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I. INTRODUCTION

Recent Nebraska cases, such as State v. Case,¹ raise the issue of whether the bill of particulars will have continued vitality in child sexual assault cases. In child sexual assault cases, courts generally have relaxed certain procedural standards while still seeking to preserve the defendant’s right to due process.² The bill of particulars accomplishes this purpose by allowing a defendant to file a motion for a bill of particulars to force the prosecution to set forth the time, place, manner, and means of the crime charged. The purpose of this procedural device is to provide the defendant with sufficient notice of the charges against him so he may prepare his defense.

With specific reference to the protection of double jeopardy, Nebraska courts have recognized in child sexual assault cases a “blanket bar” to a second prosecution for assaults committed against the same victim within the same time frame.³ This blanket bar is intended to relax the requirement that the prosecution allege specific acts with particularity, while protecting a defendant against prosecution for any act committed within the time frame alleged. Courts sometimes hold that a defendant’s right to a bill of particulars is adequate protection from vague allegations of sexual assault⁴ because a prosecutor is forced to particularize what alleged acts the defendant committed within a specific time frame. If there is a blanket bar, however, a prosecutor may, in a single count, allege an indefinite series of acts occurring within a specific time frame without being required to furnish any particulars. Therefore, in this class of cases the blanket bar makes a bill of particulars superfluous.

². See, e.g., NEB. REV. STAT. § 29-1926 (Reissue 1995)(establishing procedures for use of videotaped testimony of child victims); Idaho v. Wright, 497 U.S. 805 (1990)(allowing use of videotaped testimony of child victims); State v. Craig, 219 Neb. 70, 76, 361 N.W.2d 206, 212 (1985)(admitting evidence of uncharged misconduct because “evidence of repeated incidents may be especially relevant in proving sexual crimes committed against persons otherwise defenseless due to age—either the very young or the elderly”).
⁴. See, e.g., State v. Lawrinson, 551 N.E.2d 1261 (Ohio 1990)(holding that in a prosecution for gross sexual imposition of a minor, the State was required to furnish the defendant with a bill of particulars identifying the specific week during which the offense could have occurred, when the State had access to evidence that allowed the State to narrow the date to within one week, and when the defendant was prepared to submit evidence supporting his assertion that he could account for much of his time during the week in question and the bill was essential to the defendant’s alibi defense).
Two aspects of these cases may concern courts, prosecutors, and defense attorneys. The first aspect is the limitation on a defendant's right to a bill of particulars. Second, these cases limit the State's right to bring separate prosecutions for a series of transactions, and courts may extend this limitation to criminal cases other than child sexual assault cases. If these concerns have merit, then a defendant will have difficulty receiving a bill of particulars, and prosecutors will lose their traditional discretion to bring separate prosecutions for each offense in a series of offenses.

This Article discusses the bill of particulars in recent child sexual assault cases. Part II provides a criticism of recent cases, emphasizing whether it was necessary for the courts to forge a new jurisprudence on the subject of bills of particulars. Part III discusses the history of the bill of particulars in Nebraska. Part IV identifies the specific problem giving rise to this change in the law. Finally, Part V concludes with proposals for future treatment of these issues.

II. RECENT DEVELOPMENTS

A. State v. Quick: The Problem Stated

This Part discusses recent Nebraska cases on the bill of particulars and concludes that courts have engaged in an unprecedented revision of prior holdings. This revision of Nebraska jurisprudence on the bill of particulars began in State v. Quick.

1. Quick and the "Clear Record" Rule

In Quick, the State charged the defendant with one count of first degree sexual assault under section 28-319(1)(c) of the Nebraska statutes. The State alleged that the defendant, Gary Quick, subjected his mentally retarded daughter to sexual penetration. Originally, the State alleged the abuse occurred during a period from March 27, 1988 to April 9, 1988. By selecting this time frame, the State intended to cover the last in a series of sexual assaults described by the child victim. The victim reported to authorities that Quick had abused her approximately four times. The victim stated in a pretrial deposition

5. The limitation referred to is not explicitly stated in the cases, but can be inferred because after Martinez II, no defendant can claim denial of a bill of particulars will cause prejudice based solely on the Sixth Amendment. See State v. Martinez, 250 Neb. 597, 550 N.W.2d 655 (1996).


that the last of the four assaults occurred within one week of April 9, 1988. At trial, the State intended to prove the fourth and final assault, although the State offered evidence of the series of four assaults.

During the trial, the victim stated that when all four assaults occurred, her father would feign a heart attack and then would be transported by rescue squad to the hospital. But, the records of the emergency medical personnel reflected only two occasions when Quick was transported by rescue squad in 1987: on April 26 and August 4. At the conclusion of the State's case, the State moved to amend the information to conform to the evidence by changing the beginning date of the time period from March 27, 1988 to April 25, 1987. This expanded the time frame from two weeks to almost one year within which the alleged sexual assault might have occurred.

The defendant was convicted and appealed, assigning as error the trial court's ruling to allow the amendment of the information. In deciding the issues involved in the appeal, the court applied State v. Piskorski. The facts in Piskorski involved a complaint in county court that initially charged that "[o]n or about December, 1982... Piskorski... subject[ed] [the victim] to sexual penetration... in violation of Section 28-319(1)(a).". The next day, the State filed an amended complaint. The State then filed an information particularizing the time frame to allege that the offense had occurred "[o]n or after December 11, 1982 and before December 25, 1982." Before trial, Piskorski's motion to quash the information as too vague was denied, and the trial began. At the close of the State's case, the information was amended over objection to further expand the time frame "to allege that the assault occurred on or after September 1, 1982, and before December 25, 1982."

On appeal to the Nebraska Supreme Court, Piskorski argued that because the State introduced evidence of several occasions between September and December when Piskorski may have assaulted the victim, he could not know which specific act was involved in his conviction and which act was barred. The supreme court found this argument meritless, stating that a defendant "may go outside the in-

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8. While the State thought it would prove just one assault, the court did not find this persuasive on the double jeopardy issue.
10. Id. at 544, 357 N.W.2d at 208-09.
11. The only difference between the two complaints was that in the amended complaint the name of the victim was deleted and the State alleged that the crime was committed by subjecting a person younger than 16 years of age to sexual penetration in violation of § 28-319(1)(c), rather than § 28-319(1)(a). See Neb. Rev. Stat. § 28-319(1)(a), (c) (Reissue 1995).
13. Id.
formation itself to determine what charge the conviction was based
upon in order to raise it as a bar to a subsequent prosecution."\(^{14}\)

The court found that in Piskorski's case, the jury had been
instructed that it could arrive at a guilty verdict based only on an inci-
dent when the mother was present, and the child's testimony could be
corroborated.\(^{15}\) The jury had been instructed not to consider any
other incident described in the child's testimony because such inci-
dents "completely lack[ed] any corroboration and the defendant was
never identified as the actor therein."\(^{16}\) In short, the record was clear
that only one incident occurred when the mother was present, and
thus the defendant could determine which act resulted in the convic-
tion and thus was a bar to further prosecution.\(^{17}\)

The appeals court in \textit{Quick} distinguished \textit{Piskorski} on the ground
that in \textit{Piskorski}, "the Supreme Court recited facts specific to the rec-
ord in Piskorski's case that clearly identified the particular act for
which Piskorski was convicted."\(^{18}\) By contrast, in \textit{Quick}, the court of
appeals could not determine from the record the occasion of alleged
criminal conduct for which the defendant had been convicted. The
court of appeals read \textit{Piskorski} as standing for the proposition that
"[w]hen a conviction could be based on any of two or more occasions of
indistinguishable criminal conduct alleged at trial, the record must
clearly indicate which occasion of criminal conduct supports the con-
viction in order for the judgment to serve as a bar to future
prosecution."\(^{19}\)

Applying the rule derived from \textit{Piskorski} to the facts in \textit{Quick}, the
court of appeals reasoned as follows:

\begin{quote}
We are unable to conceive of facts, within or outside the record, that Quick
could use to prove that a future prosecution for first degree sexual assault of
the victim would be barred by the conviction now before us . . . . If faced with
a future prosecution for sexual assault of the victim, Quick might file a bill of
\end{quote}

\(^{14}\) \textit{Id.} at 548, 357 N.W.2d at 210 (citing Cowan v. State, 140 Neb. 837, 2 N.W.2d 111
(1942)). The court also stated that

\[\text{an indictment or information alone need not be full protection}
\text{against double jeopardy because a defendant may allege and prove facts}
\text{outside the record in support of a plea of former adjudication. The rem-
edy of a bill of particulars is available to assist a defendant in preparing}
\text{his defense and to protect him against a second prosecution for the same}
\text{offense.}\]

\textit{Id.} at 548, 357 N.W.2d at 210-11 (internal citation omitted)(quoting State v. Ad-
ams, 181 Neb. 75, 79, 247 N.W.2d 144, 149 (1966)). The court also noted that
"other jurisdictions addressing this question have reached similar conclusions."

\textit{Id.} at 548, 357 N.W.2d at 211 (listing other jurisdictions with similar holdings).

\(^{15}\) \textit{Id.} at 549, 357 N.W.2d at 211.

\(^{16}\) \textit{Id.}

\(^{17}\) \textit{Id.}

\(^{18}\) \textit{State v. Quick, 1 Neb. Ct. App. 756, 764, 511 N.W.2d 168, 172 (1993), overruled}
\by \textit{State v. Martinez, 250 Neb. 597, 550 N.W.2d 655 (1996).}

\(^{19}\) \textit{Id.} at 765, 511 N.W.2d at 172.
particulars to force the State to specify which assault was being alleged in the subsequent prosecution. However, the State could pick whichever alleged assault it preferred. The factual pattern of each of the alleged assaults is identical. In *Piskorski*, the defendant could rely on a distinguishing fact to prevent the State from prosecuting him for the same assault for which he had already been convicted. In the case before us, there would be no way for Quick to prove that he had already been convicted of the assault alleged in a subsequent prosecution.\(^\text{20}\)

Therefore, the court reversed Quick's conviction and remanded the case for retrial.\(^\text{21}\)

2. Criticism of Quick

If Quick's conviction was reversed because of prejudice to his substantive rights, then the court can be criticized for failing to indicate how the defendant in *Quick* could show prejudice resulting from the overbroad information until a subsequent prosecution was actually underway.\(^\text{22}\) Moreover, it is highly unlikely that a prosecutor would bring a second prosecution based on the facts in *Quick*.

Beyond this obvious shortcoming, however, a more serious flaw of *Quick* is that it derives from *Piskorski* the rule that the record must clearly indicate which occasion of criminal conduct supports the conviction before the judgment will bar future prosecution. The *Quick* court illogically derives this rule from *Piskorski* by arguing that if a conviction could be based on two or more acts, then a reviewing court must know which act supports the conviction. In fact, as *Martinez*\(^\text{23}\) will point out, *Piskorski* does not support this proposition.\(^\text{24}\)

Nevertheless, the *Quick* court reasoned that *Piskorski* implied that a subsequent prosecution was barred if, and only if, the record of the former proceeding made clear which of two or more acts formed the

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20. *Id.* at 767, 511 N.W.2d at 173-74.
21. *Id.* at 768, 511 N.W.2d at 174.
22. See, e.g., State v. Demon, 614 A.2d 1342 (N.H. 1992)(holding that in a prosecution for aggravated felonious assault, the trial court did not abuse its discretion in denying the father's motion for a bill of particulars when the motion made no specific claim of the need for an exact date to avoid prejudice and mentioned no double jeopardy concern).
23. State v. Martinez, 4 Neb. Ct. App. 192, 200, 541 N.W.2d 406, 412 (1995), aff'd, 250 Neb. 597, 550 N.W.2d 655 (1996). *Martinez I*, however, does not draw the correct conclusion from *Piskorski* either. See infra subsection II.B.2. What *Piskorski* does state is that a court looks to more than just the information when deciding when prosecution is barred. Thus, an overly general information is not per se defective. By using facts outside the record in addition to the information in asserting former jeopardy, a defendant is aided by the bill of particulars, which forces the prosecution to particularize its allegations. The bill, in conjunction with the hearing provided by § 29-1817, was held adequate to protect the defendant in *Piskorski*.
basis for the conviction. It thus concluded that the trial record always must show evidentiary earmarks that will exclude all but one act as the basis for conviction.25 For the sake of brevity, this doctrine will be referred to as “a clear record.”

The logical fallacy in Quick is its reliance on Piskorski for the proposition that a clear record necessarily and sufficiently protects a defendant from double jeopardy if, and only if, the record necessarily excludes all but one instance as the basis of conviction.26 But, Piskorski in fact states only that a clear record is sufficient to protect a defendant from double jeopardy. Other facts, which may be gathered “outside the record,”27 also may afford a defendant double jeopardy protection even in the absence of a clear record. The Quick court ignored the significance of facts “outside the record,” and fallaciously leapt to the conclusion that “the record must clearly indicate which occasion of criminal conduct supports the conviction.”28

The Quick court was oblivious to the procedural tradition represented in Piskorski,29 which incorporates both the hearing on the plea in bar and the bill of particulars. Although the court wrote that “Quick might file a bill of particulars to force the State to specify which assault was being alleged in the subsequent prosecution,”30 it did not accept this as sufficient. The Quick court ignored the rule that the State must furnish exact dates only when that information is within the State’s possession.31 Even if the bill of particulars could not be granted, Quick nevertheless could call the victim at the hearing as authorized by section 29-1817 and require the victim to testify as to

26. Martinez I further dilutes this and allows a conviction to furnish double jeopardy protection if the record conceivably excludes all acts but one. See State v. Martinez, 4 Neb. Ct. App. 192, 202, 541 N.W.2d 406, 413 (1995), aff’d, 250 Neb. 597, 550 N.W.2d 655 (1996). “Thus, although the record contains evidence of more than one assault, there is only one count charged, and there is evidence which defines with reasonable certainty the time and place of at least one assault—the first one—while the mother was away in treatment.” Id.
29. See infra Part III. “A plea in bar sets forth matters which per se destroy [a] right of action and bar[s] its prosecution absolutely, such as [the] bar of statute of limitations or constitutional guarantee against self-incrimination.” BLACK’S LAW DICTIONARY 1037 (5th ed. 1979). This general term encompasses the defense of double jeopardy. The plea does not go to the merits of the case, and if proved, provides a complete bar to the action.
whether or not she could distinguish between the incidents. If the victim could not make the distinction, then subsequent action would be barred.

The problem in Quick was that the prosecution was faced with a child witness who could not distinguish between incidents. This also was the case in Piskorski, and it is not uncommon in child sexual assault cases. The unfortunate result in Quick, unlike Piskorski, would make prosecution of child sexual assault cases in most instances impossible.

B. State v. Martinez: The Problem Resolved?

1. Court of Appeals: Martinez I

In State v. Martinez, another panel of the court of appeals reexamined the issues raised by Quick. The panel rejected Quick's reasoning, and the Nebraska Supreme Court affirmed. Martinez raises a number of issues: (1) Can the blanket bar be limited to child sexual assault cases? (2) Is it proper to use the "duplicitous information analysis" to distinguish Quick from Piskorski, that is, is it a correct reading of Piskorski? (3) Is the law left with a redundant two-fold analysis consisting of (a) the blanket bar, and (b) the requirement of a clear record?

In Martinez, the victim, then five years old, lived with his babysitter from July 14 to August 12, 1991, when his mother was hospitalized for inpatient alcohol treatment. The defendant, Martinez, lived with the child's babysitter, who cared for the child from July 1991 to August 1993. The child was eight years old and in the second grade at the time of trial. At trial, the State introduced hearsay evidence of the child's statements. The jury heard an audiotape of an interview with the child, in which the child indicated that the first time the defendant hurt him was while the child was staying with Martinez and the babysitter during the month his mother had gone to Hastings "to stop drinking." While the child could not remember how many acts of sexual penetration occurred, he did testify to the various acts, and he "stated that he was in kindergarten the first time that Martinez did this to him."

The trial court sustained the defendant's motion for a directed verdict as to the second and third counts of the information for first degree assault and sexual assault of a child. The jury found Martinez

guilty on the remaining count of first degree sexual assault. Martinez appealed, arguing that the jury instruction allowed the State to prove the first degree sexual assault happened sometime between July 1, 1991 and September 1, 1993, which Martinez argued was insufficient to bar a future prosecution for the same criminal conduct.\(^{36}\)

The court first found that the information was sufficient in the sense that “[a]n information which alleges the commission of a crime using the language of the statute which defines that crime is generally sufficient.”\(^{37}\) The court noted, however, that under the Sixth Amendment of the United States Constitution, an information “must apprise a defendant with reasonable certainty of the charge against him so that he may prepare a defense to the prosecution and be able to plead the judgment of conviction as a bar to a later prosecution for the same offense.”\(^{38}\) The court referred to this as the “Bartell rule,” based on the eponymous United States Supreme Court case.\(^{39}\) The Nebraska Court of Appeals believed the issue was whether or not the information satisfied the Bartell rule.

To resolve this issue, the court applied the “duplicitous information” standard set forth in \textit{State v. Saraceno}.\(^{40}\) The defendant faced multiple counts of sexual assault, each of which involved indistinguishable yet individual incidents occurring over a period of years. The second and third counts, for which the defendant was convicted, alleged the defendant committed the crime of fellatio with a minor between August 1980 and August 1983, “on divers uncertain dates” and

\(^{36}\) \textit{Id.} at 197, 541 N.W.2d at 410.

\(^{37}\) \textit{Id.} at 196, 541 N.W.2d at 410.

\(^{38}\) \textit{Id.} at 197, 541 N.W.2d at 410-11.


\[^{40}\] An indictment or information meets all constitutional requirements (1) if it shows that the acts which defendants is [sic] charged with committing amounted to a crime which the court had power to punish, and that it was committed within the territorial jurisdiction of the court, (2) if it informs the defendant of the nature of the charge against him, and (3) if it constitutes a record from which it can be determined whether a subsequent proceeding is barred by the former adjudication. And to the third requirement, it cannot be said that the indictment or information alone must be full protection against double jeopardy, for the reason that in many cases, such as where several acts constitute a single crime, the defendant is often required to allege facts outside the record to support his plea of former adjudication. If the information or indictment apprises the defendant with reasonable certainty of the accusation against him so that he may prepare his defense and plead the judgment as a bar to a subsequent prosecution for the same offense, it meets the fundamental purposes of an information or indictment, as well as constitutional requirements.

\textit{Id.} (citations omitted).

"on divers uncertain days."41 In Saraceno, the Connecticut Court of Appeals stated that "[d]uplicity occurs when two or more offenses are charged in a single count of an accusatory instrument."42 The court held that the information was not duplicitous because (1) each count contained only a single set of essential elements, (2) a jury was precluded from returning a verdict that was not unanimous, (3) only a single statute was involved in each count, and (4) the counts sufficiently delineated the crimes charged and the time frames so the state could not subsequently raise the same charges within the designated time frames.43

Relying on Saraceno, the Martinez court decided that Piskorski was a "one count—one act"44 case, and not a duplicitous information case. The Martinez court reasoned that (1) the Quick court misinterpreted Piskorski as compelling the state to file a nonambiguous information; (2) such issues usually are analyzed under a duplicitous information analysis; (3) but Piskorski was a "one count—one act" case, not a "duplicitous information case."45 Therefore, the Martinez court stated that "Piskorski could [not] properly be used as a 'springboard' for the broad proposition of law laid down by the court in State v. Quick."46

Yet, as argued above,47 Quick requires a clear record merely because of the factual peculiarities of Piskorski, and nothing in Martinez indicates otherwise. For instance, the court concluded that the facts in Martinez could be distinguished from Quick because the Martinez trial court had limited the time frame in its jury instructions, as had the court in Piskorski.48 The court stated that

\[\text{[t]he case at hand is factually closer to Piskorski than to Quick. Here, [the victim] testified that Martinez assaulted him more than once, but never specified how many times. He did, however, testify that it first happened in the babysitter's garage while he was in kindergarten, and his statement to the investigating officer (received in evidence) was that the first time was while his mother was receiving treatment "to stop drinking." Thus, although the}\

41. Id. at 1119 n.1.
42. Id. at 1120 (quoting A. SPINELLA, CONNEcTIcuT CRII3INAL PROCEDURE 406 (1985)).
43. Id. at 1120-21. While the court relies on Serfass v. United States, 420 U.S. 377 (1975), it does not appear to support anything like a blanket bar.
45. Id. at 201, 541 N.W.2d at 413.
46. Id. at 201, 541 N.W.2d at 412-13.
47. See supra subsection II.A.2 and the text accompanying notes 15-16.
record contains evidence of more than one assault, there is only one count charged, and there is evidence which defines with reasonable certainty the time and place of at least one assault—the first one—while the mother was away in treatment. Accordingly, the instant case is not an allegedly duplicitous information case such as Saraceno . . . .49

The appeals court in Martinez concluded that Piskorski was not duplicitous because only one incident could furnish the basis for conviction, which was the same conclusion reached in Quick.50 Based on its reading of Piskorski, however, the Martinez court drew a conclusion completely at odds with Quick.

When only one sexual assault within the charging period is determinable as having occurred during that period by linkage to another event, which then furnishes a reasonably definite time for an offense, the requirement of the Double Jeopardy Clause that the defendant be able to plead the conviction as a bar to further prosecution is satisfied when used in conjunction with a “blanket bar” for the time period in the charging information.51

2. Criticism of Martinez I

Two rather obvious criticisms can be used to attack Martinez I: neither the duplicitous information analysis nor the blanket bar are mentioned in Piskorski. While duplicity is never mentioned in Piskorski, the Martinez court reasoned somewhat plausibly that in Piskorski, the assault occurred while the mother was present, which was the only basis for conviction. Thus, a clear record protected the defendant for double jeopardy purposes. Piskorski’s clear record precluded duplicity in the Martinez court’s view. Similarly in Martinez, the first assault occurred while the victim’s mother was absent and while the victim was in kindergarten. Thus, the court reasoned that the defendant could read the record and establish that he had been convicted for the first assault.52

The Martinez court also concluded that “the bar to future prosecutions must of necessity extend to the entire time period in the information.”53 If the Martinez court’s analysis of Piskorski was correct and

49. Id. at 201-02, 541 N.W.2d at 413.
50. Id. at 201, 541 N.W.2d at 413.
51. Id. at 205, 541 N.W.2d at 414-15. This language will be echoed by the court in Martinez II. See State v. Martinez, 250 Neb. 597, 599, 550 N.W.2d 655, 657 (1996)("[W]here an information provides a time frame which has a distinct beginning and an equally clear end within which the crimes are alleged to have been committed, it is sufficient to satisfy the requirements of the Sixth Amendment.").
52. While nothing in Martinez compelled this conclusion, at least it is conceivable that a court could exclude all acts but one to support the conviction. This is where Martinez stakes new ground: while Quick requires that the record necessarily exclude all acts but one, Martinez requires only that the record conceivably exclude all acts but one.
sufficient to resolve the issue, then it would be disingenuous for the court to extend a blanket bar to the defendant.

Unstated in the appeals court’s analysis is that the court had to extend the blanket bar because of the precedent set by *Quick*. To accept *Quick* as precedent, the panel in *Martinez* would have to reverse. To get around *Quick*, the *Martinez* court essentially rewrote *Piskorski*: the *Martinez* court inferred from *Piskorski* the duplicitous information and blanket bar analysis.

First, *Piskorski* does not implicate a duplicitous information analysis. In *Martinez I*, the court concluded that *Piskorski* was not based on a duplicitous information because one specific act furnished the basis for conviction. 54 The supreme court in *Piskorski* held that it was clear which act would be barred from future prosecution because the trial court instructed the jury to ignore the evidence of all other acts. 55 Otherwise, the information alone, as in *Quick* and *Martinez*, would not clearly indicate which act had formed the basis for conviction. 56

Second, *Piskorski* does not support the blanket bar. While a clear record was sufficient to protect the defendant from subsequent prosecution for one act, the State was not precluded from prosecuting the other acts supported by testimony, i.e., there was no blanket bar in *Piskorski*. In fact, the *Piskorski* court did not concern itself with whether the defendant could be prosecuted at a later time for the other acts implicated in the first trial. *Martinez I* does not consider the implication of *Piskorski*, namely, that the defendant could be prosecuted for all acts except one. 57

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54. *Id.* at 201, 541 N.W.2d at 413.
56. It is important to note how fundamentally similar all three cases are. *Martinez*, like *Quick*, involved multiple acts and some evidence that defined the time frame of one act. Yet, it was impossible to identify the act for which Martinez was convicted, as was the case in *Piskorski*, when the jury was instructed that it must convict for one act or not at all. The precedent set by *Quick* would still compel the *Martinez* court to reverse because the jury in *Martinez* was not instructed to convict for one act or not at all. In *Quick*, the victim testified to four separate acts, and the defendant faced one charge in the information. The incidents were indistinguishable except the victim stated that she remembered the assaults occurred when the ambulance came, and the rescue squad personnel testified the ambulance responded twice. The record presented to the court of appeals did not necessarily imply that one rescue call formed the basis for the conviction and would serve as a bar. Similarly, in *Martinez* the record did not necessarily imply that one act in the period from 1991 to 1993 formed the basis for the conviction. The court merely found it conceivable that the first act formed the basis for conviction.
57. *State v. Piskorski*, 218 Neb. 543, 549, 357 N.W.2d 206, 211 (1984). The record clearly indicates that only one such event occurred while the mother was present, although other violations not charged in the information may have occurred. Therefore, it would not be difficult to establish which act resulted in the conviction and is a bar to a subsequent prosecution for the same offense.
Martinez, therefore, presents a redundant amalgamation between the clear record of Quick ("linkage to another event") and the blanket bar. If the defendant has the blanket bar, it does not matter for double jeopardy purposes whether or not there is a clear record. The only significance of a clear record post-Martinez is that it allows the State to prove that the alleged act occurred within the time frame alleged. Reliance on a clear record is superfluous in the face of the blanket bar.

Piskorski's requirement that the time and place of an assault be particularized and corroborated by reference to another fact was based on the tradition of the proceeding in section 29-1817 and the bill of particulars. In Martinez I, section 29-1817 and the bill of particulars were ignored in favor of the broader protection given by the blanket bar. Presumably, after acquittal or conviction, the State cannot bring a later prosecution unless new evidence demonstrates that acts within the time frame are distinct from the former acts. One reasonably may ask whether trial courts in Nebraska will be able to limit the new analysis to child sexual assault cases.

C. Supreme Court: Martinez II

1. Limited Scope of Martinez II

To clarify the conflict between Quick and Martinez I, the State petitioned the supreme court for further review of the court of appeals' decision in Martinez I. Although the supreme court adopted the blanket bar in Martinez I, the supreme court's opinion did not endorse all of the reasoning of Martinez I.

The supreme court's analysis is significant because it is limited solely to the notice requirement of the Sixth Amendment and resolving the conflict between Quick and Martinez I on that issue alone. "The question, then, on which the decisions of the Court of Appeals differed was whether the information, as limited by the trial court, i.e., from July 1, 1991, to September 1, 1993, satisfied the Bartell standard." Martinez II returns to the traditional rationale of the plea in


59. In its petition, the State urged further review because the statutes governing the court of appeals do not preclude disagreement among panels, and no mechanism entitled the entire court to sit en banc to overrule an individual panel's decision. See State's Petition for Further Review and Memorandum Brief at 2, State v. Martinez, 4 Neb. Ct. App. 192, 541 N.W.2d 406 (1995)(No. A-95-019).

60. The State's petition for review requested the supreme court to resolve the conflict on the blanket bar, which requires consideration only of the Sixth Amendment.

bar found in *Piskorski*, but its limited scope does not allow it to address how procedures will be changed by the blanket bar.

The supreme court first noted that "[u]nder *Piskorski*, an information or indictment is not rendered invalid when the State presents evidence of several violations . . . to secure one conviction." The court rejected as unconscionable the Quick court's "policy" that an information cannot allege a time frame to compensate for the vagaries of a child's memory. The supreme court endorsed the court of appeals' analysis in *Martinez* I as consistent with *Piskorski* inasmuch as "a trial court in a subsequent prosecution may tailor double jeopardy protection to reflect the time period involved in the charge in the first prosecution." The supreme court reasoned that "a defendant may allege and prove facts outside of the record in support of his plea of former adjudication." Therefore, *Martinez* II instructs a trial court to use the traditional protection offered by the plea in bar.

The supreme court went beyond *Piskorski*, however, and adopted the following policy, which it held was consistent with *Piskorski*:

Unless the offense charged in the second prosecution is clearly separate and apart from the offense charged in the first prosecution, the time frame alleged in the first prosecution acts as a 'blanket bar' for subsequent prosecutions. This is the only viable means of balancing the profound tension between the constitutional rights of one accused of child molestation against the State's interest in protecting those victims who need the most protection.

This new policy is unsupported by *Piskorski* and therefore alters former law because the State was not barred from reprosecuting Piskorski.

2. *Issues Raised by Martinez II*

*Martinez II* presents significant differences from *Martinez I*, particularly the lack of reliance on the clear record doctrine. The opinion

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62. Significantly, the bill of particulars is absent.
64. *Id.* at 601, 550 N.W.2d at 658.
65. *Id.*
66. *Id.*
67. *Id.* at 600, 550 N.W.2d at 657.
68. *Id.* at 601, 550 N.W.2d at 658. The court provided the following reasoning:

It is preferable to allow the State to conduct one vigorous prosecution to protect a child rather than to bar any prosecution at all because of a child's natural mnemonic shortcomings. If, at the time the information is filed, the State knows of all facts and all possible charges arising from one transaction or series of transactions within a time frame, and if nothing prevents the State from filing all charges in one information, then there is no reason why the State need attempt a series of prosecutions of one charge at a time rather than prosecute all charges at once.

*Id.*

69. *See supra* subsection II.B.2.
holds that either the instances charged\textsuperscript{70} and proved at trial must be clearly separate or the defendant receives the benefit of the blanket bar.\textsuperscript{71} Martinez II appears to recognize that Martinez I is muddled on this point. Martinez I allowed the benefit of the blanket bar precisely because the instances were indistinguishable, yet at the same time Martinez I stated that the record must be made clear by reference to extrinsic or corroborating evidence.

A further difference between the opinions is that Martinez II self-consciously limits its decision to resolve the issue of what notice must be provided in an information for Sixth Amendment purposes. But, this limited scope leaves unresolved issues concerning the bill of particulars or the plea in bar. First, while Martinez II states the traditional rule that a defendant may allege and prove facts outside the record, it never mentions the bill of particulars as a means of securing double jeopardy protection. Second, if the blanket bar exists, is a defendant ever entitled to a bill of particulars? While the blanket bar may be consistent with Piskorski, it is inconsistent with the Piskorski rule that a bill gives the defendant double jeopardy protection.

Therefore, questions will arise in cases in which the State alleges a time frame and the defendant asks for a bill of particulars. In this context, double jeopardy arguments fail because the standard for ruling on the motion is abuse of discretion:\textsuperscript{72} unless the defendant can show prejudice, he cannot demonstrate that a trial court abused its discretion in denying the motion for a bill. But if there is a blanket bar, there never can be prejudice.

A bill of particulars can serve purposes other than preventing double jeopardy violations. For instance, a bill gives notice of the charges so the defendant can prepare his defense. If a defendant requests the bill of particulars for notice purposes, when should a trial court grant the motion? A bill also limits what the State can prove at the trial to the incidents specified in the bill. But should the State ever be limited in light of the policy of Martinez II?

Another question raised by Martinez II is whether its policy of the blanket bar will apply to types of cases other than child sexual assault. Other instances of criminal conduct must, of necessity, be indistinguishable from child sexual assault cases. For instance, in pollution cases, when contamination occurs sporadically over a period of time, the prosecution may allege a time frame rather than specific

\textsuperscript{70} Presumably the court's holding still determines what is barred based on proof presented at trial, and the information alone is not determinative. Therefore, the issue remains as to whether the incidents the State proves at trial are the only ones that are barred, leaving uncharged incidents about which no proof is offered available for later prosecution.


\textsuperscript{72} See 2 LaFave & Israel, supra note 32, § 19.2(f), at 459-61; Teillier, supra note 31.
instances. Is the polluter entitled to a blanket bar? Or, should a defendant attack vagueness under another theory, such as duplicity? Is there a rationale for entitling the polluter to a bill of particulars?

Some of these questions are raised, but not answered in State v. Case.

D. State v. Case: The Constitutional Protections of the Bill of Particulars

In State v. Case,73 the defendant was charged with three counts of sexual contact with a child and four counts of first degree assault of a child. The defendant was arraigned and pled not guilty to all seven counts. After arraignment, but before trial, the defendant asked for a bill of particulars, claiming the charges were too vague to use his conviction as a bar to future prosecution. The trial court denied the motion, and after conviction the defendant assigned the decision as error. The court of appeals affirmed and drew an important distinction between the bill for notice purposes and for double jeopardy purposes.74

1. Motion for a Bill of Particulars Treated as Motion to Quash

The first issue the Case court considered was whether the court should have granted a motion for a bill of particulars to satisfy the notice requirement of the Sixth Amendment. The defendant asserted that he had "a constitutional right to be adequately informed of the charges against him,"75 but the court of appeals decided that the defendant failed to properly preserve the error. "When a defendant wishes to challenge the certainty and particularity of the information for the preparation of his defense, a motion to quash is the proper method of attack."76 "To the extent that Case is arguing that he may have been hindered in his ability to prepare his defense because of the language of the information, he waived the right to challenge the language by pleading not guilty at arraignment."77

Thus, instead of addressing a question left from Martinez II, i.e., the extent to which the Sixth Amendment requires a bill of particulars, the court in Case took a detour. The court incorrectly assumed Case was asserting that the information was defective, rather than asserting that he needed a bill of particulars to have notice and to prepare his defense. The court then concluded that a motion to quash was the proper procedural device.

74. Id. at 893, 553 N.W.2d at 180.
75. Id. at 891-92, 553 N.W.2d at 179.
76. Id. at 892, 553 N.W.2d at 179.
77. Id. at 893, 553 N.W.2d at 180.
The court correctly asserted that a motion for a bill of particulars was the inappropriate vehicle to challenge a defective information. As the court stated in *Commonwealth v. March*,78 “[t]he function of a bill of particulars . . . is to give notice to the accused of the offense charged in order to permit him to prepare a defense, avoid surprise, and be placed on notice as to any restrictions upon the Commonwealth’s proof.”79 The court also pointed out that “[a] motion for a bill of particulars does not question the sufficiency of an indictment or information, but, rather assumes its validity.”80

In *Case*, the defendant was neither questioning the validity of the information nor asserting the information was defective because it lacked particularity. The court of appeals assumed this and relied on *State v. Bocian*81 for the rule that “[a]ll defects which may be excepted to by a motion to quash are considered waived by a defendant pleading the general issue.”82 Yet, *Bocian* was not a case in which the defendant complained that he was erroneously denied a bill of particulars.83 In fact, the *Bocian* court stated that “[t]he record does not disclose any motions addressed to the trial judge requesting a more specific statement of the charges.”84

Instead, *Case* asserted that he needed the bill of particulars to satisfy the notice requirement of the Sixth Amendment. As the court stated in *Martinez I*, the constitutional requirements of the Bartell rule are not waived when a defendant pleads the general issue and proceeds to trial “because the sufficiency of the information for double jeopardy purposes may require reference to the record, which obviously does not exist at the time of arraignment, as well as reference to facts outside the record, which is permissible, and any second prosecution is obviously a future event.”85 Therefore, to the extent *Case* was asserting he could not prepare his defense because of a lack of particularity, his remedy would be a bill of particulars, not a motion to quash.

2. Bill of Particulars and Double Jeopardy

An anomaly of *Case* is that the court distinguished two functions of the bill of particulars: (1) to cure a vague or defective information so the defendant may prepare a defense, and (2) to prevent double jeop-

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79. *Id.* at 235-36.
80. *Id.* at 235.
82. *Id.*
83. The error assigned in *Bocian* was that the information subjected the defendant to multiple prosecutions for the same act in violation of double jeopardy. *Id.*
84. *Id.*
The court defined the parameters of its opinion by restricting its analysis to "whether this conviction must be reversed because Case was denied a bill of particulars and the charging information was not particular enough to enable Case to use these convictions as a bar to future prosecution." This was an easy case in light of *Martinez II* and required nothing more than an application of the blanket bar.

In the event a future prosecution against Case for sexually assaulting the son is undertaken by the State, Case will be able to plead that further prosecution based on a sexual assault of the son during any of the time periods set out in the five counts of the amended information is barred by the Double Jeopardy Clause of the U.S. Constitution because of the "blanket bar."

It was novel for the court to divide the bill's functions to provide notice and to provide protection from double jeopardy. Likewise, the court's treatment of the motion for the bill as equivalent to a motion to quash was a novel approach. Its treatment of the bill as a guarantee against double jeopardy derived from *Quick*, while its novel assimilation of the bill to the motion to quash was explicable in light of *Martinez II*, which left no role for the "incredible shrinking" bill.

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87. Id. at 895, 553 N.W.2d at 181.
88. Id.
89. The outcome in *Case* would not have been different had the defendant moved to quash the information. In the absence of demonstrated prejudice to a defendant's substantial right, a formal charge in prosecuting a criminal offense—an indictment, information, or complaint—alleging a date or period within the statutory time specified to commence prosecution for the crime charged is sufficient, unless the particular offense charged requires establishment of a specific time as an essential element of that crime charged.

State v. Wehrle, 223 Neb. 928, 934, 395 N.W.2d 142, 147 (1986). The trial court's denial of the bill also was not prejudicial to Case's right to notice of the charges. To the extent a bill would be required for notice purposes, most courts have held that it is not. See United States v. Noetzel, 124 F.R.D. 518 (D. Mass. 1989); State v. Mazzetta, 574 A.2d 806 (Conn. App. Ct. 1990); People v. Harris, 543 N.E.2d 859 (Ill. App. Ct. 1989) (holding that because the victim was young and the acts occurred over a period of six months, the dates provided were as specific as possible); State v. Ross, 561 So. 2d 1004 (La. Ct. App. 1994); State v. Varney, 641 A.2d 185 (Me. 1994) (holding that in a prosecution for gross sexual assault of his eight-year-old daughter, the defendant's motion for a bill of particulars providing exact dates of occurrences was properly denied because the daughter was unable to specify exact dates); Commonwealth v. Giannopoulos, 612 N.E.2d 1202 (Mass. App. Ct. 1993); State v. Voorhees, 632 A.2d 825 (N.H. 1993); State v. Demon, 614 A.2d 1342 (N.H. 1992).

The defendant in *Case* failed to show prejudice to win his motion for the bill. For instance, Case did not proffer an alibi defense, as did the defendant in *State v. Lawrinson*, 551 N.E.2d 1261 (Ohio 1990) (holding that without specifying the time of the offense, the defendant would be precluded from properly presenting his alibi defense).
III. HISTORICAL BACKGROUND OF THE BILL OF PARTICULARS AND PLEA IN BAR

The problem these Nebraska cases expose is that child sexual assault cases present novel concerns for courts and prosecutors, chiefly because of the child's inability to distinguish events accurately or completely. The child's mnemonic shortcomings conflict with the defendant's right to notice of the charges against him. Traditionally, notice is provided through the bill of particulars. It is arguable whether or not this traditional means of notice is viable in child sexual assault cases. Perhaps it is time for courts to recognize the shortcomings of the bill of particulars in this class of cases, as the court apparently did in Martinez II. Before courts altogether reject the bill of particulars, it is worthwhile to consider its traditional function.

The Nebraska cases before Quick speak of a procedure whereby "a defendant may allege and prove facts outside the record in support of a plea of former adjudication" and that "[t]he remedy of a bill of particulars is available to assist a defendant in preparing his defense."91 As previously stated, this Article takes the position that Quick lost sight of the meaning of this language. This Part addresses what these words meant up to the time of Piskorski.

The following is a key passage from State v. Milenkovich:92

"An indictment or information alone need not be full protection against double jeopardy because a defendant may allege and prove facts outside the record in support of a plea of former adjudication. The remedy of a bill of particulars is available to assist a defendant in preparing his defense and to protect him against a second prosecution for the same offense."

This language is in accord with the language of Section 29-1817 which provides that a defendant may present evidence outside the record to prove the identity of the offenses. Consequently, a court may consider evidence beyond the information in determining whether a prosecution violates the double jeopardy clause.93

Milenkovich recognized that section 29-1817 allows a defendant to "adduce such other evidence as may be necessary to establish the identity of the offense."94 The historical background of these words is worth exploring. In particular, it is important to understand that the bill originally had nothing to do with guaranteeing protection against double jeopardy, but instead came to be a means under federal case law of satisfying the Sixth Amendment when the government filed indefinite charges. Through this federal tradition, the plea in bar be-

93. Id. at 49-50, 458 N.W.2d at 751 (citations omitted)(quoting State v. Piskorski, 218 Neb. 543, 548, 357 N.W.2d 206, 210-11 (1984)).
94. Id. at 48, 458 N.W.2d at 751.
came inseparably linked to the bill of particulars in Nebraska jurisprudence.

A. Federal Influence

Tradition enters Nebraska cases from a common source, which is based on the court's understanding of the bill of particulars and plea in bar as described by the Eighth Circuit Court of Appeals. In *Myers v. United States*, the defendant was prosecuted for selling intoxicating liquor in violation of the National Prohibition Act. The Eighth Circuit ruled that it was not error for the lower court to overrule the defendant's motion to quash the indictment as too indefinite. Specifically, the defendant argued that the indictment failed to allege the name of the purchaser, a definite place of sale, the amount of the sale price, the definite kind or character of the liquor, and an approximation of the alcoholic content thereof.

The court remarked that the defendant never moved for a bill of particulars to obtain these facts from the prosecution, but instead sought only to quash the indictment. The court concluded that the indictment was written substantially in the language of the statute, stated all elements of the offense, and was not defective merely because further facts could have been supplied by a bill. The record provided sufficient protection from double jeopardy because it provided specific details lacking in the charging documents, but even if the record was not specific, a defendant could resort to parol evidence to fill in the details. Therefore, in *Myers*, the court linked the bill and the plea in bar as dual protection from an allegedly indefinite indictment.

Federal cases before *Myers* also dealt with indefinite indictments. *Bartell v. United States*, which involved an obscene letter the defendant had deposited in the mail, draws upon earlier federal case law based on English practice. In *United States v. Claflin*, upon which *Bartell* relies, the court stated that

95. 15 F.2d 977 (8th Cir. 1926).
96. Id. at 979.
97. Id.
98. Id. at 986.
99. Id. at 981.
100. Id. at 982.
101. 227 U.S. 427 (1913).
102. For instance, *Myers* quotes *Tubbs v. United States*, 105 F. 59 (1900):
    Defendants in this class of cases commonly affect ignorance of what they
    are indicted for, and great apprehension lest they shall be indicted a sec-
    ond time for the very same offense, and be unable to prove by the record
    a former conviction or acquittal. No case of this kind has ever occurred,
    or is ever likely to occur, but the affected apprehension of each defendant
    that it may occur in his case is perennial. The supreme court has put a
    quietus on these stock objections by repeatedly pointing out that the de-
[i]t is not necessary to describe property with such particularity as will obviate all necessity for proof outside the record to support a plea of once in jeopardy. Says the court: "There must be some parol evidence in all cases, to show what it was he was tried for before." ... If, in any case, such reasonable details prove insufficient to enable the defendant to prepare his defence, all possibility of injustice is removed by a bill of particulars, to which the defendant is entitled upon making oath that further particulars are necessary to enable him to defend.\textsuperscript{104}

Two aspects of these federal opinions are particularly noteworthy. First, the cases required only "reasonable detail" in the charging document. Further detail, if needed, could be provided by a bill of particulars. Second, oral testimony could always supply what was lacking in the paper record, including what was lacking in the bill of particulars.

These two aspects came to the fore in federal criminal practice when the requirement that the indictment be prolix was gradually replaced by the rule that an indictment in the language of the statute was sufficient.\textsuperscript{105} The bill of particulars became a substitute for the particularity that formerly was furnished by the indictment itself. Eventually, the federal system recognized a defendant's right to a bill of particulars, and this right was codified in Rule 7(f) of the Federal Rules of Criminal Procedure.\textsuperscript{106} This shift from prolixity to concision is important because the historical trend in the federal courts found its way into Nebraska case law. In Nebraska courts, however, the bill of particulars has never been recognized by statute or rule. Instead, a defendant's right to a bill is recognized only by case law.\textsuperscript{107} Thus, it is

\textsuperscript{104}Id. at 61 (citations omitted).

\textsuperscript{105}See Fed. R. Crim. Proc. 7(c)(1) (providing that "[t]he indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged").

\textsuperscript{106}The court may direct the filing of a bill of particulars. A motion for a bill of particulars may be made before arraignment or within ten days after arraignment or at such later time as the court may permit. A bill of particulars may be amended at any time subject to such conditions as justice requires.

no wonder the Nebraska courts have turned to federal practice for guidance.

By contrast, in Nebraska the plea in bar is a statutory remedy.\textsuperscript{108} The Nebraska cases before Quick speak of a procedure whereby "a defendant may allege and prove facts outside the record in support of a plea of former adjudication."\textsuperscript{109} Although the Nebraska cases link the two procedures, historically the plea in bar had nothing to do with the bill of particulars.

B. English Background

1. Plea in Bar

Although two methods for protecting a defendant against vague charges appear together in the federal cases, historically they were distinct. This distinction becomes apparent when focusing on commentaries contemporaneous with Myers. In 1913, Bishop stated the following in his treatise, New Criminal Procedure:

The Identity of the parties and of the offence, the defendant taking, as just said, the burden of proof, is shown by parol. It is so even though the two indictments are alike. A common method is to produce the testimony of persons who were present at the previous trial as to what was there investigated; and if it appears to be within the present indictment a \textit{prima facie} case is made, to be overcome only by proof from the other side of the diversity of the two offences. Such witnesses need not be those of the former trial, the calling of whom is not indispensable even though they are within reach of process. If sentence was rendered against the party, proof that it was inflicted on the present defendant proves his identity.\textsuperscript{110}

The same procedure is found in Hale's treatise, Pleas of the Crown, although in the mid-1600s,\textsuperscript{111} the plea in bar was referred to in English cases as the plea of \textit{autrefoits acquit} or \textit{autrefoits convict}.

If a man pleads \textit{autrefoits acquit de mesme felonie} and vouch the record, the court may examine proof, that it is the same felony, and thereupon allow it without any solemn confession of the king's attorney, 26 Assiz. 15. But the safest way is the confession of the king's attorney, or an inquest charged to inquire, whether it be the same fact.\textsuperscript{112}

Hale seems to mention three methods that would give rise to the plea in bar: (1) producing the record to support the plea if the prosecutor does not confess; (2) confession by the prosecutor; or (3) an inquest

\textsuperscript{108} See \textbf{NEB. REV. STAT.} § 29-1817 (Reissue 1995).
\textsuperscript{110} 2 \textbf{JOEL P. BISHOP, NEW CRIMINAL PROCEDURE OR NEW COMMENTARIES ON THE LAW OF PLEADING AND EVIDENCE AND THE PRACTICE IN CRIMINAL CASES} § 816, at 634 (2d ed. 1913).
\textsuperscript{111} Although the full text of the \textit{History of the Pleas of the Crown} was first published in 1736 under editor Sollom Emlyn, it was the result of Hale's lifetime study of criminal law. See \textbf{EDMUND HEWARD, MATTHEW HALE} 132-33 (1972). Hale lived from 1609 to 1676.
\textsuperscript{112} 2 \textbf{SIR MATTHEW HALE, HISTORY OF THE PLEAS OF THE CROWN} 242-43 (1847).
that decides after hearing testimony. The third procedure mentioned can be found in the Nebraska statute, which states that at the hearing on the plea in bar, "the trial of such issue [shall be] to the court or to a jury, if the court desires to submit such issue to a jury." The Nebraska statute presumably refers to the "inquest," which Hale called one of the safest ways to plead former jeopardy, and safer than merely producing the record of the former trial. It presumably is safer because an inquest allows the defendant more information than the cold record of the former proceeding.

The conclusion to be drawn is that other than confession of the plea, there are two ways to prove the plea: (1) the record, or (2) facts outside the record, i.e., oral testimony that establishes the charges for

113. NEB. REV. STAT. § 29-1817 (Reissue 1995). The predecessor of this statute first appeared in 1873. See GEN. STAT. 1873, ch. 58, § 449, at 822. Before 1873, Nebraska law established no statutory authority for the procedure. Prior to trial on the plea, a prosecutor may demur to the plea and submit the question to the judge to determine whether or not the facts as stated in the plea prevent a subsequent trial. See Arnold v. State, 38 Neb. 752, 57 N.W. 378 (1894); Murphy v. State, 25 Neb. 807, 41 N.W. 792 (1889). If the prosecution joins issue with the plea in bar by replying to it, the issue must be tried at an evidentiary hearing, which may be before a jury. In Arnold v. State, 38 Neb. 752, 57 N.W. 378 (1894), the supreme court held that a judge always must submit the plea in bar to a jury because the original statute read "and on the trial of such issue to a jury." Id. at 754, 57 N.W. at 379. See also Bush v. State, 55 Neb. 195, 75 N.W. 542 (1898). In 1927, the Nebraska Legislature amended the statute to read as it does today: "and on the trial of such issue to the court or to a jury if the court desires to submit such issue to a jury." 1927 Neb. Laws 222-23. When a court overrules a plea in bar, it is a final, appealable order. See State v. Woodfork, 239 Neb. 720, 478 N.W.2d 248 (1991); State v. Milenkovich, 236 Neb. 42, 49, 458 N.W.2d 747, 751 (1990). In England, issues of former jeopardy, after reply, are tried solely to the court. See 11(2) Halsbury's Laws of England ¶ 970, at 817 (Lord Hailsham ed., 4th ed. 1990). "If the prosecution replies, it is for the judge, without the presence of a jury, to decide the issue." Id. In federal practice, the procedure is similar to a motion to suppress. See 8 Federal Procedure: A Problem Solving Textual Analysis of Federal Judicial and Administrative Procedure § 22:312, at 602 (rev. 1992).

114. The record alone usually is held sufficient. See, e.g., 29A Am. Jur. 2d § 1494 (1994).

To sustain a plea of former jeopardy, the defendant must introduce sufficient evidence to affirmatively show that: (1) there was a former prosecution in the same state for the same offense; (2) that some person was in jeopardy on the first prosecution; (3) that the persons are identical in the two prosecutions; (4) and that the particular offense, on the prosecution of which the jeopardy attached, was such an offense as to constitute a bar. Where the record of the former prosecution exists, the production of it, either by the original or a certified copy, is proper and sufficient evidence to sustain the plea . . . . The defendant must sustain a plea of former jeopardy by a preponderance of the evidence.

which the accused had been acquitted or convicted. The passage from Bishop shows that anyone who was present at the former trial is competent to testify at the hearing on the plea at bar. The passage from Hale indicates that the defendant may even resort to testimony of the justices of the peace.  

2. Bill of Particulars

Historically, in respect to securing protection for double jeopardy, the plea in bar antedates the use of the bill of particulars. English criminal practice borrowed the bill of particulars from English civil law. One commentator has expressed that

[although unknown to the ancient common law, the bill of particulars came to be used initially under the common law counts in the actions of debt and assumpsit. There was no need at common law for a bill of particulars in criminal cases because the accusation of old was sufficiently informative; indeed, because its allegations were prolix, verbose and repetitive, the early form of accusation was informative to a fault.]

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115. Hale states that a defendant's "plea [is] allowed by the testimony of the justices of peace before whom he was acquit." 2 Sir Matthew Hale, supra note 112, at 243.


A bill of particulars, even in civil cases, was unknown to the ancient common law, and its use in later times is said to have arisen under the common law counts in actions of debt and assumpsit . . . . In criminal cases the common law required directness and particularity in the averments of the indictment, and there was no need in general for a note of the matters to be given in evidence to be furnished to the defendant, and there was no practice of that sort except in special cases, . . . [such as a charge of being] a common barrator or a common scold . . . . But in general all the particulars required to be given are charged in the body of the indictment, and the practice of giving the bills of particulars has been unknown among us.


I think that the ordering of particulars in cases like the present [i.e., conspiracy], is a highly beneficial practice, and I also think that a particular should give the same information that a special count does. The first count in this indictment, in my opinion, states enough without any particular; the effect of a particular being, when a count is framed in a general form, to give the opposite party the same information that he would give if there was a special count. I have always understood this to be the rule with respect to particulars in civil cases.
In fact, English cases never mention the bill of particulars as a means for securing double jeopardy protection. In England, the traditional function of the bill was to furnish information to the accused concerning the facts upon which the charges were based. In English practice, the bill has always been distinct from the plea in bar. The two became linked in the United States only after federal practice began to permit prosecutors to allege the bare elements of the offense.\textsuperscript{117}

At the time of United States \textit{v. Claflin},\textsuperscript{118} the federal courts began to hold that the Sixth Amendment required only reasonable notice and if insufficient, then the defendant should ask for a bill of particulars.\textsuperscript{119} Nevertheless, the bill primarily provided notice to the accused of the charges against him under the Sixth Amendment; the bill did not function as a guarantee against double jeopardy, although the federal courts, as in Claflin, stated that if the accused claimed the allegations were so vague as to create a problem with double jeopardy upon retrial, the bill would provide notice and limit the government's proof. The federal courts further stated that if the record was insufficient, the defendant could resort to parol evidence outside the record, as was the tradition from England. The federal courts viewed the bill and the hearing on the plea in bar as two methods of supplementing the indictment when the defendant claimed the language of the indictment would not protect against a second prosecution.

Therefore, despite its linkage in federal cases with the plea in bar, the bill of particulars always maintained its traditional function, namely to particularize a general count; courts assigned the function of identifying identical offenses for double jeopardy purposes only when pleading the bare elements came into vogue. In practice, therefore, the plea in bar and the bill of particulars must be distinguished, although they have been linked formulaically in Nebraska law since the time of Myers \textit{v. United States}.\textsuperscript{120}

\section*{IV. THE PROBLEM WITH QUICK}

In light of the foregoing discussion, \textit{Quick} is subject to two criticisms. First, \textit{Quick} never clearly distinguished between the functions of the plea in bar and the bill of particulars. Second, the \textit{Quick} court

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\textsuperscript{117} The likely origin of the linkage in the United States is United States \textit{v. Claflin}, 25 F. Cas. 433 (S.D.N.Y. 1875)(No. 14798). Although the defendant in Regina \textit{v. Mansfield}, 174 Eng. Rep. 445 (Q.B. 1841), did raise the issue of whether an indictment describing a stolen tin as “25 lbs. weight of tin” rather than two “ingots” would enable the defendant to plead \textit{autrefois acquit}, Mansfield did not concern a motion for a bill of particulars.

\textsuperscript{118} 25 F. Cas. 433 (S.D.N.Y. 1875)(No. 14798).

\textsuperscript{119} See United States \textit{v. Glup}, 482 F.2d 1288 (8th Cir. 1973).

\textsuperscript{120} 15 F.2d 977 (8th Cir. 1926).
insisted on a clear record—subsequent prosecution is barred if, and only if, the record of the former prosecution establishes which incident is the basis of conviction. The tradition, however, always allowed a defendant to go outside the record.

One function the Quick court assigned to the bill of particulars was to force the prosecution to reveal which incident forms the basis for the subsequent prosecution. "If faced with a future prosecution for sexual assault of the victim, [the defendant] might file a bill of particulars to force the State to specify which assault was being alleged in the subsequent prosecution. However, the State could pick whichever alleged assault it preferred." Yet, this function was never contemplated for the bill of particulars in the course of its history. Even in Bartell the court conceived of the bill as a means of creating a record in the first prosecution by supplementing the vagueness in the charging instrument. History makes clear that a bill was a remedy only for indefinite charges upon a first prosecution, not a substitute for the proceeding provided by section 29-1817. With the benefit of hindsight, the facts in Quick should have been analyzed as in Myers—the Quick court should have taken notice of the defendant’s failure to move for a bill of particulars in the first prosecution. Had he done so, he would have a record in the event of a subsequent prosecution.

Second, the Quick court stated that it was unable to conceive of facts within or outside the record to protect the defendant in the event of a subsequent prosecution. Prior precedent, however, never conditioned the bar of double jeopardy on a clear record at the first trial and never inquired into whether facts conceivably barred a subsequent prosecution. The hearing on the plea in bar traditionally has been considered sufficient protection not just because a record of the former proceeding identifies the crime for which the defendant was convicted. Rather, the hearing on the plea is considered sufficient protection because the defendant can present whatever is necessary to prove former jeopardy. If the defendant asserts that the second prosecution is barred by the former prosecution, the State must either specify the transaction it claims is not barred or the State must confess the plea in bar. The State cannot pick any transaction, as the Quick opinion asserted, because the defendant may then put the State to its trial at the hearing on the plea in bar by calling the victim, who will testify that she cannot distinguish one transaction from another.

V. CONCLUSION: A FEW PROPOSALS ON BILL OF PARTICULARS ISSUES

Based on the foregoing analysis of the cases and history, *Martinez II* left one issue unresolved. This Part recommends ways judges and practitioners ought to deal with these motions.

The first question is whether the bill of particulars is completely supplanted by the blanket bar as a means of preserving protection against double jeopardy. Apparently, the bill of particulars has been supplanted by the blanket bar in child sexual assault cases. But in other types of criminal cases, the bill of particulars still serves as protection from indefinite or vague allegations because it furnishes notice of the charges and an opportunity to prepare a defense. Courts must exercise caution in criminal cases not involving sex crimes against children. Yet, even in child sexual assault cases, it appears from *Martinez II* that the bill still has some function if the state can specify particular events that define the time frame of the information.

Second, courts should not habitually deny a motion for a bill of particulars because the blanket bar may present grounds for reversal on appeal. Both *Martinez* opinions deal exclusively with the Sixth Amendment justification for providing notice in the information. The bill still provides notice, even after recognizing the blanket bar. The *Case* opinion, however, muddles the issue. In *Case*, the defendant argued that he needed the bill for Sixth Amendment purposes, yet the appeals court incorrectly treated this as a motion to quash. Even if a defendant fails to file a motion to quash, he still may be entitled to a bill of particulars. A motion to quash attacks the validity of the information, while a motion for a bill admits its validity.

Obviously, because of the blanket bar, a bill of particulars is unnecessary for double jeopardy purposes upon an initial prosecution, but it traditionally provides Sixth Amendment protection by providing notice of the charges so the defendant can prepare his defense and use the record to plead former jeopardy. Defense attorneys still must ask for the bill to preserve error. When a second information is filed, the bill formerly granted will elucidate whether the prosecutor is basing

122. *See supra* subsection II.C.2.

When only one sexual assault within the charging period is determinable as having occurred during that period by linkage to another event, which then furnishes a reasonably definite time for an offense, the requirement of the Double Jeopardy Clause that the defendant be able to plead the conviction as a bar to further prosecution is satisfied when used in conjunction with a "blanket bar" for the time period in the charging information.

*Id.*
124. *See supra* subsection II.D.1.
the second prosecution on the same facts. On appeal, however, the defendant cannot argue that denial of the bill in the former prosecution was prejudicial until a subsequent prosecution has begun. No prejudice can be claimed because the defendant always had the remedy of the plea in bar and the hearing authorized by section 29-1817. This aspect of the tradition confused the court in Quick and often still confuses defendants, courts, and prosecutors today. Only unfair surprise can prejudice a defendant after denial of the bill.

In sexual assault cases, defendants ask for bills of particular for a number of reasons, but only the Sixth Amendment furnishes a sufficient ground for the bill after Martinez. Trial courts should not deny such requests merely because the defendant has not moved to quash the information. On the other hand, trial courts should deny such requests when the State cannot allege facts with sufficient specificity, and courts must not treat them as substitute for discovery. If the State furnishes discovery and cannot be more specific, a court should deny the motion.125

125. See Teillier, supra note 31, at 448-50.