## NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL OF FLORIDA SECOND DISTRICT

DONALD E. WILSON,	)
Appellant,	) )
٧.	)
STATE OF FLORIDA,	)
Appellee.	) )

Case No. 2D18-4662

Opinion filed November 22, 2019.

Appeal pursuant to Fla. R. App. P. 9.141(b)(2) from the Circuit Court for Hillsborough County; Christopher Nash, Judge.

Donald E. Wilson, pro se.

BADALAMENTI, Judge.

Donald E. Wilson appeals the summary denial of his motion to modify

probation. Generally, an order denying a motion for modification of probation is not

appealable. See Wesner v. State, 843 So. 2d 1039, 1040 (Fla. 2d DCA 2003).

However, such an order is subject to certiorari review when the lower court bases its

denial on the mistaken belief that it did not have jurisdiction to consider the motion. Id.

As this is the circumstance here, we treat this appeal as a petition for writ of certiorari

and grant the petition.

In summarily denying the motion, the postconviction court found that it lacked jurisdiction to modify Mr. Wilson's sentence pursuant to Florida Rule of Criminal Procedure 3.800(c) and that his motion was premature because he has not yet begun the probationary period of his sentence. However, Mr. Wilson did not file his motion pursuant to rule 3.800(c). He instead filed his motion pursuant to section 948.03(2), Florida Statutes (2017), which states that "[t]he court may rescind or modify <u>at any time</u> the terms and conditions theretofore imposed by it upon the probationer." (Emphasis added.) By concluding that it did not have the discretion to modify Mr. Wilson's probation, the trial court departed from the essential requirements of law. Accordingly, we grant the petition for writ of certiorari and quash the order denying modification of probation. We express no opinion as to the merits of Mr. Wilson's modification of probation request.

Petition granted; order denying modification of probation quashed.

KELLY and LUCAS, JJ., Concur.