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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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).

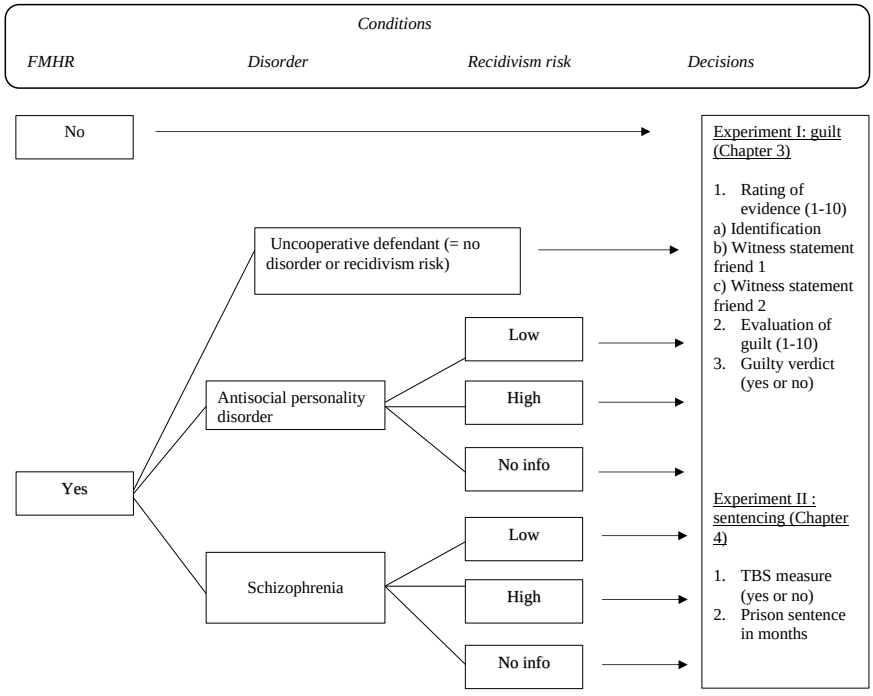

Figure 6.1: Experimental designs in Chapters 3 and 4

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.