NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES. See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. SHYRON LEE THOMAS, Petitioner.	2 CA-CR 2008-0201-PR DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-58988

Honorable Frank Dawley, Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

Barbara LaWall, Pima County Attorney
By Jacob R. Lines — Tucson
Attorneys for Respondent

Law Offices of Eric A. Larsen
By Eric A. Larsen — Tucson
Attorney for Petitioner

E C K E R S T R O M, Presiding Judge.

¶1 Following a jury trial, petitioner Shyron Thomas was convicted of one count of manslaughter and three counts of aggravated assault. The trial court sentenced him to concurrent, presumptive prison terms of 7.5 years on the aggravated assault counts, to be served consecutively to a presumptive, 10.5-year term of imprisonment for manslaughter. This court affirmed the convictions and sentences on appeal. *State v. Thomas*, No. 2 CA-CR 2003-0252 (memorandum decision filed Aug. 4, 2005). Thomas now challenges the trial court's order denying his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb a trial court's denial of relief absent an abuse of discretion. *See State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990).

¶2 Thomas contends the trial court abused its discretion by denying his claim that appellate counsel had been ineffective because he had failed to challenge, as having resulted in fundamental error, the instruction to the jury on manslaughter as a lesser included offense of second-degree murder. To state a colorable claim of ineffective assistance of appellate counsel, Thomas was required to show that counsel's failure to raise the alleged illegality of the instruction constituted deficient performance and a reasonable probability existed that, but for counsel's deficient performance, the outcome of the appeal would have been different. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Herrera*, 183 Ariz. 642, 647, 905 P.2d 1377, 1382 (App. 1995). In denying Thomas's petition, the court determined he had "fail[ed] to establish cause for relief." We agree.

¶3 Thomas relies exclusively on *Peak v. Acuna*, 203 Ariz. 83, 50 P.3d 833 (2002), for the proposition that, although "reckless manslaughter" is a lesser included offense of second-degree murder, "heat of passion manslaughter is not."[1] But the court in *Peak* did not so hold. Rather, the supreme court there addressed only whether double jeopardy principles barred a retrial on a charge of second-degree murder when the defendant had been acquitted in her first trial of manslaughter. *Id*. ¶¶ 4-5.

¶4 The defendant in *Peak* had been charged with first-degree murder following the death of her husband. *Id*. ¶ 2. The jury was instructed on first- and second-degree murder as well as manslaughter; it found the defendant guilty of second-degree murder but acquitted her of first-degree murder and manslaughter. *Id*. After the trial court granted the defendant's motion for a new trial under Rule 24.1, Ariz. R. Crim. P., the defendant moved to dismiss the second-degree murder charge "because of the acquittal on the lesser-included offense of manslaughter." *Peak*, 203 Ariz. 83, ¶ 4, 50 P.3d at 834.

¶5 The supreme court stated that "[a] lesser-included offense is one that contains all but one of the elements of the greater offense. Logically, therefore, if one has not committed the lesser offense, one cannot have committed the greater." *Id*. ¶ 5. But it noted that "the relevant statute . . . is unusual" in that, "[i]nstead of deleting an element of the greater offense, it specifies a different circumstance as a requirement to find the lesser

[1]The trial court apparently instructed the jury on both methods of committing manslaughter.

offense." *Id*. ¶ 6. The court reasoned that the "Defendant's acquittal of manslaughter d[id] not necessarily mean that she did not commit second-degree murder" because the jury might have found the "Defendant had not acted after a sudden quarrel or in the heat of passion." *Id*. It concluded, therefore, "that retrial [wa]s not barred by double jeopardy." *Id*.

¶6 Although the court noted the "unusual" nature of the relationship between second-degree murder and manslaughter, it did not address whether manslaughter committed upon a sudden quarrel or heat of passion was a lesser included offense of second-degree murder much less hold that a lesser included instruction for that type of manslaughter would be improper when the state has charged a defendant with second-degree murder. *Id*. Notably, while addressing the double jeopardy question before it, the court continued to refer to "heat of passion" manslaughter as a "lesser" offense of second-degree murder. *Id*.

¶7 Thus, appellate counsel did not perform deficiently in failing to argue that the manslaughter instruction was illegal under *Peak*; nor was Thomas prejudiced by counsel's failure to raise such a claim, given that he would not have obtained relief on appeal had he raised this issue. Therefore, although we grant Thomas's petition for review, we deny relief.

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PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

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PHILIP G. ESPINOSA, Judge

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GARYE L. VÁSQUEZ, Judge