



**Pennsylvania
Commission
on
Sentencing**

Harrisburg Office:
530 Irvis Building
Capitol Complex
Harrisburg, PA 17120-2218

Phone:
717.772.3776

Fax:
717.772.8892

URL:
pasentencing.us

Judge Sheila A. Woods-Skipper
First Judicial District
Chair

Representative Todd Stephens
House District 151
Vice Chair

Mark H. Bergstrom
Executive Director

TESTIMONY

Senate Judiciary Committee

**Public Hearing
Probation and Parole in Pennsylvania**

**North Office Building
Hearing Room #1
Harrisburg, PA**

June 26, 2019

Mark H. Bergstrom
Executive Director

*The Commission is an agency of the General Assembly affiliated with
The Pennsylvania State University.*



Good morning Chairman Baker, Chairman Farnese, and members of the Senate Judiciary Committee. I am Mark Bergstrom, Executive Director of the Pennsylvania Commission on Sentencing, an agency of the General Assembly. Thank you for providing this opportunity to testify about the use of probation and parole in Pennsylvania. As provided in its enabling legislation, the Commission serves as a clearinghouse and information center for the collection, preparation and dissemination of information on Commonwealth sentencing and parole practices, and on the effectiveness of parole dispositions and sentences imposed, and is empowered to "make recommendations to the General Assembly concerning modification or enactment of sentencing, parole and correctional statutes which the Commission finds necessary and advisable to carry out an effective, humane, and rational sentencing, resentencing and parole policy." I would like to recognize the two members of the Senate who currently serve on the Commission: Senator Wayne Langerholc and Senator Sharif Street; and two former members of the Commission who serve on this Committee: Senator Art Haywood and Senator John Sabatina.

Scope of Sentences Involving Community Supervision

Following a conviction for an offense in Pennsylvania, an individual may be subject to community supervision in numerous ways, including through an order of probation (42 Pa.C.S. §9754) or a sentence of county intermediate punishment (CIP) (42 Pa.C.S. §9763), as the final phase of a sentence of state intermediate punishment (SIP) (61 Pa.C.S. §4104), or by the exercise of discretionary parole (42 Pa.C.S. §9776, 61 Pa.C.S. §6137) from a sentence of partial or total confinement (42 Pa.C.S. §§9755, 9756).

Direct sentences to probation and CIP are for a fixed term that cannot exceed the maximum penalty based on the grade of the conviction; these sentences are under the authority of the court and supervised by county probation staff unless otherwise designated (i.e., 'special probation' supervised by the state). A sentence to SIP is also for a fixed term, but for a period of two years, with the final phase of supervised reintegration under the authority of the Department of Corrections. The JRI-II legislation proposed this Session would streamline two of these options but not meaningfully impact the delivery of community supervision: incorporating CIP into probation, and modifying SIP to function as a program within the Department of Corrections. However, JRI-II also proposes the adoption of new advisory



guidelines by the Commission to recommend a common starting point for the duration and intensity of probation in the typical case. Other legislation (e.g., SB14, HB1555) would limit the duration of probation by statute.

As related to confinement sentences, Pennsylvania has adopted an indeterminate approach (i.e., 'min/max rule'), under which the court is required to impose a maximum term of confinement that does not exceed the statutory maximum, and a minimum term that is no greater than $\frac{1}{2}$ the maximum term imposed. The maximum term generally determines the place of confinement, with a maximum term of less than 2 years served in a county facility (i.e., jail) and a maximum term of 2 years or more served in a state facility (i.e., prison), with exceptions permitting the service of sentences in county facilities for DUI and when available capacity is certified. The minimum term typically designates the earliest point at which an individual is eligible for parole, although there is no right to parole. Release prior to completion of the minimum term is authorized under limited circumstances from both state facilities (i.e., Recidivism Risk Reduction Incentive Program or RRRRI) and county facilities (i.e., County Reentry Program). If an individual is granted parole, he/she will serve the balance of the maximum term under community supervision. If an individual is denied parole, he/she will serve the entire maximum term of confinement, and upon completion will be released from confinement without supervision unless subject to an additional sentence. Parole supervision is linked to place of confinement, with parole from county facilities decided by the sentencing judge and supervised by county parole staff, and parole from state facilities decided by the Pennsylvania Board of Probation and Parole and supervised by state parole agents.

The 'min/max rule' is intended to serve two important purposes: (1) to provide flexibility for the exercise of discretionary parole, linking release to consideration of the readiness of the offender and threat to public safety; and (2) to provide for reentry and reintegration through parole supervision and support during the critical transition from confinement to the community. The Commission's advisory sentencing guidelines recommend to the court a common starting point for the minimum term of confinement in the typical case, and advisory parole guidelines being developed in conjunction with the PBPP will be used to inform parole decisions upon completion of the minimum term confinement.



The structure and duration of a sentence may be impacted when sentencing courts consider the imposition of multiple sentences. Courts are authorized to impose sentences concurrently or consecutively, given the total sentence (i.e., aggregate sentence) does not exceed the statutory maximum based on the grade of the conviction offense. A decision regarding the imposition of a sentence concurrently or consecutively must be made in every case in which more than one sentencing alternative is imposed on an offender, and this may occur in various circumstances:

- (1) multiple sentencing alternatives may be imposed on a single conviction offense (i.e., 'split sentence') – as an example, a sentence of 6-12 months of partial confinement in a county facility followed by a consecutive period of two years of probation, for an aggregate period of confinement/supervision of three years;
- (2) sentences imposed for multiple convictions during a single sentencing hearing – as an example, a sentence of 1-2 years of total confinement in a state facility for burglary, along with a concurrent 1-2 years of total confinement in a state facility for criminal conspiracy, and a consecutive period of three years of probation for possessing an instrument of crime, for an aggregate period of confinement/supervision of five years; and
- (3) sentences imposed on different dates in different courts – as an example, an aggregate sentence of 2-5 years of total confinement in state facility imposed on March 1, 2019, followed by a consecutive aggregate of 1-2 years of total confinement in a state facility and a consecutive period of five years of probation imposed on May 1, 2019, for a newly aggregated sentence of 3-7 years of total confinement in a state facility sentence followed by a consecutive period of five years of probation, for an aggregate period of confinement/supervision of 12 years.

Until 1997, the Pennsylvania Rules of Criminal Procedure included a provision that held that multiple sentences were to be served concurrently unless otherwise stated. With the repeal of this Rule, there is no default in place and courts are required to state whether any new sentence is to be served concurrent with or consecutive to any other sentence. Earlier versions of JRI-II proposed that the Commission consider maximum terms of confinement and aggregate sentences when adopting sentencing guidelines. SB14 and HB1555 limit the use of certain consecutive sentences.



A final factor related to sentences involving community supervision is the consequence of a revocation. Presently, a revocation of an order of probation or a sentence to CIP or SIP results in a re-sentencing of the individual up to the original statutory maximum, with the original sentencing options available to the Court. The Commission recently adopted resentencing guidelines for consideration following revocation of probation, CIP and SIP. In the near future, these guidelines will be submitted to the General Assembly for review; unless rejected by concurrent resolution, these re-sentencing guidelines will take effect 1/1/2020. Both SB14 and HB1555 contain new provisions relating to revocations.

A revocation of parole results in a recommitment to the facility from which the individual was released to serve all or part of the unserved portion of the original maximum term. A recommitment to a county facility by the court is, by operation of statute, for the unserved balance, but the court retains the power to re-parole at any time. A recommitment to a state facility by the PBPP is for a fixed period of time ("back-time"), upon completion of which the individual is eligible for consideration for re-parole. In conjunction with the development of parole guidelines, the Commission is collaborating with the PBPP on the development of recommitment ranges.

Current Practices -- Duration and Intensity of Community Supervision

It is important to recognize that courts and paroling authorities require broad exercise of discretion in order to individualize sentencing, parole and revocation decisions to the circumstances of the offender and the offense. This exercise of discretion is informed by experience and professional judgement at these critical decision points, and decision makers require the latitude to consider various purposes of sentencing and approaches to intervention and community supervision. The recommendations of the Justice Reinvestment Working Group and the proposals contained in SB14 and HB1555 represent a range of approaches to structuring the exercise of discretion when ordering community supervision. Changes to existing statutes or guidelines should not eliminate discretion, but rather guide the exercise of discretion in order to guard against unwarranted disparity and to collect information to inform individual and policy decisions. These same purposes led to the establishment of advisory sentencing guidelines, intended to promote consideration of objective factors as a common starting point for the exercise of discretion, and to systematically collect and disseminate information on decisions in order to



facilitate research and evaluation and to provide the data required to develop evidence-based best practices. Hard caps on the use of probation and strict limits following revocation may have unintended consequences, as the imposition of probation for more serious offenses is often a mitigated sentence or a departure below the guidelines, and so removing discretion through caps and limits rather than guiding discretion through guidelines may result in higher initial rates of confinement. The duration and intensity of community supervision is impacted by the nearly unlimited discretion exercised in three areas: determining the term of probation; determining the maximum term of confinement; and determining the use of concurrent or consecutive sentencing. Each of these, and the combination of the three, are addressed below.

Probation... Unfettered Discretion?

The JRI-II legislation includes a proposal that the Commission address the intensity of intervention, the use of restrictive conditions and the duration of terms of probation as part of the sentencing guidelines. This is an important linkage between the work of county adult probation and parole in assessing the risk, needs and responsivity (RNR) of offenders and the use of this information by the courts to determine the appropriate intensity and duration of probation supervision and/or the consideration of other sentencing alternatives. There are times when the use of probation and community supervision serves as a trade-off in negotiating an appropriate level of punishment: a longer or more restrictive period of probation replacing a short period of confinement. In fact, such trade-offs are authorized by statute, permitting CIP to satisfy a mandatory minimum sentence or serve as an alternative to county jail.

JRI-II recommends greater consideration of public safety and cost-benefit analysis when ordering probation, using risk and needs to drive decisions regarding the intensity and duration of supervision, with limits on the use of long terms of community supervision. A preliminary analysis of 2018 sentencing data found that over 70% of non-DUI sentences imposed during judicial proceedings included probation, with terms of probation often exceeding the three years of community supervision generally viewed as an optimal supervision period, and numerous outlier cases with maximum terms in excess of 10 years reported. Details are provided in the summary tables on the next page and in the attached Probation Frequencies reports.



This first table and first set of reports address aggregate probation terms, including approximately 20% in which probation is part of a 'split sentence' (i.e., probation imposed in addition to confinement or IP).

Highest Grade in Judicial Proceeding	Number of Cases	Probation (% of Cases)	Probation MEAN	Probation MEDIAN	Probation MODE	Probation MAXIMUM
M3	5,003	77%	11 months	12 months	12 months	150 months (12.5 years)
M2	9,772	72%	17 months	12 months	12 months	120 months (10 years)
M1	8,829	75%	25 months	24 months	12 months	180 months (15 years)
F3	7,080	67%	32 months	24 months	12 months	420 months (35 years)
F2	3,385	55%	41 months	36 months	60 months	360 months (30 years)
F1	2,384	49%	57 months	48 months	60 months	444 months (37 years)

This second table and second set of reports is limited to aggregate probation terms where probation was the most serious sentence of the judicial proceeding.

Highest Grade in Judicial Proceeding	Number of Cases	Probation (% of Cases)	Probation MEAN	Probation MEDIAN	Probation MODE	Probation MAXIMUM
M3	3,648	100%	11 months	12 months	12 months	150 months (12.5 years)
M2	5,930	100%	17 months	12 months	12 months	120 months (10 years)
M1	5,307	100%	25 months	24 months	12 months	180 months (15 years)
F3	2,355	100%	32 months	24 months	36 months	420 months (35 years)
F2	388	100%	41 months	36 months	60 months	360 months (30 years)
F1	96	100%	47 months	36 months	60 months	240 months (20 years)



Maximum Terms of Partial and Total Confinement ... Any Limits?

While current statute requires the court to impose a minimum and a maximum term when ordering partial or total confinement, and the min/max rule sets a requirement that the minimum term not exceed half of the maximum term, the only constraint on the setting of the maximum term is the statutory maximum based on the grade of the offense. As noted previously, the sentencing guidelines (and any applicable mandatory minimum statutes) serve as a starting point for imposing a minimum term with this term generally setting the earliest point at which parole may be considered, and the maximum term generally determining the place of confinement and paroling authority. However, this construct may lead to unsatisfactory policy options, such as 'short minimum' sentences (e.g., 6 months – 5 years total confinement) committed to the Department of Corrections; or extensive periods of parole supervision for 'long-tail' sentences (e.g., 5-20 years total confinement) when the individual is paroled at minimum; or 'max-out' sentences (e.g., 5-10 years total confinement) when the individual is refused parole due to a statutory prohibition and/or discretionary decision and is released unsupervised at the conclusion of the maximum term.

Aggregation... More-Is-Better?

Pa.R.Crim.Proc. Rule 705(b) requires the following:

When more than one sentence is imposed at the same time on a defendant, or when a sentence is imposed on a defendant who is sentenced for another offense, the court shall state whether the sentences shall run concurrently or consecutively. If the sentence is to run concurrently, the sentence shall commence from the date of imposition unless otherwise ordered by the judge.

As described in the *Comment*, the prior Rule was amended, effective January 1, 1997, "to eliminate language that created a presumption that certain sentences run concurrently unless the judge states otherwise." With the removal of this presumption, no guidelines or standards apply to the exercise of discretion, absent a 'manifest abuse of discretion' review of the sentence by an appellate court (42 Pa.C.S. §9781) or certain statutory requirements, such as mandating the imposition of consecutive sentences for specific offenses involving multiple victims. While the exercise of discretion to distinguish the appropriate use of concurrent and consecutive sentencing is critical, the absence of any criteria does undermine concepts of uniformity and proportionality in sentencing. As an example, consider two



individuals, each convicted of five burglaries and each sentenced to 1-2 years for each burglary: if the court imposes the sentences concurrently, the aggregate sentence is 1-2 years of total confinement; if the court imposes the sentences consecutively, the aggregate sentence is 5-10 years of total confinement. There may be important distinctions between the two cases which supports these different outcomes (e.g., value of losses, role in the offenses, use of a weapon, timing of offenses, number of victims, criminal history, behavioral health, etc.), but advisory benchmarks similar to those provided in the guidelines for individual offenses do not apply to the imposition of concurrent or consecutive sentences, and so data to inform individual and policy decisions are not available.

Considering collectively these three areas of broad discretion, the greatest impact results from a compounding effect, in which unchecked discretion when imposing probation combines with maximum total confinement terms and consecutive sentencing. One example is the imposition of an aggregate sentence including multiple 'long tail' total confinement sentences along with consecutive periods of probation imposed for other offenses. There may be circumstances when such a sentence is justified, but as with departures from the sentencing guidelines, recognizing these sentences as outside the norm and requiring the court to report reasons for a deviation would provide the foundation for evaluating the effectiveness of such sentences.

Extended periods of community supervision, and imposition of conditions inconsistent with effective supervision and treatment strategies divert valuable resources and contribute to technical violations of probation and parole. The PBPP and many county probation and parole agencies have developed or validated and are using assessments to build community supervision approaches that address the specific risk, needs and responsivity of the individual. Many of these same agencies have deployed sanctioning procedures to more effectively intervene when misconducts and violations first occur, promoting resolution of problems before resorting to formal revocation. In addressing the compounding exercise of discretion, earlier versions of JRI-II proposed that the Commission also consider maximum terms of confinement and aggregate sentences under the sentencing guidelines.



Opportunities and Suggestions

Many proposals have been advanced through JRI-II (SB500, SB501, SB502; HB1573, HB1574, HB1575) and other reform legislation (SB14, HB1555), and most seek to find the sweet spot on a discretionary continuum, some place between unfettered discretion and no discretion. The Commission has long advocated the use of advisory guidelines to promote consideration of objective and relevant factors in the exercise of discretion, to create a process whereby guidelines are developed through a public and transparent process, and to collect, analyze and disseminate detailed information to assist courts and other decision makers and to inform the public and public policy. And while this has applied to the sentencing guidelines for nearly 40 years, the same process is being used to develop and implement resentencing guidelines, parole guidelines, recommitment ranges and risk assessment, and could be considered for other areas under review by the General Assembly.

To this review, I offer several additional suggestions that have been discussed in the past:

- (1) Provide a formal review of probation and parole cases after three years, and regular reviews thereafter, to determine if termination from community supervision is warranted;
- (2) Consider modification to the mix/max rule to permit minimum terms in excess of half the maximum term and/or recalibrate the maximum term for purposes of community supervision upon release on parole;
- (3) Link place of confinement requirements to minimum term remaining (following deduction of credit time) (e.g., DOC based on minimum of one years or greater rather than maximum of two years or greater), but permit court to request 'special parole' state supervision of cases with a maximum of two years or greater served in county facilities;
- (4) Promote the development of integrated and modular correctional programming between state and county corrections facilities to promote continuity of treatment and efficient use of resources;
- (5) Adopt guiding principles for the effective use of concurrent and consecutive sentences.

Thank you for providing this opportunity to testify. The Commission is pleased to provide any additional data and information requested by the Committee.



Pennsylvania Commission on Sentencing
Senate Judiciary Committee, Public Hearing on Probation and Parole
June 29, 2019

Probation Frequencies

Preliminary Sentencing Data (2018)

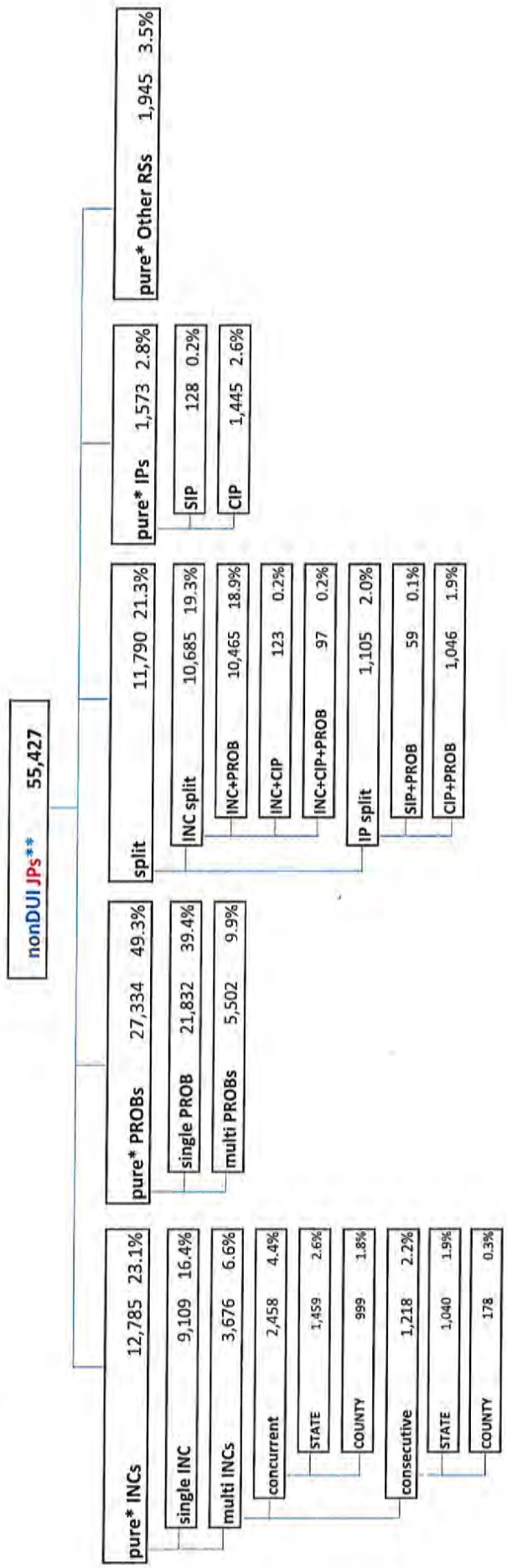
- Sentence Distribution
- Probation Utilization

PA Commission on Sentencing

Flow chart of sentencing locations, Pennsylvania, 2018

Unit of Analysis: nonDUI JPs**

Tracking Number: 2019_06_006



pure* : These JPs may contain offenses with non-supervision sanction(s) (i.e., economic sanctions / no further penalty)

nonDUI JPs** : DUI is NOT the most serious offense in the JP, so the JP may still contain DUI(s)

(without Duplicate JPs; without JPs contain LIFE/DEATH)

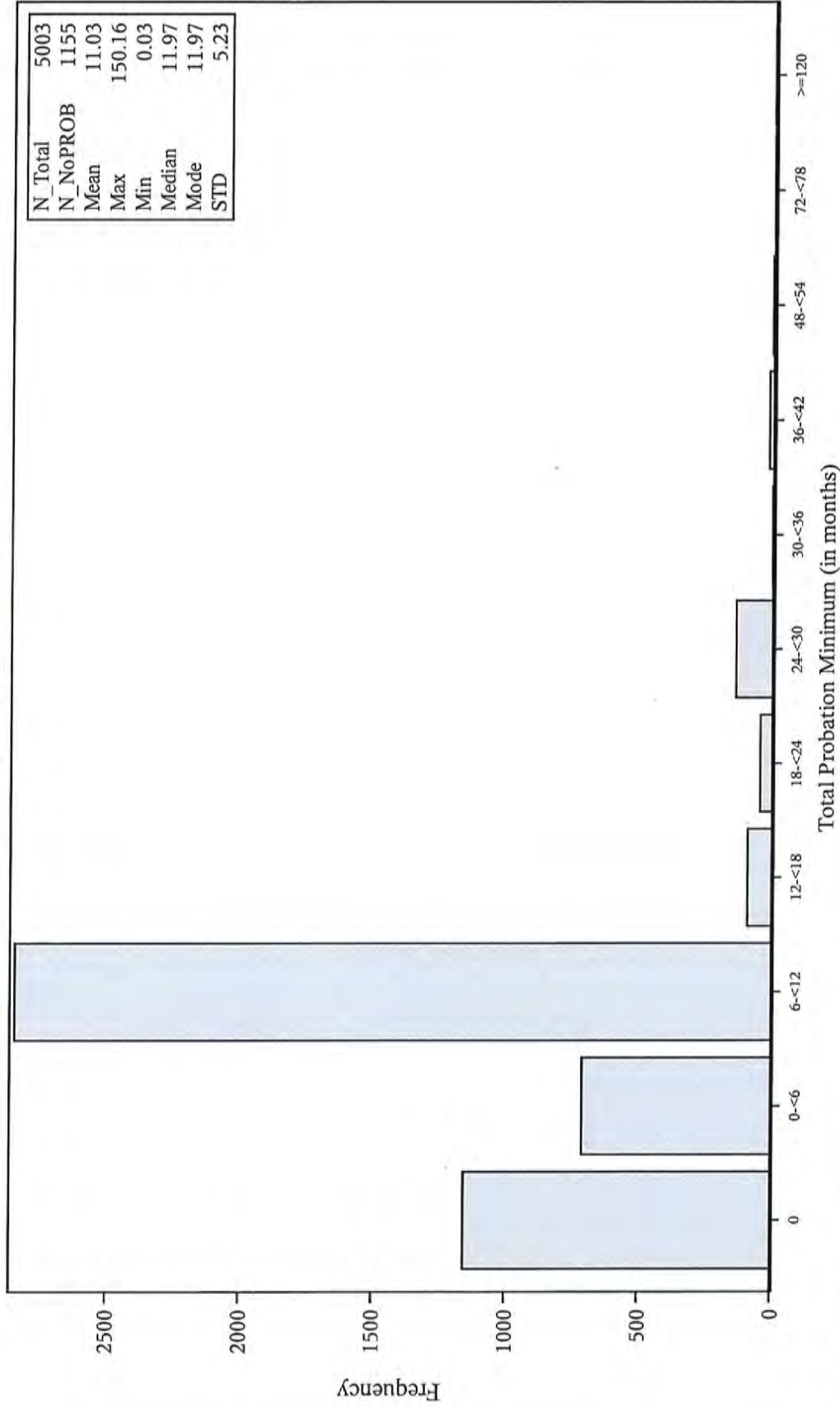
Pennsylvania Commission on Sentencing

TOTAL PROBATION MINIMUM in months by GRADE, NonDUI offenses ONLY, Pennsylvania, 2018**

Unit of Analysis: Most serious offense in Judicial Proceeding (after excluding duplicate JPs and LIFE/DEATH sentences)

Tracking Number: 2019_06_000

OFFENSE GRADE: M-3



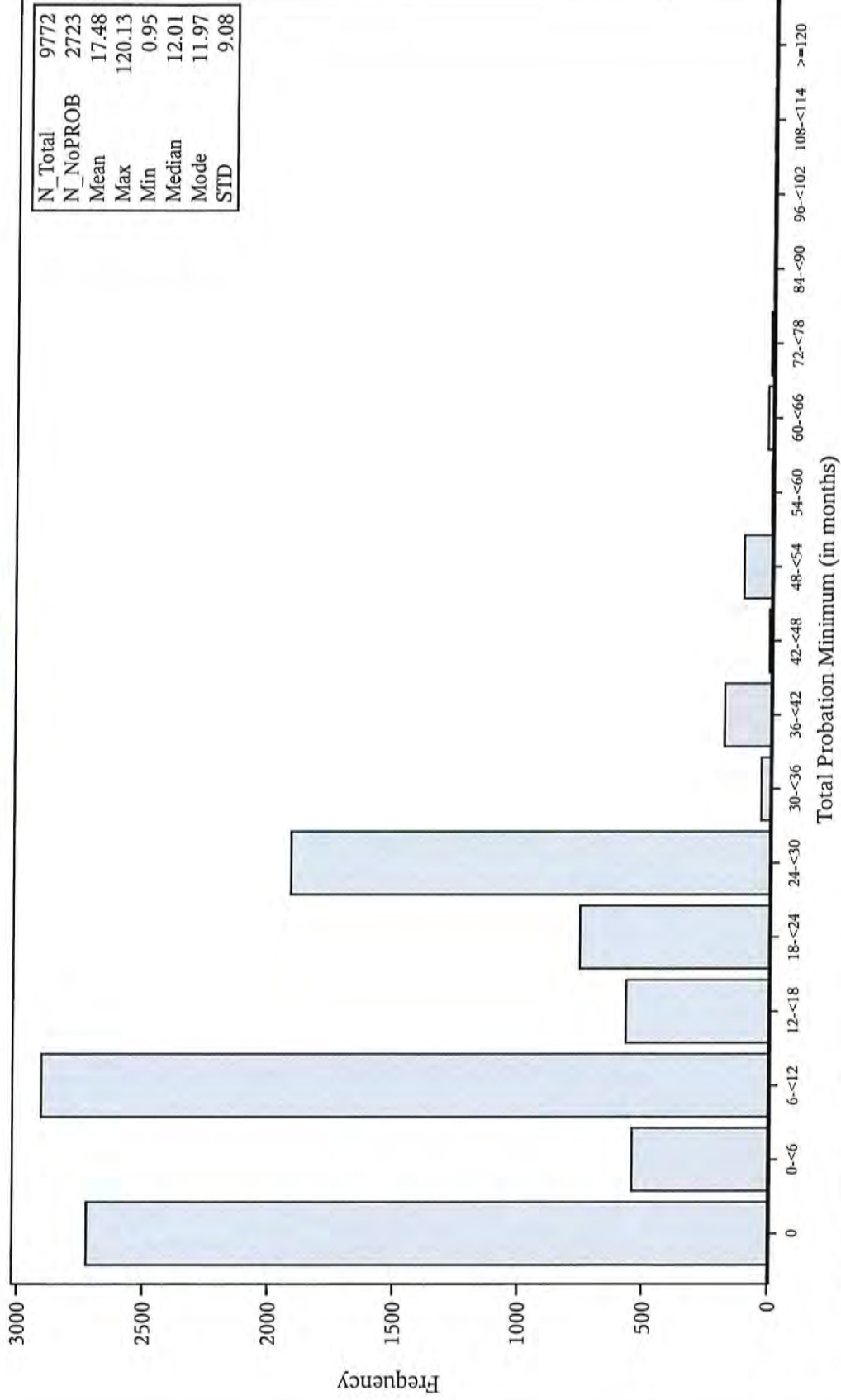
**For year of 2018, using jandec2018 datafile
 Data in this report are based upon information reported to the Commission on Sentencing by County of Common Pleas.
 The Commission relies upon the Courts for accuracy and completeness of the data.

Pennsylvania Commission on Sentencing

TOTAL PROBATION MINIMUM in months by GRADE, NonDUI offenses ONLY, Pennsylvania, 2018**

Unit of Analysis: Most serious offense in Judicial Proceeding (after excluding duplicate JPs and LIFE/DEATH sentences)
 Tracking Number: 2019_06_000

OFFENSE GRADE: M-2

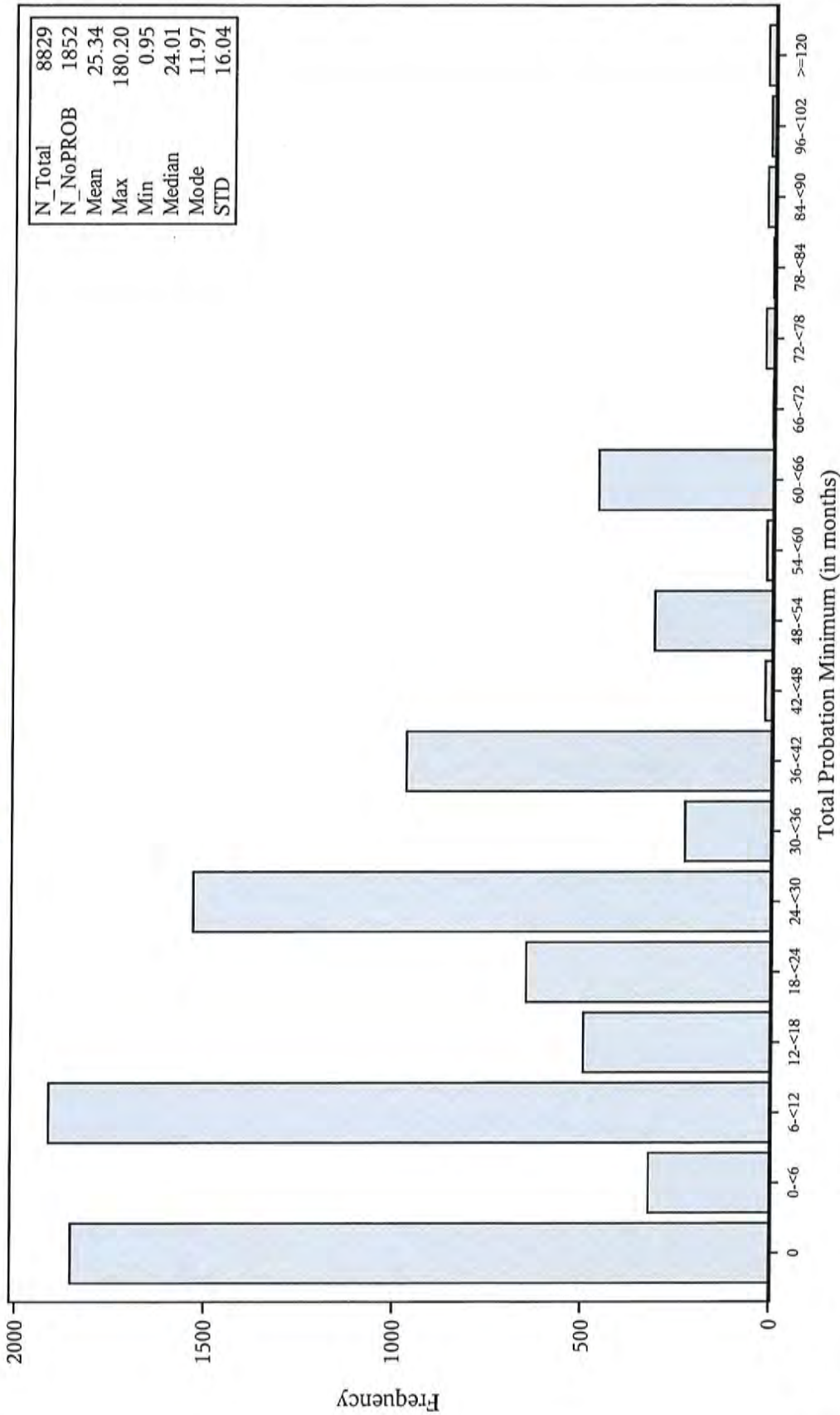


N_Total	9772
N_NoPROB	2723
Mean	17.48
Max	120.13
Min	0.95
Median	12.01
Mode	11.97
STD	9.08

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Pennsylvania Commission on Sentencing
TOTAL PROBATION MINIMUM in months by GRADE, NonDUI offenses ONLY, Pennsylvania, 2018**
 Unit of Analysis: Most serious offense in Judicial Proceeding (after excluding duplicate JPs and LIFE/DEATH sentences)
 Tracking Number: 2019_06_000

OFFENSE GRADE: M-1



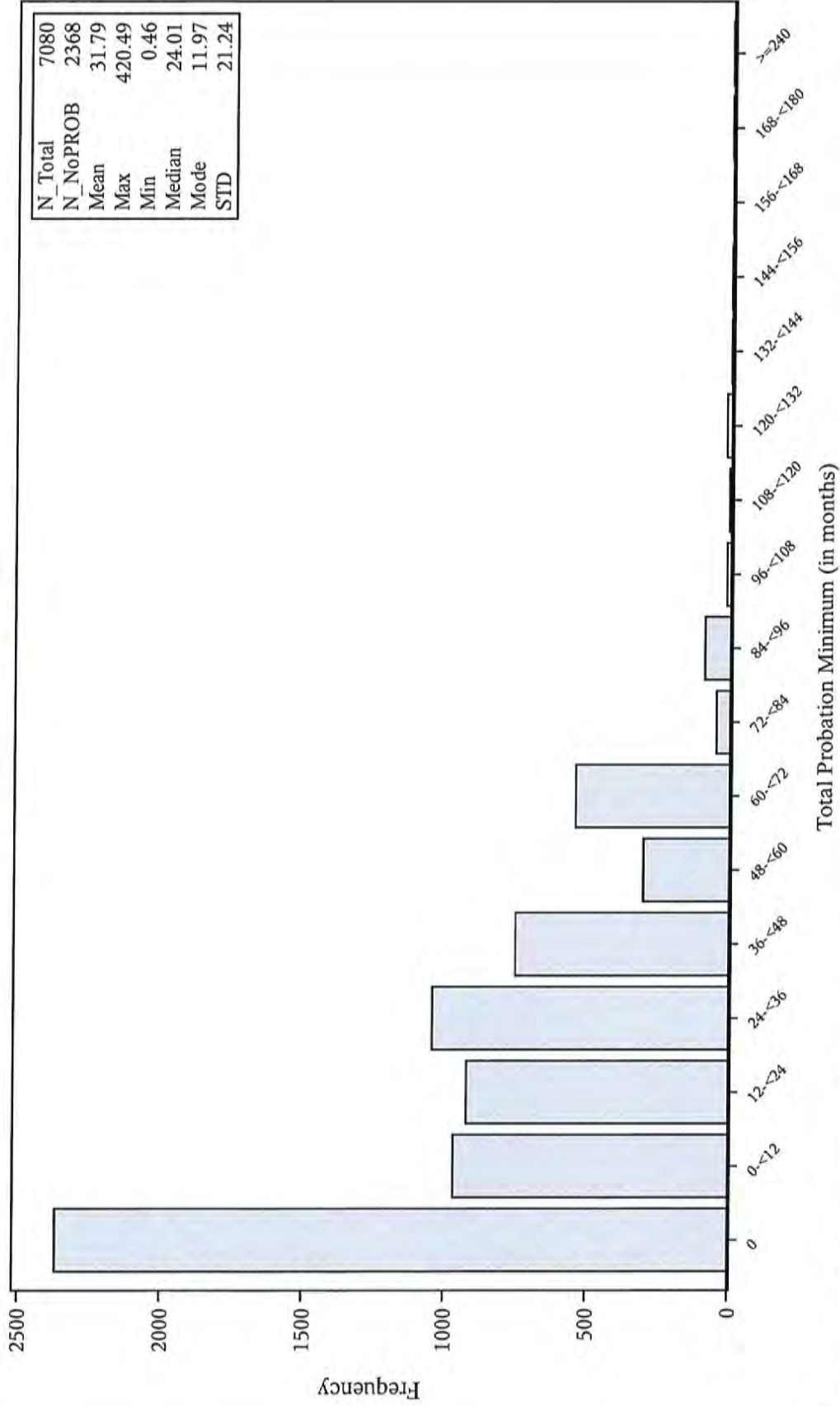
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Pennsylvania Commission on Sentencing

TOTAL PROBATION MINIMUM in months by GRADE, NonDUI offenses ONLY, Pennsylvania, 2018**

Unit of Analysis: Most serious offense in Judicial Proceeding (after excluding duplicate JPs and LIFE/DEATH sentences)
 Tracking Number: 2019_06_000

OFFENSE GRADE: F-3



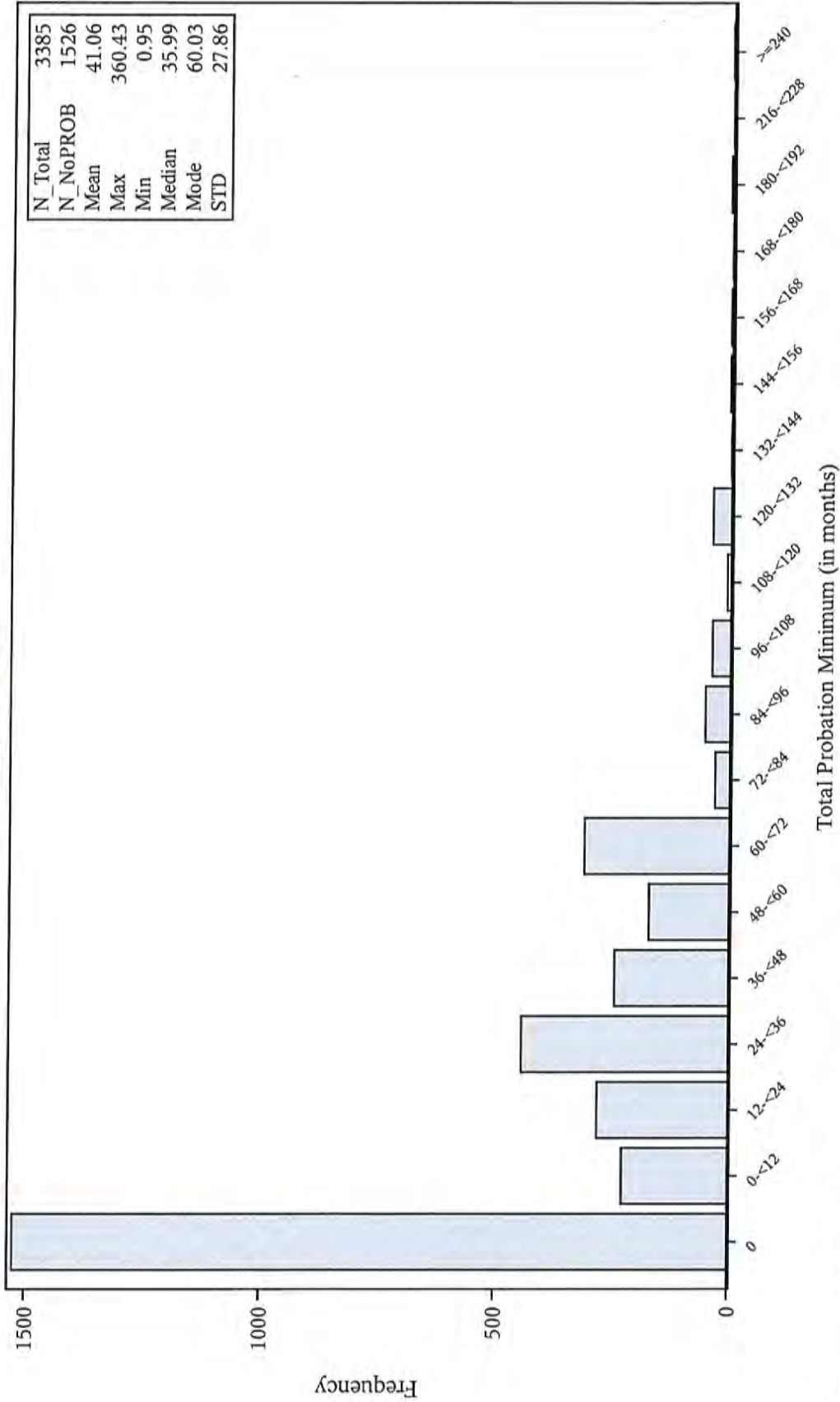
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Pennsylvania Commission on Sentencing

TOTAL PROBATION MINIMUM in months by GRADE, NonDUI offenses ONLY, Pennsylvania, 2018**

Unit of Analysis: Most serious offense in Judicial Proceeding (after excluding duplicate JPs and LIFE/DEATH sentences)
 Tracking Number: 2019_06_000

OFFENSE GRADE: F-2



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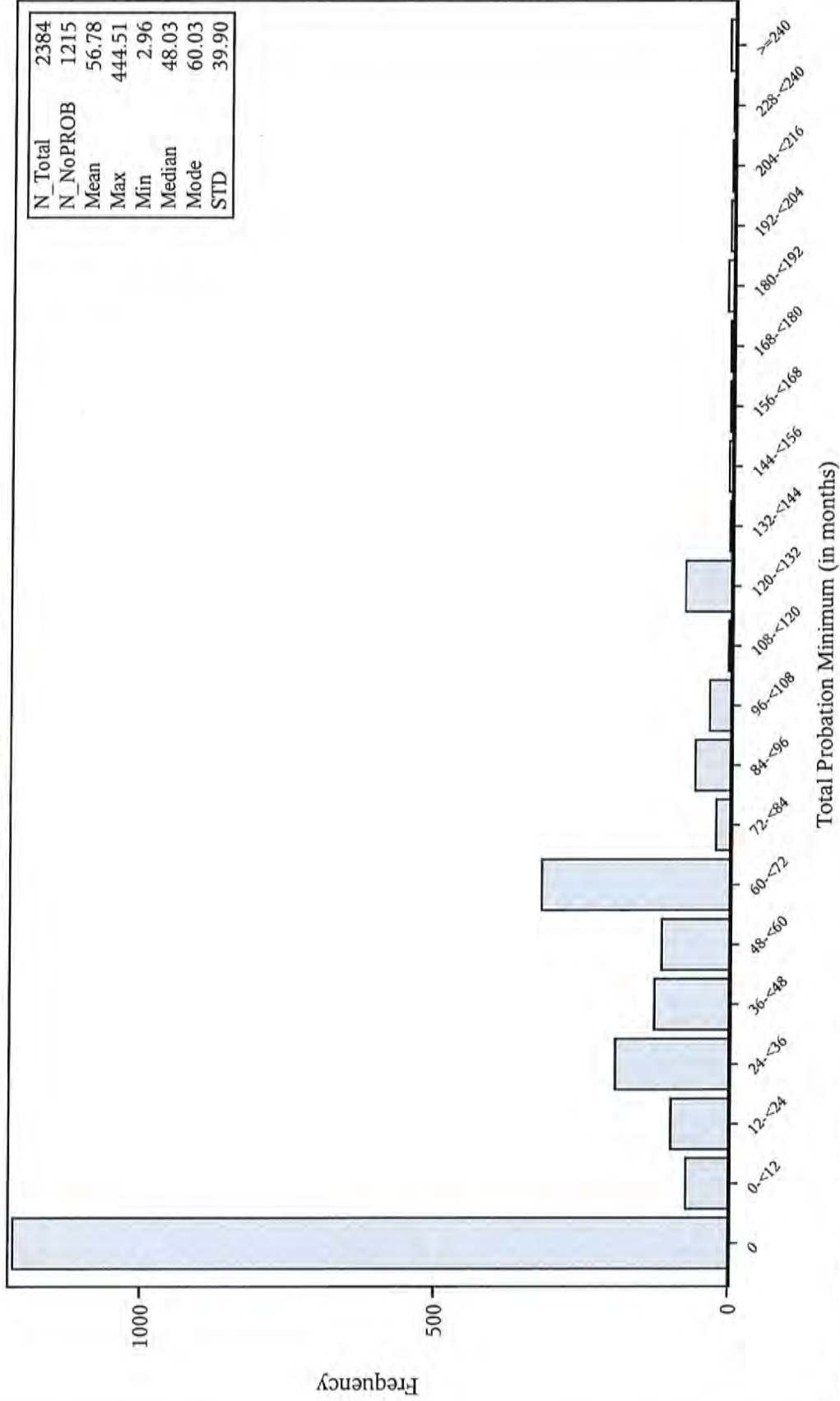
Pennsylvania Commission on Sentencing

TOTAL PROBATION MINIMUM in months by GRADE, NonDUI offenses ONLY, Pennsylvania, 2018**

Unit of Analysis: Most serious offense in Judicial Proceeding (after excluding duplicate JPs and LIFE/DEATH sentences)

Tracking Number: 2019_06_000

OFFENSE GRADE: F-1



**For year of 2018, using jandec2018 datafile

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Pennsylvania Commission on Sentencing
Senate Judiciary Committee, Public Hearing on Probation and Parole
June 29, 2019

Probation Frequencies

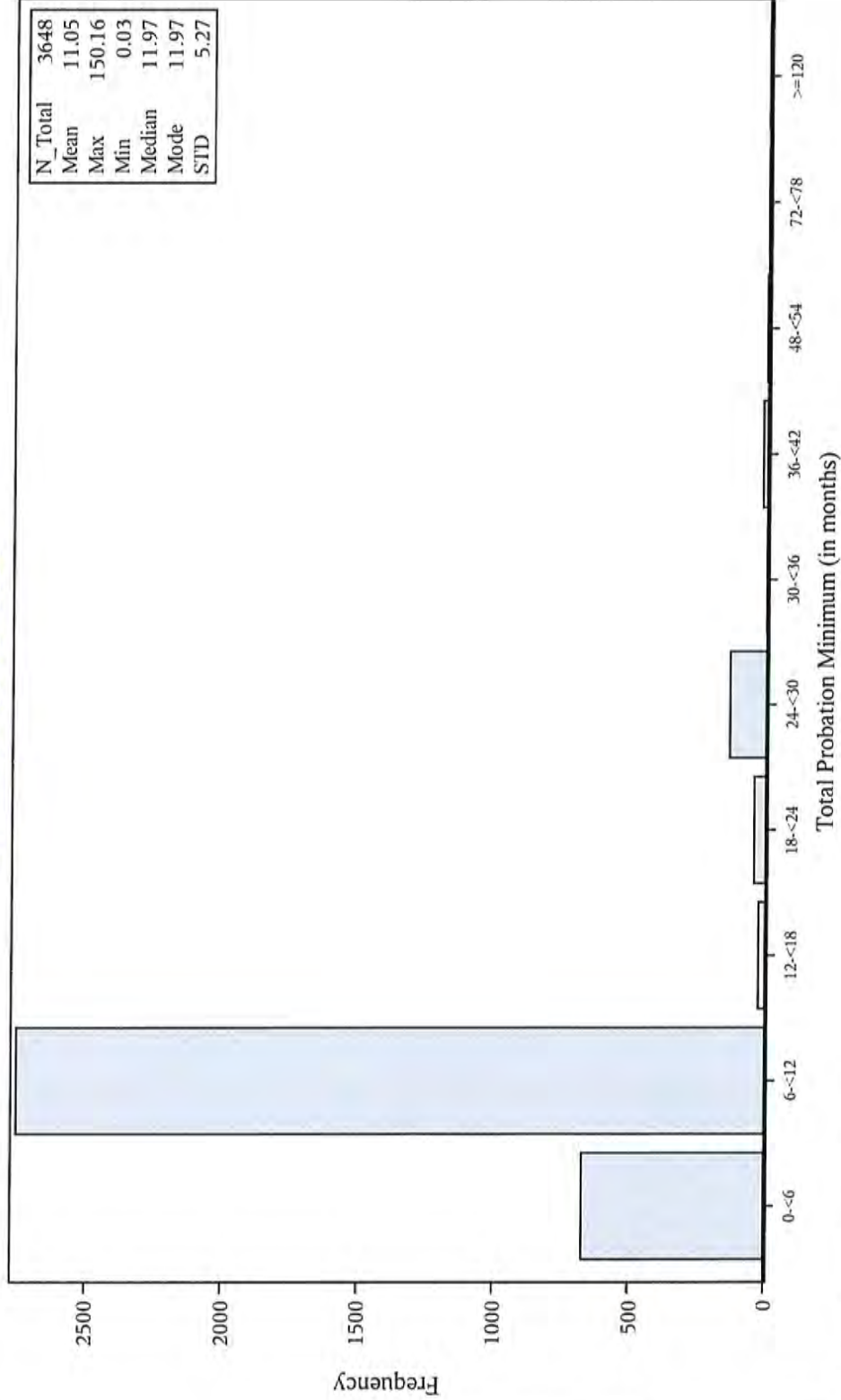
Preliminary Sentencing Data (2018)
- Probation Utilization
(excluding split sentences)

Pennsylvania Commission on Sentencing

TOTAL PROBATION MINIMUM in months by GRADE, NonDUI offenses ONLY, Pennsylvania, 2018**

Unit of Analysis: Most serious offense in Judicial Proceeding that contains PROBATION ONLY(after excluding duplicate JPs and LIFE/DEATH sentences)
Tracking Number: 2019_06_000B

OFFENSE GRADE: M-3



**For year of 2018, using preliminary datafile

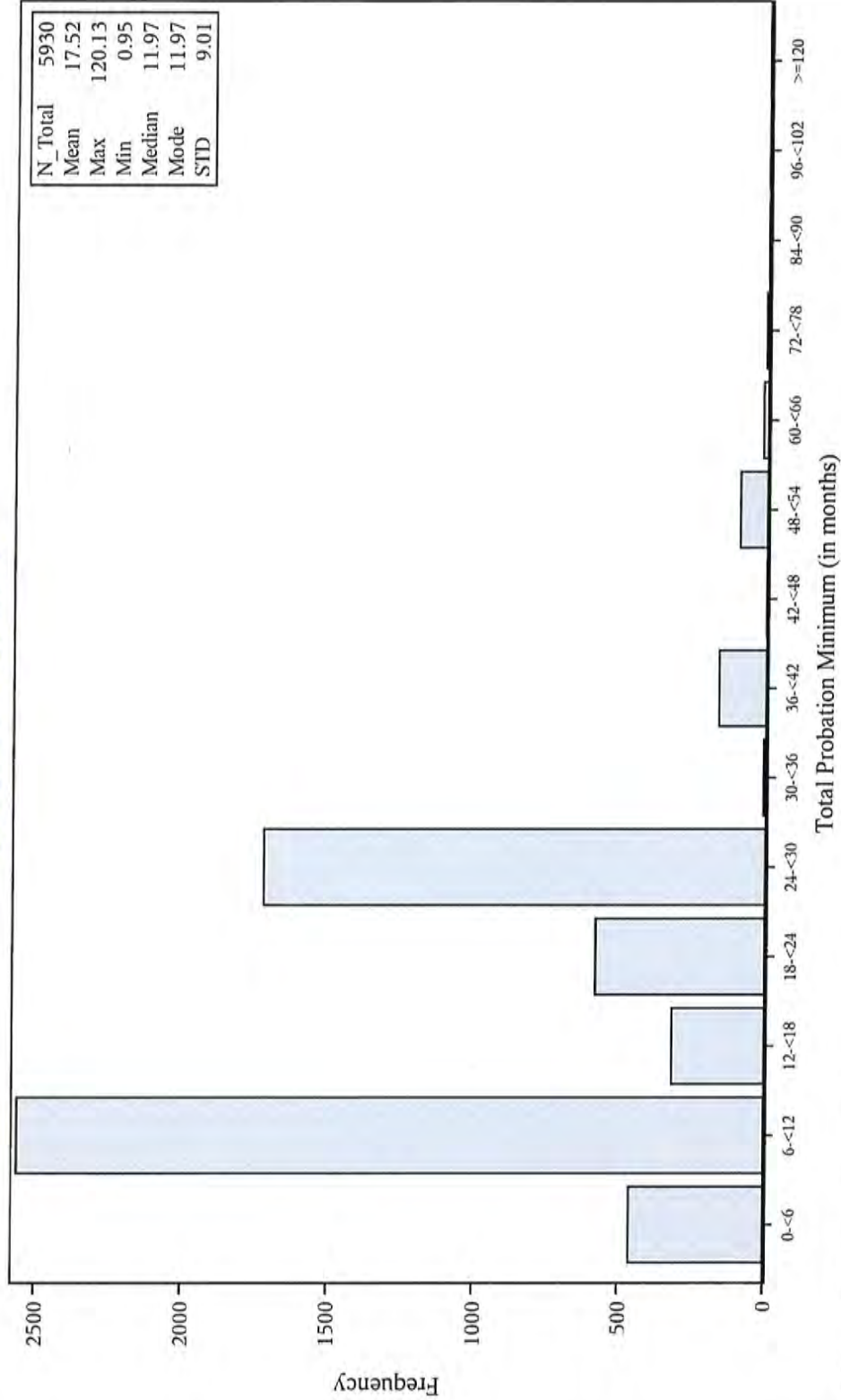
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Pennsylvania Commission on Sentencing

TOTAL PROBATION MINIMUM in months by GRADE, NonDUI offenses ONLY, Pennsylvania, 2018**

Unit of Analysis: Most serious offense in Judicial Proceeding that contains PROBATION ONLY (after excluding duplicate JPs and LIFE/DEATH sentences)
Tracking Number: 2019_06_000B

OFFENSE GRADE: M-2



N_Total	5930
Mean	17.52
Max	120.13
Min	0.95
Median	11.97
Mode	11.97
STD	9.01

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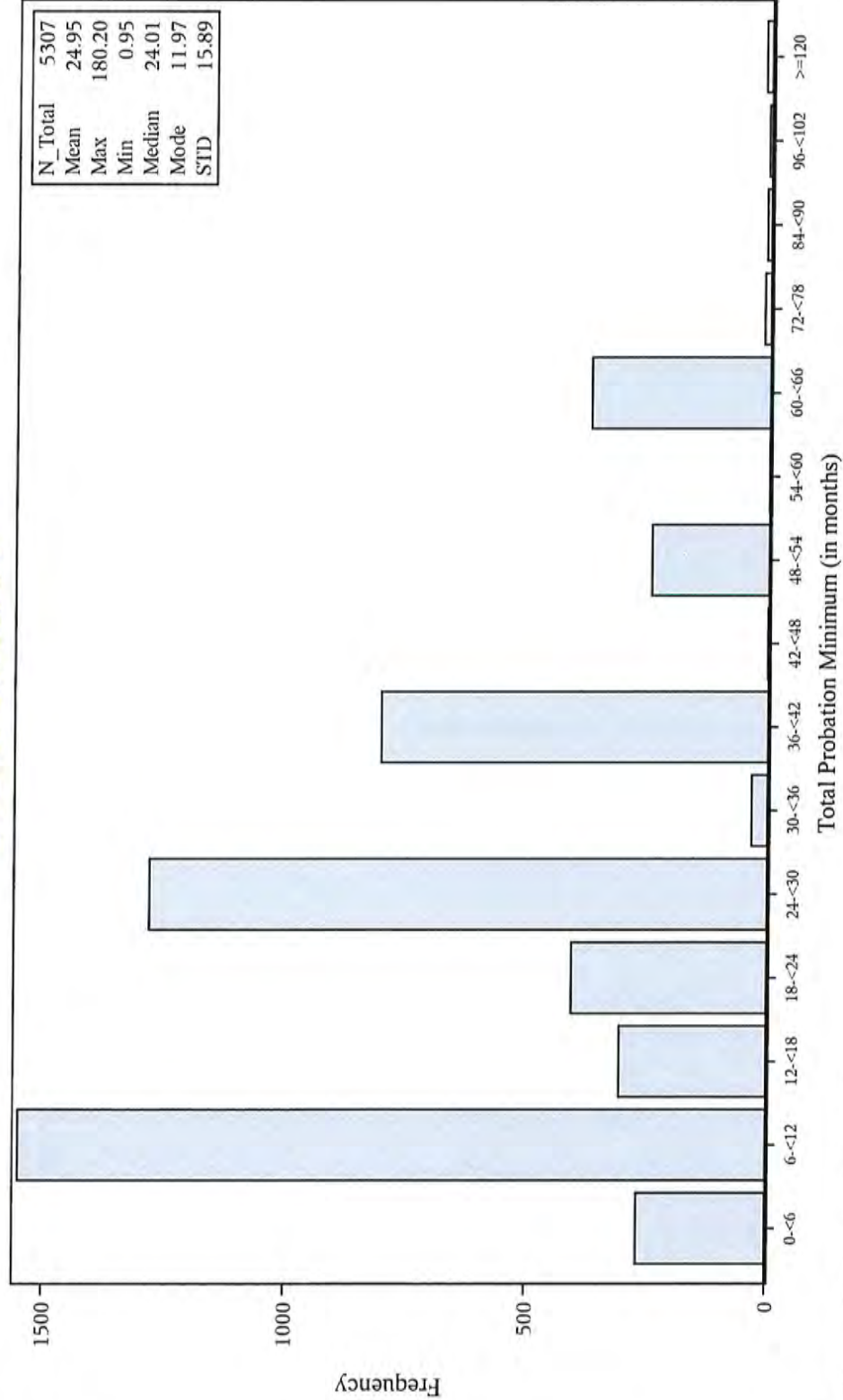
Pennsylvania Commission on Sentencing

TOTAL PROBATION MINIMUM in months by GRADE, NonDUI offenses ONLY, Pennsylvania, 2018**

Unit of Analysis: Most serious offense in Judicial Proceeding that contains PROBATION ONLY(after excluding duplicate JPs and LIFE/DEATH sentences)

Tracking Number: 2019_06_000B

OFFENSE GRADE: M-1



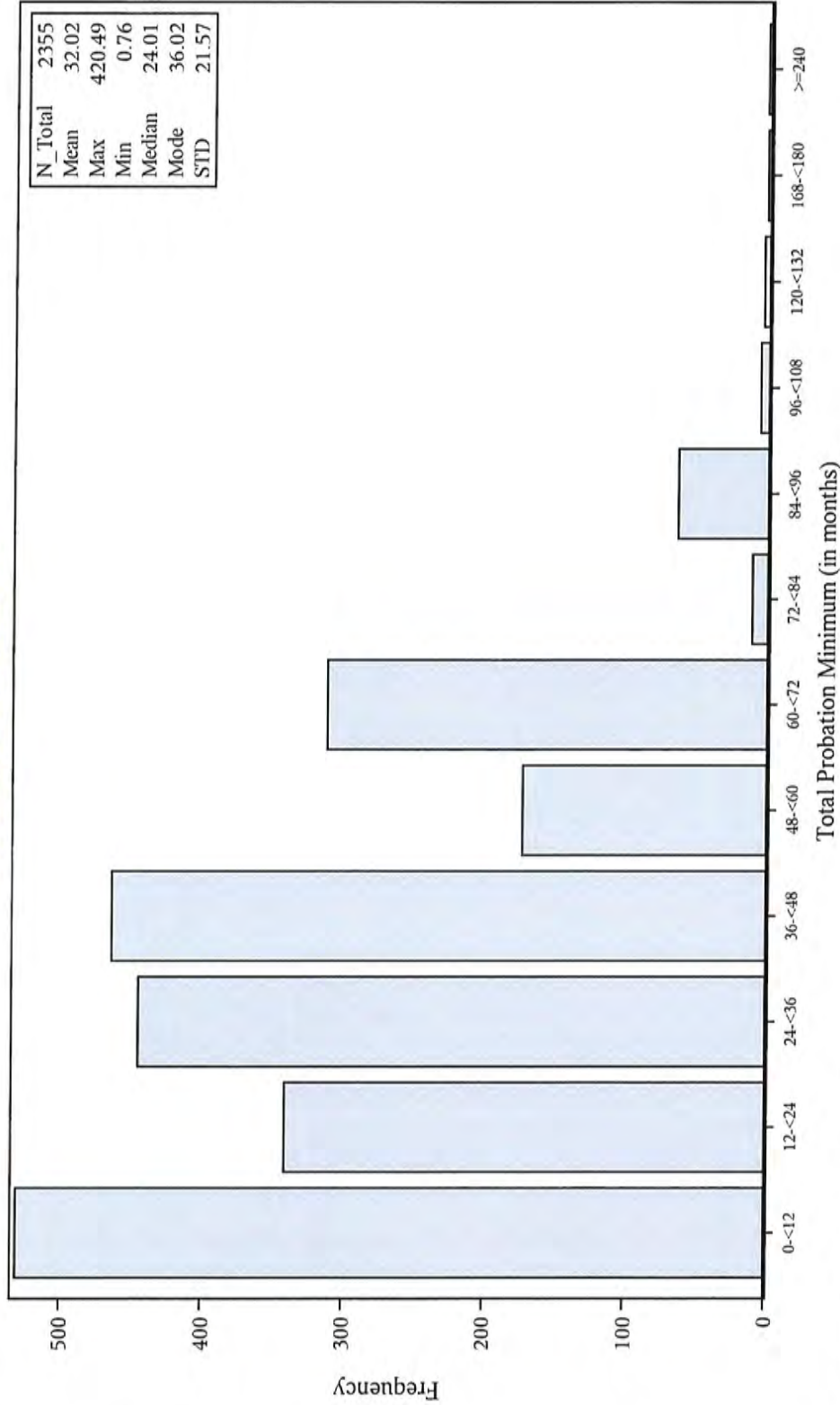
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OFFENSE GRADE: F-3



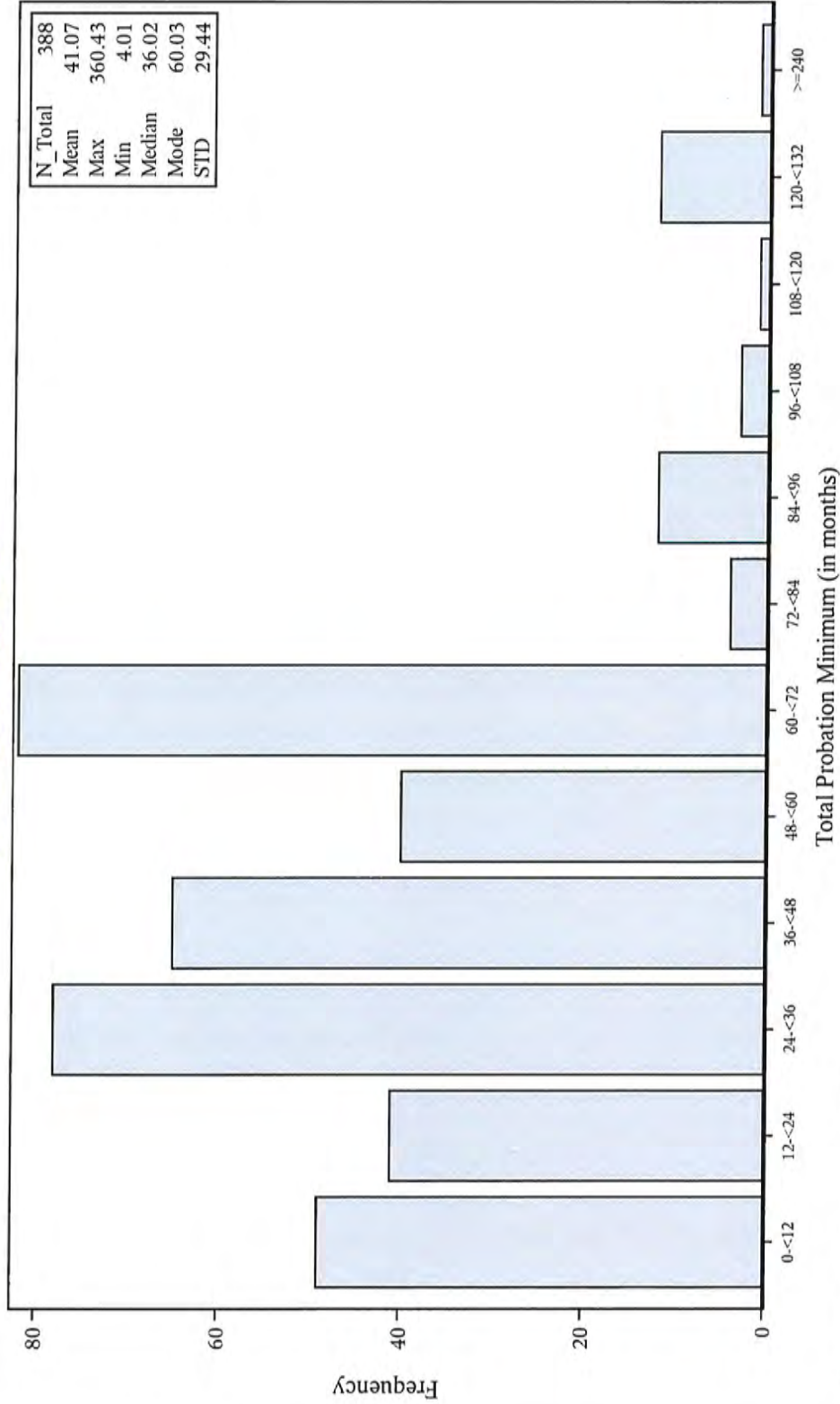
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Unit of Analysis: Most serious offense in Judicial Proceeding that contains PROBATION ONLY (after excluding duplicate JPs and LIFE/DEATH sentences)
Tracking Number: 2019_06_000B

OFFENSE GRADE: F-2



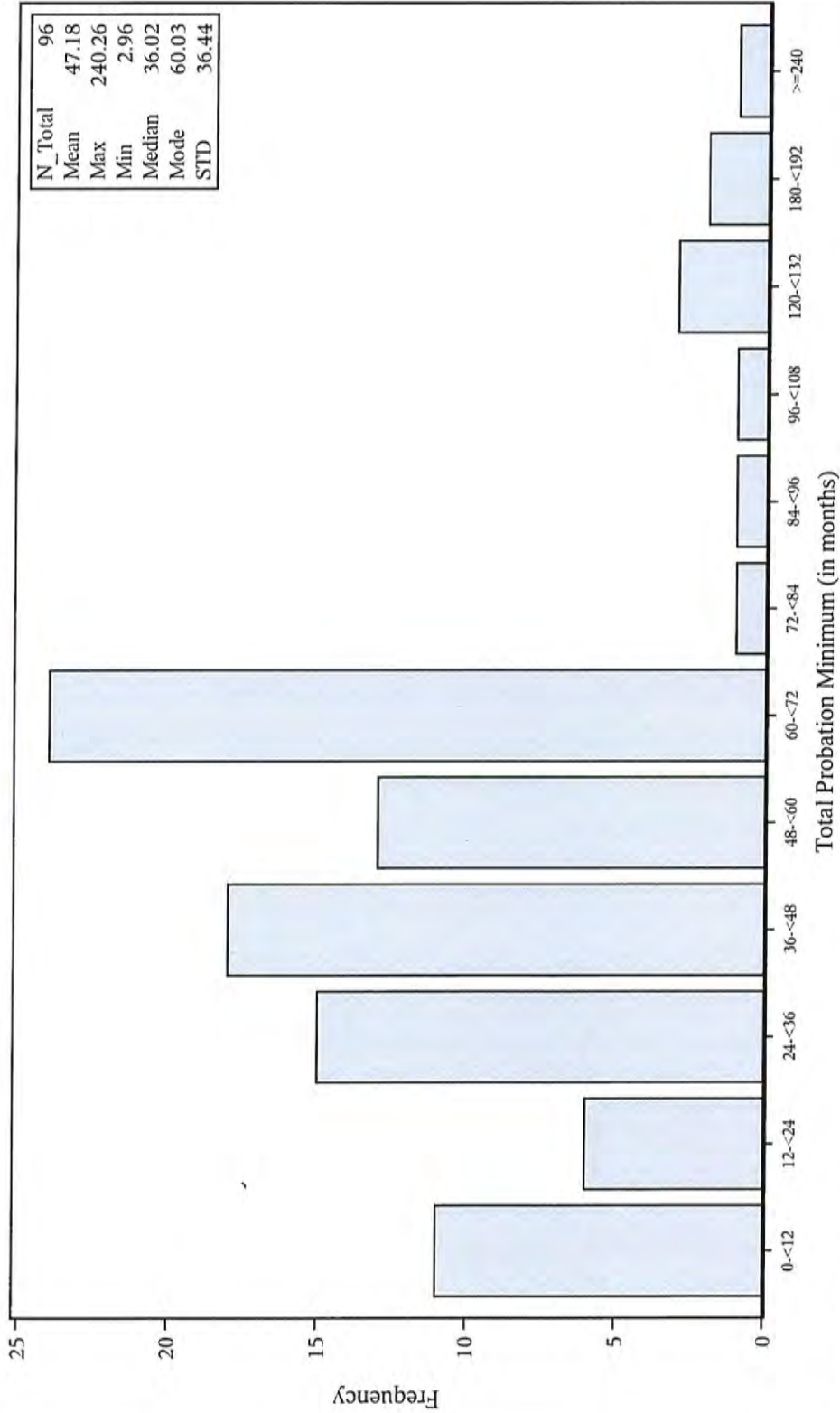
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Unit of Analysis: Most serious offense in Judicial Proceeding that contains PROBATION ONLY (after excluding duplicate JPs and LIFE/DEATH sentences)
Tracking Number: 2019_06_000B

OFFENSE GRADE: F-1



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