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STATE OF NEBRASKA, APPELLEE, V. KEVIN W. MALONE, APPELLANT.

___ N.W.2d ___

Filed June 4, 2021. Nos. S-20-118, S-20-460.

SUPPLEMENTAL OPINION

Appeals from the District Court for Douglas County: SHELLY R. STRATMAN, Judge. Former opinion modified. Motion for rehearing overruled.

Richard L. Boucher and Bradley H. Supernaw, of Boucher Law Firm, for appellant.

Douglas J. Peterson, Attorney General, and Melissa R. Vincent for appellee.

HEAVICAN, C.J., MILLER-LERMAN, CASSEL, STACY, FUNKE, PAPIK, and FREUDENBERG, JJ.

PER CURIAM.

This case is before us on a motion for rehearing filed by the appellant, Kevin W. Malone, concerning our opinion in *State v. Malone*, 308 Neb. 929, 957 N.W.2d 892 (2021). We find no substantive merit to Malone's motion and overrule it, but modify the opinion as follows:

In the analysis section, under the heading "2. POSTCONVICTION RELIEF" and the subheading "(b) Claim of Prosecutorial Misconduct," *id.* at 962, 957 N.W.2d at 920, we withdraw the second paragraph and substitute the following:

The district court first rejected this argument as procedurally barred. However, Malone had amended his motion to add an allegation that his appellate counsel had been ineffective for failing to raise the claims of prosecutorial misconduct on direct appeal. The district court alternatively rejected Malone's claim, reasoning that even if not procedurally barred, the claim failed to "set forth the facts and applicable law to establish an objection based on any of these prosecutorial [misconduct] claims would . . . have been successful." We agree.

The remainder of the opinion shall remain unmodified.

FORMER OPINION MODIFIED.

MOTION FOR REHEARING OVERRULED.