens en kortdurend kunnen verergeren. Betrokkene geeft soms signalen af dat hij zich onveilig of bedreigd voelt, ook zonder dat er reële conflicten bestaan. De psychische ontregelingen bij betrokkene zijn daarom veelal voor de omgeving niet evident duidelijk en moeilijk zichtbaar. Herhaaldelijk toonde betrokkene agressief gedrag waarvan de precieze oorzaak onbekend is. Er bestaan sterke aanwijzingen dat het beperkte functioneren van betrokkene, de realiteitstoetsingsproblemen en de agressieve impulsproblemen door onderliggende psychopathologie worden veroorzaakt: bij betrokkene is sprake van een chronisch psychotisch proces. Daarom worden de frequente realiteitstoetsingsproblemen van betrokkene geclassificeerd als een ongespecificeerde schizofreniespectrumstoornis of andere psychotische stoornis.

Toerekenbaarheid
De genoemde psychische stoornis in de juridische zin van art. 39 Sr. is al langere tijd aanwezig. Ook ten tijde van het plegen van het ten laste gelegde (indien bewezen) was deze aanwezig. Doordat betrokkene het ten laste gelegde ontkent (ook in de verhoren bij de politie of de rechter-commissaris), is niet bekend geworden wat er vlak daarvoor en tijdens het ten laste gelegde in hem omging. Het slachtoffer was een voor betrokkene onbekend persoon. In de periode voorafgaand aan en tijdens het ten laste gelegde werd betrokkene niet behandeld voor zijn stoornis. Gelet op het ontbreken van nadere informatie over het ten laste gelegde vanuit betrokkenes oogpunt, is een precieze kwalificatie van de toerekenbaarheid niet aan te geven, ondanks het gegeven dat ten tijde van de delictpleging (indien bewezen), hij op basis van zijn stoornis/gebreken geacht kan worden minder in staat te zijn geweest om inzicht te hebben in de wederrechtelijkheid van zijn gedrag en de gevolgen ervan voor het slachtoffer. Ook kan op basis daarvan geacht worden dat hij in mindere mate in staat was om zijn impulsen te beheersen. Onderzoekers zien wel redenen

om betrokkene als verminderd toerekenbaar te achten ten tijde van het plegen van het ten laste gelegde (indien bewezen).

Behandeladvies
Doordat betrokkene het ten laste gelegde ontkent, wordt geen advies gegeven over het juridisch kader waarin mogelijke interventies kunnen plaatsvinden.

Appendix B

Experimental design Chapter 4

1) Control condition (case vignette)

Zaak tegen:
Sebastiaan Johannes van Vliet, geboren te 's-Gravenhage, op 16 januari 1997, thans gedetineerd in het Huis van Bewaring te Scheveningen.

Loopproces-verbaal
Door mij, Klaas Terschuur, brigadier van politie, regio Haaglanden, wordt het volgende verklaard:

Mishandeling
Op maandag 2 september 2019, omstreeks 02:20 uur vond op de Tesselaarstraat te 's-Gravenhage een geval van ernstige mishandeling plaats. Het slachtoffer, Anton de Koning, is daardoor naar het zich laat aanzien blijvend invalide geworden.

Melding
Op maandag 2 september 2019 belde om 2:32 uur de vriendin van het slachtoffer, Corine de Jong, naar de meldkamer. Ik ben met collega Kees van Dam direct ter plaatse gegaan. Het slachtoffer was inmiddels per ambulance vervoerd naar het Westeinde Ziekenhuis te Den Haag.

Verklaring Corine de Jong (vriendin slachtoffer)
De vriendin van het slachtoffer werd op 2 september 2019, omstreeks 6.30 uur gehoord in het Westeinde Ziekenhuis te Den Haag. Zij verklaarde:
Dat zij om 02.10 uur met haar vriend Anton de Koning uit café De Lachende Kater kwam.
Dat zij daarbij liepen langs een groepje van vermoedelijk drie jongens.
Dat één van die jongens iets naar hen riep, dat Anton in het voorbijgaan iets terugzei, maar zij doorliepen.
Dat kort daarna Anton in de rug geduwd werd door een jongen. Dat deze jongen Anton sloeg. Anton viel en de jongen bleef hem schoppen, tegen de borst en tegen het hoofd. Hij bleef doorschoppen, ook toen Anton niet meer bewoog.
Daarna rende de dader weg.
Dat de dader waarschijnlijk dezelfde jongen is als de persoon die kort daarvoor iets had geroepen.
Corine de Jong heeft daarop 112 gebeld.

Buurtonderzoek op en rond Tesselaarstraat
In de middag van 2 september 2019 is op en in de directe omgeving van de Tesselaarstraat (PD) buurtonderzoek verricht. Dit leverde geen bruikbare aanwijzingen op.

Verklaring getuige Joesef Mohamed Abdullah
Op 3 september 2019 meldt zich vrijwillig bij het politiebureau Joesef Mohamed Abdullah. Hij verklaart:
Dat hij zich meldt naar aanleiding van het bericht in de lokale krant over de mishandeling van Anton de Koning.
Dat hij met twee andere jongens van de sportschool waar hij altijd traint op kroegentocht was gegaan. Dat een van hen Bas van Vliet was, wiens vriendin net die dag hun relatie had beëindigd.
Dat de ander Sjon Tegelaar heet. Dat zij na de laatste kroeg een beetje op straat rondhingen.
Dat Bas van Vliet een woordenwisseling had met een jongen en een meisje die voorbij liepen.
Dat Bas van Vliet duidelijk woedend was over hetgeen teruggezegd werd.
Dat zij enkele minuten daarna uit elkaar gingen om naar huis te gaan.
Dat Abdullah en Tegelaar samen een taxi naar huis namen.
Dat het hem niet zou verbazen als Bas van Vliet betrokken was bij de mishandeling.
Dat Bas van Vliet woont op de Lodewijkstraat 23 te 's-Gravenhage.

Verklaring getuige Sjon Tegelaar
Op 3 september 2019 omstreeks 12.30 uur hoorden wij als getuige Sjon Tegelaar. Hij verklaart:
Dat hij op 1 september 's middags in de sportschool was geweest.
Dat hij daarna met een groepje jongens van die sportschool is gaan eten.
Dat hij samen met Joesef Abdullah en Bas van Vliet nog op kroegentocht is gegaan.
Dat die Bas van Vliet zich opgefokt gedroeg omdat hij door zijn vriendin was gedumpt.
Dat hij zich herinnert dat ze na de laatste kroeg met zijn drieën nog even op straat stonden.
Dat ze moesten lachen om iets wat een voorbijlopende jongen tegen Bas van Vliet zei.
Dat hij zich daar verder niet veel van herinnert omdat hij veel bier op had.
Dat hij samen met Joesef Abdullah vervolgens in een taxi naar huis is gegaan.
Dat hij niet meer weet hoe laat hij thuis was.

Op 3 september 2019, omstreeks 13.30 uur, is buiten heterdaad na daartoe verkregen toestemming van officier van Justitie mr. A.W. Bada, in zijn woning aangehouden

Sebastiaan Johannes Van Vliet
Geboren te 's-Gravenhage op 16 januari 1997,
Wonende te Lodewijkstraat 23 te 's-Gravenhage
Hij is ingesloten in het Bureau van Politie te Den Haag.

Verhoor verdachte Van Vliet
Op 3 september 2019, omstreeks 15.00 uur, verhoorde ik, Klaas Terschuur, brigadier van politie, regio Haaglanden de verdachte Van Vliet samen met collega Kees van Dam, agent van politie eerste klas, regio Haaglanden.
Hij verklaarde:
Dat hij met een paar jongens shoarma was gaan eten en daarna gaan stappen.
Dat hij daarbij 7 of 8 biertjes gedronken heeft.
Dat hij in de ochtend van 1 september met zijn vriendin ruzie had gekregen die daarop de relatie beëindigde.
Dat hij en zijn vrienden na 02.00 uur nog even op straat stonden.
Dat toen een jongen en een meisje arm in arm voorbij liepen. Dat hij een grapje tegen het meisje maakte. Dat de jongen wat terugzei over zijn vriendin en de anderen daarom moesten lachen.
Dat bij Van Vliet toen de stoppen doorsloegen. Hij voelde zich voor lul gezet. Hij is vervolgens achter de jongen aangerend en heeft hem toen met de vuist in het gezicht geslagen. De jongen viel op de grond en Van Vliet heeft hem toen nog geschopt.

Meervoudige fotoconfrontatie getuige Corine de Jong (vriendin slachtoffer) met verdachte
Op 4 september 2019, omstreeks 14.30 uur, werd getuige Corine de Jong geconfronteerd met tien foto's waaronder een foto van verdachte Van Vliet. Zij herkende de foto van verdachte met zekerheid als de man die Anton de Koning geslagen en geschopt had.

Verklaring neuroloog
Neuroloog Boersma stelde het volgende letsel vast bij Anton de Koning:
Het geconstateerde letsel is consistent met het soort van trauma dat kan volgen uit het hard trappen tegen betreffende lichaamsdelen en bestaat uit het volgende:
Halswerveltrauma met als direct gevolg dat patiënt lijdt aan onherstelbare en blijvende verlamming van de onderste extremiteiten vanaf de navel.
Letsel in het links frontaal gedeelte van de hersenen van patiënt met uitval van het spraakvermogen als gevolg.
Bovenste twee linkse ribben zijn gebroken
Ten gevolge van het trauma, lijdt patiënt aan post-traumatische amnesie. Patiënt heeft geen herinnering van het trauma.

Voorlopige hechtenis
De verdachte heeft vanaf zijn aanhouding tot het onderzoek ter terechtzitting in preventieve hechtenis gezeten. Deze periode betrof 3 maanden.

Tenlastelegging
Aan verdachte is ten laste gelegd dat hij op of omstreeks 2 september 2019 te 's-Gravenhage, aan een persoon genaamd Anton de Koning, opzettelijk zwaar lichamelijk letsel (te weten halswervelfractuur en/of hersenletsel en/of gebroken ribben) heeft toegebracht, door opzettelijk die Anton de Koning tegen het hoofd en/of lichaam te slaan/stompen en/of te schoppen/trappen, terwijl dat feit blijvende invaliditeit

(te weten verlamming vanaf de navel en/of permanent verlies van het spraakvermogen) tengevolge heeft gehad;
[artikel 302 van het Wetboek van Strafrecht]

2) Condition with uncooperative defendant: case vignette under 1 + addition:

Pro Justitia rapportage
Gelet op de omstandigheden van het delict (plotseling agressief gedrag tegen een onbekende), besluit de rechter-commissaris om verdachte pro Justitia te laten onderzoeken. De verdachte weigerde alle medewerking. Om deze reden is hij in het Pieter Baan Centrum geplaatst ter observatie voor een periode van zes weken. Betrokkene werd onderzocht door een multidisciplinair team dat bestond uit een psychiater, psycholoog, een forensisch milieuonderzoeker en een groepsleider. Vanwege de weigering konden de gedragskundigen geen uitspraken doen over de mogelijke doorwerking van een eventuele stoornis in het ten laste gelegde delict (indien bewezen) en toerekenbaarheid, het recidiverisico en eventuele behandeladviezen.

3) Condition with antisocial personality disorder and low risk: case vignette under 1 + forensic mental health report:

Gelet op de omstandigheden van het delict besluit de rechter-commissaris om verdachte pro Justitia te laten onderzoeken.

Pro Justitia rapportage
Betrokkene werd onderzocht door een multidisciplinair team dat bestond uit een psychiater en een psycholoog. De deskundigen vonden aanwijzingen voor een in aanleg tenminste laaggemiddelde intelligentie. Betrokkene geeft soms signalen af dat hij zich onveilig of bedreigd voelt, ook zonder dat er reële conflicten bestaan. Opeens kan betrokkene zich oninvoelbaar en onberekenbaar agressief opstellen. Er bestaan sterke aanwijzingen dat het beperkte functioneren van betrokkene en de agressieve impulsproblemen door onderliggende persoonlijkheidsproblematiek worden veroorzaakt: er zijn functiebeperkingen op het gebied van agressieregulatie, impulscontrole, frustratietolerantie, geweten en empathie. Daarom wordt de problematiek van betrokkene geclassificeerd als een persoonlijkheidsstoornis met antisociale trekken.

Toerekenbaarheid
De genoemde psychische stoornis in de juridische zin van art 39 Sr. is al langere tijd aanwezig. Ook ten tijde van het plegen van het ten laste gelegde (indien bewezen) was deze aanwezig. In de periode voorafgaand aan en tijdens het ten laste gelegde, werd betrokkene niet behandeld voor zijn stoornis. Ten tijde van de delictpleging (indien bewezen), kan hij op basis van zijn stoornis/gebreken geacht worden minder in staat te zijn geweest om inzicht te hebben in de wederrechtelijkheid van zijn gedrag en de gevolgen ervan voor het slachtoffer. Ook kan op basis daarvan geacht worden dat hij in mindere mate in staat was om zijn impulsen te beheersen. Onderzoekers zien redenen om betrokkene als verminderd toerekenbaar te achten ten tijde van het plegen van het ten laste gelegde (indien bewezen).

Risicotaxatie
Er werd gebruik gemaakt van een gestructureerd klinisch instrument gericht op risicotaxatie van gewelddadig gedrag (HCR-20v3). Gebaseerd op klinische, historische risicofactoren en risicohanteringsfactoren, wijst de HCR-20v3 op een lage kans op toekomstig geweld.

Behandeladvies
Een langer durend behandeltraject dient ingezet te worden. Betrokkene heeft aangegeven dat hij open staat voor, en meewerkt aan behandeling.

4) Condition with antisocial personality disorder and high risk: case vignette under 1 + forensic mental health report:

Gelet op de omstandigheden van het delict besluit de rechter-commissaris om verdachte pro Justitia te laten onderzoeken.

Pro Justitia rapportage
Betrokkene werd onderzocht door een multidisciplinair team dat bestond uit een psychiater en een psycholoog. De deskundigen vonden aanwijzingen voor een in aanleg tenminste laaggemiddelde intelligentie. Betrokkene geeft soms signalen af dat hij zich onveilig of bedreigd voelt, ook zonder dat er reële conflicten bestaan. Opeens kan betrokkene zich oninvoelbaar en onberekenbaar agressief opstellen. Er bestaan sterke aanwijzingen dat het beperkte functioneren van betrokkene en de agressieve impulsproblemen door onderliggende persoonlijkheidsproblematiek worden veroorzaakt: er zijn functiebeperkingen op het gebied van agressieregulatie, impulscontrole, frustratietolerantie, geweten en empathie. Daarom wordt de problematiek van betrokkene geclassificeerd als een persoonlijkheidsstoornis met antisociale trekken.

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Behandeladvies
Een langer durend behandeltraject dient ingezet te worden. Betrokkene heeft aangegeven dat hij open staat voor, en meewerkt aan behandeling.

5) Condition with antisocial personality disorder and no information on risk: case vignette under 1 + forensic mental health report:

Gelet op de omstandigheden van het delict besluit de rechter-commissaris om verdachte pro Justitia te laten onderzoeken.

Pro Justitia rapportage
Betrokkene werd onderzocht door een multidisciplinair team dat bestond uit een psychiater en een psycholoog. De deskundigen vonden aanwijzingen voor een in aanleg tenminste laaggemiddelde intelligentie. Betrokkene geeft soms signalen af dat hij zich onveilig of bedreigd voelt, ook zonder dat er reële conflicten bestaan. Opeens kan betrokkene zich oninvoelbaar en onberekenbaar agressief opstellen. Er bestaan sterke aanwijzingen dat het beperkte functioneren van betrokkene en de agressieve impulsproblemen door onderliggende persoonlijkheidsproblematiek worden veroorzaakt: er zijn functiebeperkingen op het gebied van agressieregulatie, impulscontrole, frustratietolerantie, geweten en empathie. Daarom wordt de problematiek van betrokkene geclassificeerd als een persoonlijkheidsstoornis met antisociale trekken.

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Behandeladvies
Een langer durend behandeltraject dient ingezet te worden. Betrokkene heeft aangegeven dat hij open staat voor, en meewerkt aan behandeling.

6) Condition with schizophrenia and low risk: case vignette under 1 + forensic mental health report:

Gelet op de omstandigheden van het delict besluit de rechter-commissaris om verdachte pro Justitia te laten onderzoeken.

Pro Justitia rapportage
Betrokkene werd onderzocht door een multidisciplinair team dat bestond uit een psychiater en psycholoog. De deskundigen vonden aanwijzingen voor een in aanleg

tenminste laaggemiddelde intelligentie. Betrokkene heeft in het verleden herhaaldelijk psychotische episoden doorgemaakt met hallucinaties en wanen die ineens en kortdurend kunnen verergeren. Betrokkene geeft soms signalen af dat hij zich onveilig of bedreigd voelt, ook zonder dat er reële conflicten bestaan. De psychische ontregelingen bij betrokkene zijn daarom veelal voor de omgeving niet evident duidelijk en zijn moeilijk zichtbaar. Herhaaldelijk toonde betrokkene agressief gedrag waarvan de precieze oorzaak onbekend is. Er bestaan sterke aanwijzingen dat het beperkte functioneren van betrokkene, de realiteitstoetsingsproblemen en de agressieve impulsproblemen door onderliggende psychopathologie worden veroorzaakt: bij betrokkene is sprake van een chronisch psychotisch proces. Daarom worden de frequente realiteitstoetsingsproblemen van betrokkene geclassificeerd als een ongespecificeerde schizofreniespectrumstoornis of andere psychotische stoornis.

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De genoemde psychische stoornis in de juridische zin van art 39 Sr. is al langere tijd aanwezig. Ook ten tijde van het plegen van het ten laste gelegde (indien bewezen) was deze aanwezig. In de periode voorafgaand aan en tijdens het ten laste gelegde, werd betrokkene niet behandeld voor zijn stoornis. Ten tijde van de delictpleging (indien bewezen), kan hij op basis van zijn stoornis/gebreken geacht worden minder in staat te zijn geweest om inzicht te hebben in de wederrechtelijkheid van zijn gedrag en de gevolgen ervan voor het slachtoffer. Ook kan op basis daarvan geacht worden dat hij in mindere mate in staat was om zijn impulsen te beheersen. Onderzoekers zien redenen om betrokkene als verminderd toerekenbaar te achten ten tijde van het plegen van het ten laste gelegde (indien bewezen).

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Behandeladvies
Een langer durend behandeltraject dient ingezet te worden. Betrokkene heeft aangegeven dat hij open staat voor, en meewerkt aan behandeling.

7) Condition with schizophrenia and high risk: case vignette under 1 + forensic mental health report:

Gelet op de omstandigheden van het delict besluit de rechter-commissaris om verdachte pro Justitia te laten onderzoeken.

Pro Justitia rapportage
Betrokkene werd onderzocht door een multidisciplinair team dat bestond uit een psychiater en psycholoog. De deskundigen vonden aanwijzingen voor een in aanleg tenminste laaggemiddelde intelligentie. Betrokkene heeft in het verleden herhaaldelijk psychotische episoden doorgemaakt met hallucinaties en wanen die ineens en kortdurend kunnen verergeren. Betrokkene geeft soms signalen af dat hij zich onveilig

of bedreigd voelt, ook zonder dat er reële conflicten bestaan. De psychische ontregelingen bij betrokkene zijn daarom veelal voor de omgeving niet evident duidelijk en zijn moeilijk zichtbaar. Herhaaldelijk toonde betrokkene agressief gedrag waarvan de precieze oorzaak onbekend is. Er bestaan sterke aanwijzingen dat het beperkte functioneren van betrokkene, de realiteitstoetsingsproblemen en de agressieve impulsproblemen door onderliggende psychopathologie worden veroorzaakt: bij betrokkene is sprake van een chronisch psychotisch proces. Daarom worden de frequente realiteitstoetsingsproblemen van betrokkene geclassificeerd als een ongespecificeerde schizofreniespectrumstoornis of andere psychotische stoornis.

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Behandeladvies
Een langer durend behandeltraject dient ingezet te worden. Betrokkene heeft aangegeven dat hij open staat voor, en meewerkt aan behandeling.

8) Condition with schizophrenia and no information on risk: case vignette under 1 + forensic mental health report:

Gelet op de omstandigheden van het delict besluit de rechter-commissaris om verdachte pro Justitia te laten onderzoeken.

Pro Justitia rapportage
Betrokkene werd onderzocht door een multidisciplinair team dat bestond uit een psychiater en psycholoog. De deskundigen vonden aanwijzingen voor een in aanleg tenminste laaggemiddelde intelligentie. Betrokkene heeft in het verleden herhaaldelijk psychotische episoden doorgemaakt met hallucinaties en wanen die ineens en kortdurend kunnen verergeren. Betrokkene geeft soms signalen af dat hij zich onveilig of bedreigd voelt, ook zonder dat er reële conflicten bestaan. De psychische ontregelingen bij betrokkene zijn daarom veelal voor de omgeving niet evident duidelijk en zijn moeilijk zichtbaar. Herhaaldelijk toonde betrokkene agressief gedrag waarvan

de precieze oorzaak onbekend is. Er bestaan sterke aanwijzingen dat het beperkte functioneren van betrokkene, de realiteitstoetsingsproblemen en de agressieve impulsproblemen door onderliggende psychopathologie worden veroorzaakt: bij betrokkene is sprake van een chronisch psychotisch proces. Daarom worden de frequente realiteitstoetsingsproblemen van betrokkene geclassificeerd als een ongespecificeerde schizofreniespectrumstoornis of andere psychotische stoornis.

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Behandeladvies
Een langer durend behandeltraject dient ingezet te worden. Betrokkene heeft aangegeven dat hij open staat voor, en meewerkt aan behandeling.

Appendix C

Interview protocol focus groups Chapter 5

Start

1. Kort voorstelrondje inclusief functie (+ Rb/Hof) en ervaring binnen de strafsector:
   i. Hoe lang bent u al rechter (binnen de strafsector)? Wat voor type zittingen doet u zoal?
   ii. Hoe vaak krijgt u te maken met zaken waarin een of meerdere PJ-rapportages zitten?
      - Om wat voor soort zaken gaat dit dan?
   iii. Heeft u andere functies (bekleed) die mogelijk relevant zijn voor dit onderzoek? (Onderzoek, onderwijs, deskundige etc.)

De hoofdvraag van dit onderzoek luidt: Op welke manier wordt informatie uit een PJ-rapportage in de praktijk gebruikt in rechterlijke beslissingen?

Inhoudelijke vragen

Key question #1:
Kunt u iets vertellen over hoe u te werk gaat wanneer u een dossier van een zaak krijgt waarin een PJ-rapportage zit? Op welk moment bestudeert u de rapportage?

Probe questions

i. Is er een bepaalde volgorde die u hanteert bij het lezen/voorbereiden van het dossier?
ii. Hoe gaat u vervolgens te werk met het doornemen van de PJ-rapportages?
   - Vooraf aan beginnen met lezen? Bepaalde informatie eerst? (In verband met lengte van sommige rapportages: bijv. PBC rapportages van 90 pagina's).

Key question #2
Welke informatie in de PJ rapportage vindt u het meest waardevol voor uw beslissing(en) en waarom?

Probe questions

- Verschilt dit nog voor de beslissing die u dient te nemen?
- Heeft u wel eens het idee dat u informatie mist of dat het onduidelijk is? Hoe gaat u hier dan mee om?-> deskundigen oproepen? Terugverwijzen? Gebeurt dit vaak?

Key question #3
Bij welke (materiele) beslissingen uit het beslismodel in artikel 350 Sv gebruikt u de informatie uit de PJ-rapportage?

Key question #3a
a) Op welke manier/wijze heeft een Pro Justitia-rapportage invloed op de straftoemetingsbeslissing?

Probe questions
i. Vanuit de jurisprudentie weten we dat we strikt genomen het idee van 'straf naar mate van schuld' niet kennen in het strafrecht. Hoe zit dit echter in de praktijk wanneer blijkt dat een verdachte bijv. verminderd toerekenbaar wordt geacht door de deskundigen?
ii. We weten uit onderzoek en de praktijk dat het recidiverisico een belangrijke rol speelt bij de straftoemetingsbeslissing: een hoger risico kan tot een zwaardere/langere straf leiden. Op welke wijze betrekt u dit gegeven dan in uw straftoemetingsbeslissing?

Indien de respondenten volstaan met het aanhalen van het onderscheid tussen straffen en maatregelen:
- Stemt u bij het opleggen van bepaalde ingrijpende sancties (bijv. TBS met dwangverpleging) de strafduur hier op af?
- Tbs wordt als maatregel niet opgelegd met als doel vergelding of leedtoevoeging. Echter zo wordt het in de praktijk wel ervaren of heerst de angst dat een tbs-gestelde langer in de tbs zit dan in de gevangenis (DJI 2020: gemiddelde tbs duur is 7.5 jaar; Toename weigeraars de afgelopen jaren). Neemt u dit soort informatie mee in uw overwegingen bij het bepalen van de strafduur?

Key question #3b
b) In hoeverre maakt bijvoorbeeld het type stoornis/problematiek uit voor beslissingen over type sanctie en sanctie duur?
Probe questions
- Maakt het in uw overwegingen uit of iemand bijv. psychotisch is of aan een antisociale persoonlijkheidsstoornis lijdt? Of gaat het vooral om de wijze waarop het delictgedrag voortkomt uit de stoornis?

Key question #4
In hoeverre denkt u dat onderzoek dat bedoeld is voor de sanctieoplegging, zoals een Pro Justitia-rapportage, (onbedoeld) invloed kan uitoefenen op de rechterlijke overtuiging (zoals bedoeld in artikel 338 Wetboek van Strafvordering)?

Probe questions
Bij een bevestigend antwoord:
- Om welke informatie zou het dan gaan denkt u?
Eventueel onderscheid benadrukken tussen informatie over de persoon van de verdachte en mogelijk belastende verklaringen over het delict in een rapportage

- Bij wat voor soort zaken zou dit kunnen gebeuren?
- Komt dit vaak voor? Is dit problematisch?

Bij een ontkennend antwoord:
- Aangeven dat je de vraag stelt omdat uit *beperkt* (rechtspsychologisch) onderzoek blijkt dat dit wel eens zou kunnen voorkomen. Hoe kijkt u hier tegenaan?

Curriculum vitae

Roosmarijn Magdalena Sophie van Es was born on January 29th, 1994 in The Hague, the Netherlands. She obtained her bachelor's degree in Criminology (2015) and her master's degree in Forensic Criminology (2016, cum laude) from Leiden University. She also completed the Talent Program (pre-PhD program) offered by Leiden Law School. After graduation, she worked as a lecturer at the Institute of Criminal Law and Criminology at Leiden University. From February 2018 until April 2023, Roosmarijn worked on her doctoral research at the same institute after receiving a Meijers grant from Leiden Law School. For her interdisciplinary research project on the use and effects of forensic mental health reports in judicial decision-making in the Netherlands, Roosmarijn used a mixed-methods approach and collected data among legal students and professional judges. Roosmarijn is currently working as an assistant professor at the Institute of Criminal and Criminology at Leiden University.

In the range of books published by the Meijers Research Institute and Graduate School of Leiden Law School, Leiden University, the following titles were published in 2021, 2022 and 2023

MI-369 M.E. Stewart, *Freedom of Overflight: – A Study of Coastal State Jurisdiction in International Airspace* (diss. Leiden), Amsterdam: Ipskamp Printing 2021

MI-370 M.T. Beumers, *De bescherming van immateriële contractuele belangen in het schadevergoedingsrecht* (diss. Leiden), Den Haag: Boom juridisch 2021, ISBN 978 94 6290 962 5

MI-371 C.M. Sandelowsky-Bosman, T. Liefaard, S.E. Rap & F.A.N.J. Goudappel, *De rechten van ongedocumenteerde kinderen in Curaçao – een gezamenlijke verantwoordelijkheid*, Den Haag: Boom juridisch 2021, ISBN 978-94-6290-965-6

MI-372 G.J.A. Geertjes, *Staatsrecht en conventie in Nederland en het Verenigd Koninkrijk,* (diss. Leiden), Zutphen, Uitgeverij Paris bv 2021, ISBN 978 94 6251 270 2

MI-373 L. Noyon, *Strafrecht en publieke opinie. Een onderzoek naar de relatie tussen de strafrechtspleging en het publiek, met bijzondere aandacht voor het Openbaar Ministerie,* (diss. Leiden), Den Haag: Boom juridisch 2021, ISBN 978 94 6290 978 6

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