Split Sentences for Habitual DWI?

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The folks at DOC combined records tell us they see a lot of habitual impaired driving judgments that look like this: 15 - 18 months, suspended, with an intermediate condition of special probation (i.e., a split sentence) requiring an active term of 12 months in DOC custody.

DOC thinks that's an illegal sentence. We think they might be right.

The punishment provision of the habitual impaired driving statute, G.S. 20-138.5(b), says:

A person convicted of violating this section shall be punished as a Class F felon and **shall be sentenced to a minimum active term of not less than 12 months of imprisonment, which shall not be suspended**. Sentences imposed under this subsection shall run consecutively with and shall commence at the expiration of any sentence being served.

So the question is, does G.S. 20-138.5(b) mean that habitual DWI sentences can't be suspended at all? Or does it just mean at least 12 months of the sentence must not be suspended.

We think it probably means that habitual DWI sentences can't be suspended at all. That appears to be the clearer reading of the plain language of the statute, and the reading that avoids a conflict with G.S. 15A-1351(a), which would ordinarily cap the active portion of a split at one-fourth the maximum sentence imposed (a little over four months in our example above). Moreover, the other reading of the law appears to misunderstand the nature of special probation. The entirety of a split sentence technically is "suspended," not just the part served outside the jail or prison. The period of imprisonment is a condition of probation, not a residual "unsuspended" portion of an active sentence. Thus, we read the command in G.S. 20-138.5(b) that habitual DWI sentences "shall not be suspended" to mean that active punishment is required. In essence, you can cross out the "I" in any "I/A" block into which a habitual DWI defendant might fall on the sentencing grid.

A panel of the Court of Appeals thought otherwise in *State v. Groce*, 187 N.C. App. 510 (2007) (unpublished). In that case the court upheld a 12-month split sentence for a habitual DWI, reasoning that G.S. 20-138.5 and G.S. 15A-1351 *are* in conflict, and thus the later-enacted statute-which happens to be G.S. 20-138.5-should control. Moreover, the court pointed out, the specific controls the general, and G.S. 20-138.5 therefore ought to control a habitual impaired driving sentence.

If *Groce* were a published opinion, it obviously would be the law. But given that it isn't, we think the better reading of the law is that habitual DWI requires active punishment. The General Assembly knows how to create a sentencing regime where the active component of a split sentence can satisfy a mandatory minimum term of imprisonment-that's precisely what it did with respect to misdemeanor DWI sentencing. G.S. 20-179(g)-(k) ("The term of imprisonment may be suspended only if a condition of special probation is imposed to require the defendant to serve a term of imprisonment of at least [insert relevant time, depending on punishment level].").

Your thoughts?