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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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# 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.<sup>1</sup> 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.<sup>2</sup> 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.

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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:<sup>3</sup> 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).<sup>4</sup> 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<sup>5</sup> that is used since January 1<sup>st</sup> 2020:

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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?<sup>6</sup> If so, how can this be described diagnostically?
  2. What was the individual's mental condition at the time of the alleged offense?

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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<sup>7</sup> 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.*

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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,

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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:<sup>8</sup>

- 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.<sup>9</sup> 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

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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).<sup>10</sup>

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.<sup>11</sup> 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

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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<sup>12</sup> 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

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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 1<sup>st</sup> 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.<sup>13</sup>

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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 (Bodenhause & 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).<sup>14</sup>

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

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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; Geijssen 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.<sup>15</sup>

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	2	To what extent does forensic mental health expertise affect judicial decision-making according to the available scientific literature?	Systematic literature review (N = 27)
	Sentencing (type and length of sanction)			
	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.



