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Articles

Preserving Justice: A Discussion of Rhode Island's "Raise or Waive" Doctrine

Nicholas Nybo*

"Preserving issues for appellate review is a fundamental component of appellate practice."[1] "It is well established that 'the 'raise-or-waive rule' precludes a litigant from arguing an issue on appeal that has not been articulated at trial.'"[2] The rule's benefits can hardly be denied: "Not only does the rule serve judicial economy by encouraging resolution of issues at the trial level, it also promotes fairer and more efficient trial proceedings by providing opposing counsel with an opportunity to respond appropriately to claims raised."[3] Furthermore, the raise or waive

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1. Kennedy v. S.C. Ret. Sys., 564 S.E.2d 322, 323 (S.C. 2001) (quoting JEAN H. TOAL ET AL., APPELLATE PRACTICE IN SOUTH CAROLINA 65 (1999)) (internal quotation marks omitted).

2. State v. Ciresi, 45 A.3d 1201, 1212 (R.I. 2012) (quoting State v. Brown, 9 A.3d 1240, 1245 (R.I. 2010)).

3. State v. Burke, 522 A.2d 725, 731 (R.I. 1987). Requiring arguments

rule is one of appellate resource conservation, allowing courts to limit the number of issues considered to those that have been properly developed in the trial record. Nonetheless, there are consequences that result from strict enforcement of the raise or waive doctrine.

Strict adherence to the appellate preservation doctrine prevents important issues from being decided, often punishing parties (novices to the justice system) for their trial attorney's failure.[4] "[T]his philosophy makes the availability of rights to individual citizens dependent on the skills of a particular attorney and the time that she has to devote to preparing for trial in any case."[5] The cost-benefit analysis underlying raise or waive was best discussed by Justice Hugo Black in 1941:

> Ordinarily an appellate court does not give consideration to issues not raised below. For our procedural scheme contemplates that parties shall come to issue in the trial forum vested with authority to determine questions of fact. This is essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues which the trial tribunal is alone competent to decide; it is equally essential in order that litigants may not be surprised on appeal by final decision there of

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to be raised at the trial level allows the adverse party to make strategic litigation decisions:

> If the adverse party is aware of the objection the party can . . . urge that the action not be taken, an alternative be adopted, or make as complete a record as possible to support the action. If no objection is made, the adverse party may think that the other party agrees with the action or for tactical reasons decides not to raise an objection. In either case the adverse party may fail to develop a record that would support the action taken or forgo taking some step that would avoid the alleged error.

Robert J. Martineau, *Considering New Issues on Appeal: The General Rule and the Gorilla Rule*, 40 VAND. L. REV. 1023, 1031 (1987) (footnote omitted).

4. The use of the word failure is not intended as a qualitative criticism of trial attorneys who do not raise an issue at trial. To expect a trial attorney to catch every arguably objectionable issue (and also articulate the precise defect) would be patently unreasonable. An appellate attorney with the opportunity to carefully read the record and consult relevant case law is naturally in a far better position to identify and articulate potential error—regardless of the respective quality and experience of the attorneys.

5. Gideon's Trumpet, *Gideon: Appellate Decisions Diminish Stature of Judges*, CONN. L. TRIB., Apr. 17, 2014.

> issues upon which they have had no opportunity to introduce evidence. . . . There may always be exceptional cases or particular circumstances which will prompt a reviewing or appellate court, where injustice might otherwise result, to consider questions of law which were neither pressed nor passed upon by the court . . . Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. A rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with this policy. Orderly rules of procedure do not require sacrifice of the rules of fundamental justice.[6]

That same year, Roscoe Pound, celebrated legal commentator and former dean of Harvard Law School, criticized an overly restrictive approach to rules of appellate preservation.[7] In Pound's opinion, "appellate review in America focused on a search for error rather than a search for justice, which resulted in an overemphasis on the content of the record."[8] In fact, the American legal system would be without a number of its most revered principles had the United States Supreme Court rigorously adhered to the rule. The Court's decisions in *Mapp v. Ohio* (incorporating the Fourth Amendment),[9] *Washington v. Davis* (reevaluating the equal protection standard for racial discrimination),[10] and *Erie Railroad v. Tompkins* (a choice of law landmark)[11] all suffered from various preservation defects.[12]

6. Hormel v. Helvering, 312 U.S. 552, 556–57 (1941).

7. *See* Martineau, *supra* note 3, at 1028 (citing ROSCOE POUND, APPELLATE PROCEDURE IN CIVIL CASES 107–10 (1941)).

8. *Id.* (citing POUND, *supra* note 7, at 318–20).

9. 367 U.S. 643 (1961).

10. 426 U.S. 229 (1976).

11. 304 U.S. 64 (1938).

12. Specifically, those preservation defects have been catalogued as such:

> [S]ome of the Supreme Court's most famous opinions decided issues not presented by the briefs or addressed below. In *Erie Railroad v. Tompkins*, the Court overturned sua sponte an ancient precedent on applying the common law in diversity cases. *Mapp v. Ohio* overrules a prior case and applied the Fourth Amendment exclusionary rule to

Yet and still, the aforementioned benefits of raise or waive have encouraged courts in every state to adopt some version of the rule.[13] Moreover, the rule enjoys particular importance in the

> the states, without briefing or argument on the issue. In *Washington v. Davis*, the Court decided that Title VII standards did not apply to constitutional discrimination, even though the parties had agreed that they did. *Younger v. Harris* prohibits injunctions against pending state court criminal cases, even though the issue was not argued on appeal. Indeed, in *Stanley v. Illinois*, the Court held that due process requires hearings and an opportunity to make submissions before a state can terminate the parental rights of unwed fathers. But the Court decided this without briefing or argument—without a hearing on the issue or an opportunity for the parties to make submissions.

Barry A. Miller, *Sua Sponte Appellate Rulings*, *When Courts Deprive Litigants of an Opportunity to be Heard*, 39 SAN DIEGO L. REV. 1253, 1255–56 (2002) (footnotes omitted). Furthermore, in *Terminiello v. City of Chicago*, the Court reversed the petitioner's disorderly conduct conviction based on a speech he gave in Chicago on behalf of the Christian Veterans of America. 337 U.S. 1, 2 (1949). Justice Felix Frankfurter dissented as follows:

> The impropriety of . . . the charge which is now made the basis of reversal was not raised at the trial nor before the Appellate Court of Illinois. . . . Thus an objection, not raised by counsel in the Illinois courts, not made the basis of the petition for certiorari here—not included in the "questions presented," nor in the "reasons relied on for the allowance of the writ"—and explicitly disavowed at the bar of this Court, is used to upset a conviction which has been sustained by three courts of Illinois.

Id. at 9 (Frankfurter, J., dissenting). The majority opinion in *Terminiello*, authored by Justice William O. Douglas, rejected the trial court's jury instruction broadly defining "breach of peace," which the Court found violated the First Amendment. *Id*. at 4–6 (majority opinion). As an interesting (albeit exceedingly tangential) aside, Justice Robert Jackson's dissent in the case contains the only citation to Adolf Hitler's *Mein Kampf* that can currently be found in the U.S. Reports. *Id*. at 23–24 (Jackson, J., dissenting); *see also* NOAH FELDMAN, SCORPIONS: THE BATTLES & TRIUMPHS OF FDR'S GREAT SUPREME COURT JUSTICES 328 (2010).

13. *Ex parte* Morrow, 915 So. 2d 539, 546 (Ala. 2004) (Brown, J., dissenting); Still v. Cunningham, 94 P.3d 1104, 1111 (Alaska 2004); State v. Tyszkiewicz, 104 P.3d 188, 191 (Ariz. Ct. App. 2005); Leach v. State, 402 S.W.3d 517, 528 (Ark. 2012); People v. Bonilla, 160 P.3d 84, 99–100 (Cal. 2007); Pub. Serv. Co. of Colo. v. Willows Water Dist., 856 P.2d 829, 831 (Colo. 1993); Bell Atl. Mobile Inc. v. Dep't of Pub. Util. Control, 754 A.2d 128, 146–47 (Conn. 2000); Nance v. State, 903 A.2d 283, 285 (Del. 2006); Hodges v. State, 885 So. 2d 338, 358 (Fla. 2004) (per curiam); Smith v. State, 695 S.E.2d 679, 681 & n.3 (Ga. Ct. App. 2010); State v. Honolulu Univ. of Arts, 135 P.3d 113, 127 (Haw. 2006); Jones v. Crawforth, 205 P.3d 660, 668–69 (Idaho 2009); People v. Kitch, 942 N.E.2d 1235, 1240 (Ill. 2011); Ingram v. State, 718 N.E.2d 379, 382 n.5 (Ind. 1999); Duck Creek Tire Serv., Inc. v. Goodyear

Ocean State. Between January 1, 2010 and January 1, 2014, the Rhode Island Supreme Court relied on the rule in refusing to decide the merits of an issue in fifty-three cases.[14] That number

Corners, 796 N.W.2d 886, 892 (Iowa 2011); State v. Bailey, 255 P.3d 19, 27 (Kan. 2011); Cain v. Lodestar Energy, 302 S.W.3d 39, 42 (Ky. 2009); State v. Johnson, 860 So. 2d 180, 187–88 (La. Ct. App. 2003); Butler v. Killoran, 714 A.2d 129, 134 n.9 (Me. 1998); Hobby v. State, 83 A.3d 794, 802–03 (Md. 2014); Commonwealth v. Bowler, 553 N.E.2d 534, 534 (Mass. 1990); Admire v. Auto-Owners Ins. Co., 831 N.W.2d 849, 851 n.5 (Mich. 2013); State v. Maurstad, 733 N.W.2d 141, 153 (Minn. 2007) (en banc) (Gildea, J., dissenting); Walker v. State, 913 So. 2d 198, 217 (Miss. 2005) (en banc); Vance Bros. v. Obermiller Constr. Serv., 181 S.W.3d 562, 564 (Mo. 2006); State v. Johnson, 265 P.3d 638, 642 (Mont. 2011); Paulsen v. State, 541 N.W.2d 636, 645 (Neb. 1996); Old Aztec Mine, Inc. v. Brown, 623 P.2d 981, 983–84 (Nev. 1981); State v. Brooks, 34 A.3d 643, 654 (N.H. 2011); State v. Robinson, 974 A.2d 1057, 1068 (N.J. 2009); Juneau v. Intel Corp., 127 P.3d 548, 552 (N.M. 2005); People v. Cona, 399 N.E.2d 1167, 1169 (N.Y. 1979); State v. Chapman, 611 S.E.2d 794, 822–23 (N.C. 2005); Coughlin Const. Co., Inc. v. Nu-Tec Indus., Inc., 755 N.W.2d 867, 871 (N.D. 2008); State v. Peagler, 668 N.E.2d 489, 492 (Ohio 1996); Miller v. State, 313 P.3d 934, 971 (Okla. Crim. App. 2013); Barcik v. Kubiaczyk, 895 P.2d 765, 781 n.12 (Or. 1995) (en banc); Harman *ex. rel.* Harman v. Borah, 756 A.2d 1116, 1124–25 (Pa. 2000); Martin v. Lawrence, 79 A.3d 1275, 1282 (R.I. 2013); Foster v. Foster, 711 S.E.2d 878, 880 (S.C. 2011); State v. Wright, 768 N.W.2d 512, 534 (S.D. 2009); Spicer v. State, 12 S.W.3d 438, 444 n.7 (Tenn. 2000); Fed. Deposit Ins. Corp. v. Lenk, 361 S.W.3d 602, 611 (Tex. 2012); Rapela v. Green, 289 P.3d 428, 436 (Utah 2012); State v. Sharrow, 949 A.2d 428, 436–37 (Vt. 2008); Lee v. Lee, 404 S.E.2d 736, 737 & n.1 (Va. Ct. App. 1991) (en banc); State v. McFarland, 899 P.2d 1251, 1255–56 (Wash. 1995) (en banc); State v. Legg, 625 S.E.2d 281, 291 (W. Va. 2005); State v. Rogers, 539 N.W.2d 897, 900–01 (Wis. Ct. App. 1995); Moore v. Moore, 809 P.2d 261, 267 (Wyo. 1991).

14. *Martin*, 79 A.3d at 1282; State v. Whitaker, 79 A.3d 795, 808 (R.I. 2013); Johnson v. QBAR Assocs., 78 A.3d 48, 54 (R.I. 2013); Greensleeves, Inc. v. Smiley, 68 A.3d 425, 438–39 (R.I. 2013); State v. Pona, 66 A.3d 454, 468–69 (R.I. 2013); State v. Moten, 64 A.3d 1232, 1238, 1243 (R.I. 2013); Berard v. HCP, Inc., 64 A.3d 1215, 1219 & n.2 (R.I. 2013); State v. Price, 66 A.3d 406, 416–17 (R.I. 2013); State v. Botas, 71 A.3d 430, 434 (R.I. 2013); Bucci v. Lehman Bros. Bank, FSB, 68 A.3d 1069, 1081 n.10, 1082–83 (R.I. 2013); Peloquin v. Haven Health Ctr. of Greenville, LLC, 61 A.3d 419, 430–31 (R.I. 2013); Swain v. Estate of Tyre *ex rel.* Reilly, 57 A.3d 283, 288 n.13 (R.I. 2012); State v. Ford, 56 A.3d 463, 470 (R.I. 2012); Rodriguez v. Virgilio, 58 A.3d 914, 915 n.3 (R.I. 2012); State v. Bellem, 56 A.3d 432, 433 n.2 (R.I. 2012); State v. Tep, 56 A.3d 942, 945 n.10 (R.I. 2012); State v. Kluth, 46 A.3d 867, 875–76 (R.I. 2012); State v. Robat, 49 A.3d 58, 83–84 (R.I. 2012); McGarry v. Pielech, 47 A.3d 271, 282 (R.I. 2012); State v. Cook, 45 A.3d 1272, 1279–80 (R.I. 2012); State v. Viveiros, 45 A.3d 1232, 1243–44 (R.I. 2012); Iozzi v. Cranston, 52 A.3d 585, 590 (R.I. 2012); State v. Ciresi, 45 A.3d 1201, 1212–13 (R.I. 2012); Town Houses at Bonnet Shores Condo. Ass'n v. Langlois, 45 A.3d 577, 584 (R.I. 2012); State v. Alston, 47 A.3d 234, 242–43 (R.I. 2012);

represents roughly ten percent of the total cases decided by the court during that time. However, such reliance is certainly justified. The state is one of only ten without an intermediate appellate court,[15] and its five appellate justices are tied with six other states for least in the country.[16] By way of local comparison, Connecticut has seventeen appellate justices, one of which is on senior status,[17] while Massachusetts has thirty-one.[18] Of course,

Tarzia v. State, 44 A.3d 1245, 1259–60 (R.I. 2012); Robideau v. Cosentino, 47 A.3d 338, 341 (R.I. 2012); Krivitsky v. Krivitsky, 43 A.3d 23, 32 (R.I. 2012); State v. Carpio, 43 A.3d 1, 8–9 (R.I. 2012); State v. Vieira, 38 A.3d 18, 25 (R.I. 2012); State v. Lyons, 37 A.3d 118, 118 n.1 (R.I. 2012); State v. Delestre, 35 A.3d 886, 892 n.6 (R.I. 2012); *In re* Jazlyn P., 31 A.3d 1273, 1280–81 (R.I. 2011); State v. Karngar, 29 A.3d 1232, 1235–36 (R.I. 2011); DeMarco v. Travelers Ins. Co., 26 A.3d 585, 628–29 (R.I. 2011); Randall v. Randall, 22 A.3d 1166, 1172 (R.I. 2011); *In re* Quigley, 21 A.3d 393, 401 (R.I. 2011); Dawkins v. Siwicki, 22 A.3d 1142, 1150 (R.I. 2011); State v. Goulet, 21 A.3d 302, 308–09 (R.I. 2011); State v. Kelly, 20 A.3d 655, 660–61 (R.I. 2011); State v. Kizekai, 19 A.3d 583, 591 n.11 (R.I. 2011); State v. Laurence, 18 A.3d 512, 524 (R.I. 2011); Gordon v. State, 18 A.3d 467, 473–74 (R.I. 2011); State v. Brown, 9 A.3d 1240, 1246 (R.I. 2010); State v. Marsich, 10 A.3d 435, 441 (R.I. 2010); State v. Storey, 8 A.3d 454, 465–66 (R.I. 2010); State v. Moreno, 996 A.2d 673, 684 (R.I. 2010); Vanderheiden v. Marandola, 994 A.2d 74, 78 (R.I. 2010); State v. McManus, 990 A.2d 1229, 1237 (R.I. 2010); *In re* Miguel A., 990 A.2d 1216, 1223 (R.I. 2010); State v. Adefusika, 989 A.2d 467, 479 (R.I. 2010); Int'l Bhd. of Police Officers v. E. Providence, 989 A.2d 106, 109–10 (R.I. 2010); Classic Entm't & Sports, Inc. v. Pemberton, 988 A.2d 847, 849 n.4 (R.I. 2010).

15. COUNCIL OF CHIEF JUDGES OF THE STATE COURTS OF APPEAL, THE ROLE OF STATE INTERMEDIATE APPELLATE COURTS: PRINCIPLES FOR ADAPTING TO CHANGE 2–3 & illus. 1 (2012), *available at* http://www.sji.gov/PDF/Report_5_CCJSCA_Report.pdf.

16. The other six states with only five appellate justices are: Delaware, New Hampshire, South Dakota, Vermont, West Virginia, and Wyoming. *Judicial Officers of the Delaware Supreme Court*, DEL. ST. CTS., http://courts.delaware.gov/Supreme/justices.stm (last visited Jan. 22, 2015); *Supreme Court – Meet the Justices*, N.H. JUD. BRANCH, http://www.courts.state.nh.us/supreme/justices.htm (last visited Jan. 22, 2015); *South Dakota Supreme Court*, S.D. UNIFIED JUD. SYS., http://ujs.sd.gov/Supreme_Court/default.aspx (last visited Jan. 22, 2015); *Vermont Supreme Court Justices' Biographies*, VT. JUDICIARY, https://www.vermontjudiciary.org/GTC/Supreme/Justicesbios.aspx (last visited Jan. 22, 2015); *Justices & Staff*, W. VA. JUDICIARY, http://www.courtswv.gov/supreme-court/justices-staff.html (last visited Jan. 22, 2015); *Wyoming Supreme Court, Meet the Justices*, WYO. JUD. BRANCH, http://www.courts.state.wy.us/WSC (last visited Jan. 22, 2015).

17. Connecticut has eight supreme court justices and nine appellate court judges. *Connecticut Supreme Court Justices*, ST. OF CONN. JUD. BRANCH, http://www.jud.ct.gov/external/supapp/supjustices.htm (last visited Jan. 22, 2015); *Connecticut Appellate Court Judges*, ST. OF CONN. JUD.

each additional justice results in an exponential increase in judicial resources given that an appellate justice often enjoys at least two law clerks as well as other research services. Finally, of the ten states without an intermediate appellate court, Rhode Island has the fourth highest population per appellate justice.[19] In Rhode Island, there are 210,058 residents per appellate justice.[20] In a country where judicial resources are in short supply, Rhode Island is paradigmatic.

In light of raise or waive's competing interests, as well as the rule's continued prevalence in Rhode Island, a discussion of the rule's history and future is warranted. Part I of this Article will revisit the historical development of both the rule and its narrow exception in the state. Part II will discuss *State v. Moten*,[21] a 2013 Rhode Island Supreme Court decision representing (in this author's humble opinion) an excessively restrictive approach to the doctrine. Finally, Part III will explore other possible approaches to appellate preservation. The Article does not advocate the abolition of the raise or waive doctrine. To allow the talented appellate bar in Rhode Island to treat the trial record as a first year torts exam, freely combing the transcript and spotting issues for the court's consideration, would wreak havoc on the administration of appellate justice.

The Article will, however, seek clarification of the rule (and, more specifically, its increasingly vague exception) to foster a more crisp understanding of when the court will and will not

BRANCH, http://www.jud.ct.gov/external/supapp/appjudge.html (last visited Jan. 22, 2015).

18. Massachusetts has seven justices on its Supreme Judicial Court and twenty-four appeals court justices. *Supreme Judicial Court Justices*, MASS. CRT. SYS., http://www.mass.gov/courts/court-info/sjc/about/sjc-justices/ (last visited Jan. 22, 2015); *Appeals Court Justices*, MASS. CRT. SYS., http://www.mass.gov/courts/court-info/appealscourt/appeals-court-justices/ (last visited Jan. 22, 2015).

19. Based on 2012 state population census estimates, Rhode Island has 210,058 residents per appellate justice while Nevada has 394,133 residents per appellate justice, New Hampshire has 264,144 residents per appellate justice, and West Virginia has 371,083 residents per appellate justice. *2012 State Population Census Estimates*, GOVERNING, http://www.governing.com/gov-data/state-census-population-migration-births-deaths-estimates.html (last visited Jan. 22, 2015).

20. *Id.*

21. 64 A.3d 1232 (R.I. 2013).

consider the merits of an unpreserved, substantive argument. Such clarification should allow appellants to voluntarily abandon certain unpreserved arguments at an early stage, thus sparing resources in researching and briefing the merits of that particular argument. Of course, if the appellant abandons an issue, the opposing party can ignore both the potential preservation defects as well as the merits of the substantive argument—thereby conserving its resources. And finally, if the argument is never raised, the appellate court need not take time to justify its decision whether to decide the merits. Ultimately, clarification should yield efficiency returns at all levels of appellate practice.

I. THE HISTORICAL DEVELOPMENT OF "RAISE OR WAIVE" AND ITS NARROW EXCEPTION

Rhode Island's raise or waive rule experienced a fairly unremarkable debut.[22] The appeal in *Denison v. Foster* arose from an action for trespass and ejectment.[23] At trial, the court granted the defendant's motion for dismissal after the plaintiffs

22. The rule's original conception, however, occurred overseas with England's writ of error procedure:

> Under the writ of error review procedure the only issues that could be presented to the appellate court were those that had been raised and decided in the trial court. The entire purpose of the proceeding was to test the correctness of the judge's actions. The purpose was not to test whether the proper party had won, but only whether the judge had made an error. . . . [T]he appellate court could not rule on any question not reflected in the record because the record was the only way to determine the basis of the judge's ruling. At the time, the record consisted only of formal documents filed in court and the official record of the actions of the jury and the judge. Because there was no way to record verbatim what occurred at trial, a procedure developed whereby a party could challenge a court's action that otherwise would not be reflected in the record . . . Under this procedure, a party could ask the judge or a third party to record in writing the action or inaction of the judge and the fact that the party took exception to the judge's ruling. This became known as the bill of exceptions and was sent to the appellate court along with the record. In effect, the bill of exceptions was the complaint against the trial judge. Thus, a matter had to be presented to and ruled on by the trial judge before the issue could be raised in the appellate court, both because of the nature of the writ of error procedure and the practicalities of recording the lower court proceeding.

Martineau, *supra* note 3, at 1026–27.

23. 31 A. 894, 894 (R.I. 1894).

presented their testimony.[24] The plaintiffs appealed arguing, among other errors, that their right to a full and fair trial had been violated because they were "forced to trial in a hasty and discourteous manner, [and] that they were not prepared for trial."[25] Late Rhode Island Supreme Court Chief Justice Pardon E. Tillinghast responded that "[t]he statement of evidence submitted with the papers in the case not having been presented to or allowed by the justice presiding at the trial . . . forms no part of the record, and we cannot, therefore, consider the same."[26] While the court stated that it would not consider the claim since it had not been presented to the trial court, it also recognized that the plaintiffs "fail[ed] to show any sufficient reason for not being ready for trial" but merely relied on "bald assertions" and "general statements."[27] The court denied and dismissed the petition for new trial.[28]

In the subsequent 120 years, the rule has thusly evolved. Appellate issues must be "preserved at trial by a specific objection, sufficiently focused so as to call the trial justice's attention to the basis for said objection."[29] Accordingly, "a litigant cannot raise an objection or advance a new theory on appeal if it was not raised before the trial court."[30] The court, nevertheless, "has declined to lock the door in an unequivocal manner and has recognized the existence of a narrow exception to the 'axiomatic' raise or waive rule."[31] That exception applies when "basic constitutional rights are concerned," but "the alleged error must be more than harmless, and the exception must implicate an issue of constitutional dimension derived from a novel rule of law that could not reasonably have been known to counsel at the time of

24. *Id*. at 894–95.
25. *Id*.
26. *Id*. at 895. At the time of the opinion, Justice Tillinghast was not the Chief Justice; however, he would serve in that position from 1904 until his death in 1905. *See Chief Justice Tillinghast Expires of Pneumonia—His Career*, N.Y. TIMES (Feb. 10, 1905), *available at* http://query.nytimes.com/mem/archive-free/pdf?res=9B0CE5D7163DE733A25753C1A9649C946497D6CF.
27. *Denison,* 31 A. at 895.
28. *Id*.
29. State v. Warren, 624 A.2d 841, 842 (R.I. 1993).
30. State v. Bido, 941 A.2d 822, 829 (R.I. 2008).
31. Pollard v. Acer Grp., 870 A.2d 429, 432 n.10 (R.I. 2005).

trial."[32]

This narrow exception derives from two cases decided in 1965, *State v. Dufour* and *State v. Mendes*.[33] These appeals arose from criminal trials that occurred before June 22, 1964, the day that the United States Supreme Court decided *Escobedo v. Illinois*.[34] In *Escobedo*—an extension of *Gideon v. Wainwright*[35] and a precursor to *Miranda v. Arizona*[36]—the Court held that the Sixth Amendment required the police to inform a criminal defendant of his right to counsel and his right to remain silent once the investigation had matured from a "general inquiry" to an investigation focused on the defendant.[37] In *Dufour*, the defendant was suspected of possessing pornographic films and agreed to go to the police station and discuss the investigation when confronted by police officers.[38] During that discussion, the defendant confessed that he was, in fact, the owner of the films.[39] At no point did the defendant ask for counsel nor did the officers advise the defendant of his right to counsel.[40] The Rhode Island Supreme Court recognized that the defendant had neither briefed nor argued at oral argument that the confession was invalid.[41] Nevertheless, the court concluded that the police had violated the defendant's rights under *Escobedo*, and the confession was suppressed.[42] Justice Joslin, in concurrence, emphasized that "[w]hen we are satisfied that a defendant's constitutional rights have been violated in this manner in a criminal case, we are not justified in sanctioning those violations because of the defendant's failure to observe procedural technicalities."[43]

Five months later, the court decided *State v. Mendes*, an

32. State v. DeOliveira, 972 A.2d 653, 660 n.6 (R.I. 2009) (quoting State v. Breen, 767 A.2d 50, 57 (R.I. 2001)) (internal quotation marks omitted).
33. State v. Mendes, 210 A.2d 50 (R.I. 1965); State v. Dufour, 206 A.2d 82 (R.I. 1965).
34. 378 U.S. 478 (1964).
35. 372 U.S. 335 (1963).
36. 384 U.S. 436 (1966).
37. 378 U.S. at 490–91.
38. 206 A.2d at 83–84.
39. *Id*. at 84.
40. *Id*.
41. *Id*. at 85. The defendant instead argued that his arrest was not supported by probable cause. *Id*.
42. *Id*. at 86.
43. *Id*. at 88 (Joslin, J., concurring).

appeal from a conviction for driving to endanger resulting in death.[44] After a night of drinking, the defendant struck the victim with his vehicle and killed her.[45] The defendant was taken into custody, where tests revealed his level of intoxication, and he was subsequently held overnight.[46] The next morning, the defendant was told that the victim had died, and during the subsequent interrogation, the defendant made numerous incriminating statements.[47] Like in *Dufour*, the officers failed to advise the defendant of his right to remain silent or his right to counsel.[48] At trial, the defendant's statement was introduced into evidence, and the defendant's counsel conceded in open court that he had no objection to the introduction of the statement.[49] In fact, the defense counsel used the statement to cross-examine the police officers.[50] The majority in *Mendes*, however, excused the defendant's failure to raise the objection at trial, "[b]ecause defendant's contentions have merit, we do not believe we should compel him to seek post-conviction relief . . . The defendant has been denied due process and the conviction cannot stand."[51] The majority determined that the defendant's statement violated the principles in *Escobedo* and remanded the case to the superior court for retrial.[52]

Justice Joslin dissented in *Mendes* because, among other reasons, he felt that the defense counsel had waived the issue on appeal given that counsel (unlike the defense counsel in *Dufour*) had intentionally refused to object to the introduction of the statement.[53] "As part of his trial tactics, deliberately adopted, [defense counsel] intentionally bypassed [the contemporaneous objection] requirement. By that conduct defendant forfeited his right to assert on review that the admission of the statement

44. State v. Mendes, 210 A.2d 50, 52 (R.I. 1965).
45. *Id*. at 53.
46. *Id*.
47. *Id*.
48. *Id*. at 54.
49. *Id*.
50. *Id*. at 57–58 (Joslin, J., dissenting).
51. *Id*. at 56 (majority opinion) (citing State v. Dufour, 206 A.2d 82, 88 (R.I. 1965) (Joslin, J., concurring)).
52. *Id*.
53. *Id*. at 57–58 (Joslin, J., dissenting).

violated his federal constitutional rights."[54] Justice Joslin further emphasized the importance of defense counsel's intentional use of the statement:

> I add, however, to what I have said that my opinion would be otherwise if the requirement of contemporaneous objection were a procedural technicality having no rational relationship to a well ordered trial. If such were the case, I would not insist, nor would I have any right to on compliance at the expense of ignoring a defendant's constitutional rights. . . . When such a procedure is intentionally disregarded by competent trial counsel, in my judgment the constitutional right, which might have been brought into issue by compliance, is waived.[55]

The exception for novel constitutional issues has developed since 1965; however, appellants who have claimed the exception over the years have not enjoyed much success. In the past twenty-five years, the court has rejected litigants' attempts to satisfy the exception in at least fifty-seven cases.[56] A most recent example

54. *Id*. at 58.

55. *Id*. at 59 (citations omitted).

56. State v. Moten, 64 A.3d 1232, 1241 (R.I. 2013); State v. Kluth, 46 A.3d 867, 876 n.14 (R.I. 2012); State v. Robat, 49 A.3d 58, 83–84 (R.I. 2012); State v. Alston, 47 A.3d 234, 243 n.16 (R.I. 2012); State v. Figuereo, 31 A.3d 1283, 1289 n.7 (R.I. 2011); State v. Goulet, 21 A.3d 302, 308 n.13 (R.I. 2011); Gordon v. State, 18 A.3d 467, 474 (R.I. 2011); State v. Brown, 9 A.3d 1240, 1246 (R.I. 2010); *In re* Miguel A., 990 A.2d 1216, 1223 (R.I. 2010); State v. DeOliveira, 972 A.2d 653, 660 n.6 (R.I. 2009); State v. Merida, 960 A.2d 228, 236 n.16 (R.I. 2008); State v. Bouffard, 945 A.2d 305, 312 (R.I. 2008); State v. Bido, 941 A.2d 822, 829–30 (R.I. 2008); State v. Strom, 941 A.2d 837, 841 (R.I. 2008); State v. Young, 941 A.2d 124, 128 (R.I. 2008); State v. Ramirez, 936 A.2d 1254, 1262 (R.I. 2007); Shoucair v. Brown Univ., 917 A.2d 418, 428 (R.I. 2007); State v. Feliciano, 901 A.2d 631, 647 (R.I. 2006); State v. Gomes, 881 A.2d 97, 113 n.27 (R.I. 2005); Lyons v. State, 880 A.2d 839, 841 n.4 (R.I. 2005); State v. Oliveira, 882 A.2d 1097, 1126 n.15 (R.I. 2005); State v. Mohapatra, 880 A.2d 802, 810 (R.I. 2005); State v. Hallenbeck, 878 A.2d 992, 1018 (R.I. 2005); State v. Crow, 871 A.2d 930, 936 n.7 (R.I. 2005); Pollard v. Acer Grp., 870 A.2d 429, 432 n.10 (R.I. 2005); State v. Ibrahim, 862 A.2d 787, 797 (R.I. 2004); *In re* Ephraim L., 862 A.2d 196, 201 (R.I. 2004); State v. Lynch, 854 A.2d 1022, 1040 (R.I. 2004); Brown v. State, 841 A.2d 1116, 1122 (R.I. 2004); State v. Portes, 840 A.2d 1131, 1141–42 (R.I. 2004); State v. Rivera, 839 A.2d 497, 501 n.5 (R.I. 2003); State v. Silva, 798 A.2d 419, 428 (R.I. 2002); State v. Kaba, 798 A.2d 383, 388 (R.I. 2002); Roe v. Gelineau, 794 A.2d 476, 482 (R.I. 2002); Harvey Realty v. Killingly Manor Condo. Ass'n, 787

was the court's decision in *State v. Moten*.[57]

II. *STATE V. MOTEN* & THE BENEFIT OF HINDSIGHT

Rigorous adherence to the rules of appellate preservation is particularly justified for certain substantive issues. Evidentiary rulings, for example, often invoke principles (such as conditional relevance and undue prejudice) that are intrinsically intertwined with and must be evaluated in the context of the trial. In a vacuum—without the benefit of counsels' arguments and the trial court's ruling on those arguments—it would be difficult for appellate justices to review an evidentiary issue with only the benefit of the "cold record."[58] From January 1, 2010 to January 1, 2014, of the fifty-three cases wherein the court denied review of an issue pursuant to raise or waive, about one third (sixteen cases) involved evidentiary issues.[59] Moreover, Rule 30 of the Superior

A.2d 465, 467 (R.I. 2001); State v. Hazard, 785 A.2d 1111, 1116 (R.I. 2001); Cronan *ex. rel.* State v. Cronan, 774 A.2d 866, 878 (R.I. 2001); State v. Breen, 767 A.2d 50, 57 (R.I. 2001); State v. Verrecchia, 766 A.2d 377, 390 n.16 (R.I. 2001); State v. Rieger, 763 A.2d 997, 1004 (R.I. 2001); State v. Addison, 748 A.2d 814, 820 n.1 (R.I. 2000); *In re* David G., 741 A.2d 863, 866 (R.I. 1999); State v. Brezinski, 731 A.2d 711, 715 (R.I. 1999); State v. Vanover, 721 A.2d 430, 437 (R.I. 1998); State v. Brown, 709 A.2d 465, 479 (R.I. 1998); State v. Rivera, 706 A.2d 914, 920 (R.I. 1997); State v. Gomes, 690 A.2d 310, 319 (R.I. 1997); State v. Leonardo, 677 A.2d 1336, 1337 (R.I. 1996); State v. Figueroa, 673 A.2d 1084, 1092 (R.I. 1996); State v. Grabowski, 672 A.2d 879, 882 (R.I. 1996); State v. Mastracchio, 672 A.2d 438, 446 (R.I. 1996); State v. Thomas, 654 A.2d 327, 332 (R.I. 1995); State v. Froais, 653 A.2d 735, 739 (R.I. 1995); State v. Rupert, 649 A.2d 1013, 1015–16 (R.I. 1994); State v. Cardoza, 649 A.2d 745, 748 (R.I. 1994); State v. Sanden, 626 A.2d 194, 199 (R.I. 1993); State v. Donato, 592 A.2d 140, 142 (R.I 1991).

57. 64 A.3d at 1241.

58. The court has most often used the "cold record" language in the context of reviewing the trial court's denial of a motion for a new trial. *See, e.g.*, State v. Whitaker, 79 A.3d 795, 804 (R.I. 2013); State v. Erminelli, 991 A.2d 1064, 1069 (R.I. 2010).

> It is well-established that we accord a great deal of respect to the factual determinations and credibility assessments made by the judicial officer who has actually observed the human drama that is part and parcel of every trial and who has had an opportunity to appraise witness demeanor and to take into account other realities that cannot be grasped from a reading of a cold record.

Erminelli, 991 A.2d at 1069 (quoting State v. Gonzalez, 986 A.2d 235, 242 (R.I. 2010)) (internal quotation marks omitted). This logic can also apply to evidentiary rulings based on relevance, prejudice, or bias.

59. Martin v. Lawrence, 79 A.3d 1275, 1282 (R.I. 2013); State v. Pona, 66

Court Rules of Criminal Procedure specifically mandates the preservation of objections to jury instructions.[60] During the above stated time period, the court denied review of unpreserved arguments related to jury instructions in five cases.[61] Nevertheless, there remain thirty-two other cases where the court rejected a wide variety of issues including criminal joinder,[62] adequacy of tax sale notice,[63] and the removal of probate funds.[64] Certainly, the court properly invoked raise or waive in the great majority of these cases; however at least one warrants further discussion.

In May of 2013, the Rhode Island Supreme Court released its opinion in *State v. Moten*, affirming the appellant's first-degree child abuse conviction.[65] The sole issue on appeal involved the testimony of Dr. Nancy Harper, a pediatrician who examined the child's injuries.[66] During the doctor's testimony, she was asked about statements made to her by a colleague (an ophthalmologist) who had examined the child's eyes.[67] The defense counsel objected, and the trial justice sustained the objection.[68] The prosecutor then asked Dr. Harper whether the ophthalmologist's

A.3d 454, 469 (R.I. 2013); State v. Ford, 56 A.3d 463, 470 (R.I. 2012); State v. Bellem, 56 A.3d 432, 433 n.2 (R.I. 2012); State v. Tep, 56 A.3d 942, 945 n.10 (R.I. 2012); State v. Cook, 45 A.3d 1272, 1280 (R.I. 2012); State v. Ciresi, 45 A.3d 1201, 1212–13 (R.I. 2012); *Alston*, 47 A.3d at 243; Robideau v. Cosentino, 47 A.3d 338, 341 (R.I. 2012); *In re* Jazlyn P., 31 A.3d 1273, 1280–81 (R.I. 2011); State v. Kelly, 20 A.3d 655, 660–61 (R.I. 2011); *Brown*, 9 A.3d at 1246; State v. Moreno, 996 A.2d 673, 684 (R.I. 2010); State v. McManus, 990 A.2d 1229, 1237 (R.I. 2010); *In re Miguel*, 990 A.2d at 1223; State v. Adefusika, 989 A.2d 467, 479 (R.I. 2010).

60. Rule 30 of the Superior Court Rules of Criminal Procedure provides, in relevant part: "No party may assign as error any portion of the charge or omission therefrom unless the party objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which the party objects and the grounds of the party's objection." R.I. Super. R. Crim. P. 30.

61. *Whitaker*, 79 A.3d at 808; State v. Botas, 71 A.3d 430, 434 (R.I. 2013); State v. Viveiros, 45 A.3d 1232, 1243–44 (R.I. 2012); State v. Delestre, 35 A.3d 886, 892 n.6 (R.I. 2012); Dawkins v. Siwicki, 22 A.3d 1142, 1150 (R.I. 2011).

62. State v. Kluth, 46 A.3d 867, 875–76 (2012).

63. Johnson v. QBAR Assocs., 78 A.3d 48, 54 (2013).

64. Randall v. Randall, 22 A.3d 1166, 1172 (2011).

65. 64 A.3d 1232, 1234 (R.I. 2013).

66. *Id*. at 1235.

67. *Id*. at 1236–37.

68. *Id*. at 1236.

statements were necessary for Dr. Harper's complete assessment of the child, and the doctor answered in the affirmative.[69] The prosecutor asked again about the ophthalmologist's statements, and the defense counsel again objected; however the trial justice overruled the objection.[70] Dr. Harper testified about the ophthalmologist's statements regarding the extensive injuries suffered by the child.[71] The defendant was convicted of first-degree child abuse and given a twenty-year prison sentence.[72]

On appeal, the defendant's only argument was that Dr. Harper's testimony violated the Sixth Amendment's Confrontation Clause.[73] While the trial counsel did repeatedly object to Dr. Harper's testimony, counsel never specifically referenced the Confrontation Clause.[74] Justice Robinson, writing for the majority, began by emphasizing that the court's raise or waive rule "is not some sort of artificial or arbitrary Kafkaesque hurdle. Instead, the rule serves as an important guarantor of fairness and efficiency in the judicial process."[75] The majority proceeded to recognize that the trial counsel had made a general objection to Dr. Harper's testimony, but had not articulated the specific basis for that objection.[76] The defendant maintained that it was clear that the trial counsel's objection was based on the Confrontation Clause; however, the majority disagreed: "In our view . . . it is equally—if not more—plausible that the prosecutor and the trial justice understood defendant's objection to be on hearsay

69. *Id*. at 1236–37.

70. *Id*. at 1237. That exchange proceeded as follows:

> Q: And did you need [the ophthalmologist's statements] to further your information for the treatment of [the child], as well as the diagnosis?
>
> A: Yes.
>
> Q: And what did he tell you.
>
> DEFENDANT'S ATTORNEY: Objection.
>
> THE COURT: Overruled. You may answer.

Id. (internal quotation marks omitted).

71. *Id*.

72. *Id*.

73. *Id*.

74. *Id*. at 1239.

75. *Id*. at 1238 (quoting DeMarco v. Travelers Ins. Co., 26 A.3d 585, 628 n.55 (R.I. 2011)) (internal quotation marks omitted).

76. *Id*. at 1239.

grounds."[77] In support of this conclusion, Justice Robinson cited an earlier objection levied by defense counsel to the introduction of similar out of court statements made by an emergency room technician.[78] In that instance, there was a sidebar during which the attorneys and trial justice discussed Rule 803(4) of the Rhode Island Rules of Evidence, which creates a hearsay exception for out of court statements made for the purposes of medical treatment.[79] The majority relied upon this and other circumstantial evidence of the trial counsel's intent to propound a hearsay objection to Harper's testimony and declined to further embark upon a "journey into the mind of defense counsel, the prosecutor, or the trial justice," which the court characterized as "a fruitless effort that brings to the fore the very purpose of the 'raise or waive' rule."[80] The court then moved on to discuss the narrow exception for novel constitutional issues.[81]

The majority began its discussion of the exception by warning that "the alleged error must be more than harmless, and the exception must implicate an issue of constitutional dimension derived from a novel rule of law that could not reasonably have been known to counsel at the time of trial."[82] The defendant's argument focused on the reformulated Confrontation Clause analysis first announced in *Crawford v. Washington*, decided on March 8, 2004.[83] In *Crawford*, the United States Supreme Court, abandoning the framework established in *Ohio v. Roberts*,[84] stated that the admission of an out of court, "testimonial" statement violates the Sixth Amendment's Confrontation Clause unless the declarant is determined to be "unavailable" and the defendant had a prior opportunity to cross-examine the declarant.[85]

While the defendant did not specifically rely on *Crawford*, the majority stated that such reliance would have been frivolous given that the decision was published more than two and a half years

77. *Id*.
78. *Id*.
79. *Id*.
80. *Id*. at 1240.
81. *Id*.
82. *Id*. (quoting State v. Breen, 767 A.2d 50, 57 (R.I. 2001)) (internal quotation marks omitted).
83. *Id*. (citing Crawford v. Washington, 541 U.S. 36 (2004)).
84. 448 U.S. 56, 66 (1980).
85. *Moten*, 64 A.3d at 1241 (citing *Crawford*, 541 U.S. at 68).

before Dr. Harper's testimony at trial.[86] The defendant instead relied upon two more recent United States Supreme Court decisions in *Melendez-Diaz v. Massachusetts*[87] and *Bullcoming v. New Mexico*,[88] which, the defendant argued, constituted "intervening decisions" establishing a novel constitutional rule.[89] The majority rejected the argument: "Both *Bullcoming* and *Melendez-Diaz* merely apply the rule announced in *Crawford*. Therefore, those cases cannot be considered to have established a 'novel constitutional rule.'"[90] The defendant desperately attempted to avoid the dreaded result by arguing that *Melendez-Diaz* and *Bullcoming* had extended the rule in *Crawford* from mere witness statements to neutral, scientific evidence that had not previously been considered to violate the Confrontation Clause.[91] The testimonial statements in *Crawford* were made by the victim to the police, whereas the testimonial statements in *Melendez-Diaz* and *Bullcoming* consisted of lab results.[92] The defendant asserted that the ophthalmologist's statements were neutral, scientific evidence covered by *Melendez-Diaz* and *Bullcoming*, both decided after the defendant's trial.[93] Justice Robinson remained unconvinced:

> The "narrow exception" to the "raise or waive" rule applies to novel constitutional rules. It is not available when the Supreme Court applies a familiar constitutional rule to a novel fact pattern. If that were the standard, then virtually every constitutional decision of the Supreme Court would provide defendants an opportunity to take advantage of the exception. There would be nothing "narrow" about such an outcome, nor would that outcome further the rule's purpose of "fairness and efficiency in the judicial process."[94]

86. *Id*.
87. 557 U.S. 305 (2009).
88. 131 S. Ct. 2705 (2011).
89. *Moten*, 64 A.3d at 1241.
90. *Id*.
91. *Id*. at 1242.
92. *Compare* Crawford v. Washington, 541 U.S. 36, 40 (2004), *with Melendez-Diaz*, 557 U.S. at 307, *and Bullcoming*, 131 S. Ct. at 2712.
93. *Moten*, 64 A.3d at 1242.
94. *Id.* at 1243.

With that, the majority affirmed the defendant's conviction.[95]

"Hindsight is always twenty-twenty—especially when afforded the benefit of almost seven years of clarifying United States Supreme Court jurisprudence."[96] Thus began the dissenting opinion in *Moten* authored by Justices Flaherty and Indeglia. The two justices began by concurring with the majority's affirmance of the conviction—given that the ophthalmologist's statements were not testimonial—yet expressed concern over the majority's narrowing of the raise or waive exception.[97] The dissent emphasized the United States Supreme Court's disclaimer in *Crawford*: "[W]e leave for another day any effort to spell out a comprehensive definition of 'testimonial.'"[98] The dissent continued to stress the ongoing development in this area of criminal procedure:

> It was not until approximately three-and-one-half years after Moten's trial, which took place in 2006, that the United States Supreme Court moved beyond the realm of interrogation and considered whether forensic analyses—statements much more akin to the ophthalmologist's out-of-court statements made to Dr. Harper—were testimonial in nature and, thus, subject to exclusion under the Confrontation Clause.[99]

Justices Flaherty and Indeglia disputed the majority's assertion that *Melendez-Diaz* was a mere application of *Crawford*, recognizing that the scope of the Confrontation Clause remained unsettled and vigorously debated in the wake of *Crawford*.[100]

The dissent moved on to cite Justice Anthony Kennedy's concerns that the *Crawford* approach exhibited "persistent ambiguities" which were "symptomatic of a rule not amenable to sensible applications."[101] This ambiguity had been exacerbated by

95. *Id*.
96. *Id*. (Flaherty, J. and Indeglia, J., dissenting in part and concurring in result).
97. *Id*.
98. *Id*. at 1244 (quoting Crawford v. Washington, 541 U.S. 36, 68 (2004)).
99. *Id*.
100. *Id*. (citing Commonwealth v. Vasquez, 923 N.E.2d 524, 532 (Mass. 2010)).
101. *Id*. at 1245 (quoting Bullcoming v. New Mexico, 129 S. Ct. 2527, 2726 (2011) (Kennedy, J., dissenting)).

the fact that, prior to Moten's trial, the Rhode Island Supreme Court had provided sparse clarification of *Crawford*.[102] Justices Flaherty and Indeglia concluded with the following:

> Although it cannot reasonably be disputed that the exception to our "raise or waive" rule is indeed a narrow one, we maintain that the majority effectively reads this exception out of our jurisprudence. The line between a novel rule of law and the application of a rule of law in a new context can sometimes be blurry, if not indistinguishable. We acknowledge that this is a close call, but we cannot fault defense counsel for his failure to forecast *Crawford*'s application to the facts.[103]

The dissent then moved on to explain why the ophthalmologist's statements in this case were not testimonial.[104]

While the majority in *Moten* was particularly stringent in its interpretation of the novel constitutional issue exception, such rigidity has not always been the standard. In *State v. Dennis*, the appellant levied a due process challenge against Rhode Island General Laws section 11-37.1-15(a)(2), which allows the superior courts to determine the extent of witness production and cross examination necessary before a person is classified as a sex offender.[105] The Rhode Island Supreme Court acknowledged that the appellant had failed to raise the procedural due process objection to the statute at the superior court level, but chose to review the claim anyway.[106] "Although we remain unconvinced that the right to procedural due process in the Superior Court amounts to a novel rule of constitutional law . . . we shall nonetheless address defendant's claims."[107] It remains entirely unclear why the court—composed of the same five justices that decided *Moten*—agreed to rule on the merits of the appellant's procedural due process claim in *Dennis*. As the court recognized, the principles underlying procedural due process rights were far from novel—having been established by the United States

102. *Id*.
103. *Id*.
104. *Id*. at 1246–48.
105. 29 A.3d 445, 449 (R.I. 2011).
106. *Id*. at 449–50.
107. *Id*. at 450.

Supreme Court in the 1970s.[108] More importantly, the court had ruled, nearly two years earlier, on the extent to which procedural due process applies to section 11-37.1-15(a)(2).[109] Accordingly, unlike in *Moten*, there was hardly an interstice in this area of Rhode Island's constitutional jurisprudence.[110]

An examination of the majority opinion in *Moten* (especially when juxtaposed with *Dennis*) reveals the subjective, unpredictable nature of Rhode Island's raise or waive rule and, more specifically, its exception. As the dissent in *Moten* recognized, the distinction between a truly novel rule and the mere application of an existing rule to new facts is tenuous at best.[111] Was the United States Supreme Court's 2012 decision in *United States v. Jones*—concluding that GPS tracking constitutes a search—a novel rule or an application of existing Fourth Amendment jurisprudence to a new set of facts?[112] Was *Roe v. Wade* a novel constitutional rule[113] or simply a new application of

108. *See* Mathews v. Eldridge, 424 U.S. 319 (1976); Goldberg v. Kelly, 397 U.S. 254 (1970).

109. State v. Germane, 971 A.2d 555, 578 (R.I. 2009).

110. Compounding this confusion are the cases where the court has concluded that an issue was waived and yet proceeded to decide the merits anyway. In *State v. Figuereo*, for example, the defendant argued that the trial justice committed reversible error by declining to give a certain jury instruction regarding eyewitness reliability. 31 A.3d 1283, 1288 (R.I. 2011). The court began by reciting its raise or waive rule, explaining that the defendant had not requested the particular instruction which she now claimed was required, and therefore, she had waived her right to argue in favor of said instruction. *Id.* at 1289–90. Nonetheless, the court chose to rule on the merits of the defendant's argument, ultimately rejecting the claim. *Id.* at 1290–91. Furthermore, in *State v. Delarosa*, the court ruled on the merits of the defendant's "right to allocution" argument despite observing that the defendant "may have waived the issue of his right to allocution because he did not indicate to the hearing justice that he wished to address the court." 39 A.3d 1043, 1052 n.17 (R.I. 2012). These are cases where the court seemed to be bolstering its substantive decision by emphasizing that, even if one disagrees with its decision on the merits, the appellants' arguments should be rejected because they were waived. While the court is certainly permitted to provide alternative bases for a ruling, the virtue of judicial efficiency—so often cited to justify the harsh realities of the raise or waive doctrine—is impeded when the court decides to rule on the merits despite waiver of the argument.

111. *See* State v. Moten, 64 A.3d 1232, 1245 (R.I. 2013) (Flaherty, J. and Indeglia, J., dissenting in part and concurring in result).

112. 132 S. Ct. 945, 952–54 (2012).

113. 410 U.S. 113 (1973).

the right to privacy that the Court had discovered eight years earlier in *Griswold v. Connecticut*?[114] In a legal system predicated on the incremental extension of existing jurisprudence, divining the precise moment of conception for a particular constitutional principle is a difficult proposition.

Additionally, even if a constitutional principle can be classified as truly novel, what is the statute of limitations on novelty? The majority in *Moten* determined that *Crawford*'s novelty had expired after two and a half years.[115] That determination seems eminently reasonable; however, at what point in those two and a half years did the novelty actually expire? After the first year? After the second year? Moving forward, how do appellate litigators determine whether too much time has passed between the novel case and the underlying trial? At some point, it probably becomes easier to simply require that the novel case actually intervene the trial and appeal as occurred in *State v. Mendes* and *State v. Dufour*.[116] Simply put, the novelty standard results in a situation where both advocates as well as the court must expend significant resources while attempting to determine whether the appeal presents a novel issue or merely a novel application. This, of course, occurs before any consideration of the underlying substantive question is addressed.[117] All of this is in service of a rule which purportedly advances the efficient administration of justice.

One final concern with the ambiguous exception is the conflict that can arise between the attorney's duty to their client and the attorney's duty of candor to the court. In reviewing trial transcripts for error, appellate counsel will inevitably be confronted with potential preservation issues—whether the trial counsel failed to object at all or merely failed to articulate the proper basis for the objection (as was the case in *Moten*[118]).

114. 381 U.S. 479 (1965).

115. *Moten*, 64 A.3d at 1241.

116. *See* State v. Mendes, 210 A.2d 50, 52–53 (R.I. 1965); State v. Dufour, 206 A.2d 82, 83, 85, 87 (R.I. 1965).

117. *See* Martineau*, supra* note 3, at 1032 ("Each time an appellant asks the appellate court to consider an issue not raised in the trial court, the appellate court must devote time to deciding whether to consider the issue and, if it decides to do so, must then spend additional time examining its merits.").

118. *Moten*, 64 A.3d 1239.

Arguably, affirmatively raising the defect in the topside brief is not in the appellant's best interest. However, Rule 3.3 of the Rhode Island Rules of Professional Conduct demands an attorney's candor to the tribunal. More specifically Rule 3.3(a)(2) states that "[a] lawyer shall not knowingly . . . fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel."[119] "The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case."[120]

In light of this conflict, many attorneys may endeavor to shoehorn an unpreserved argument into the novel constitutional rule exception, thereby justifying his or her choice not to affirmatively alert the court of the procedural defect. The more ambiguous the exception, the more preservation defects counsel can, in good faith, justify not raising. Certainly, the odds are low that such defects escape opposing counsel, the justices, and their law clerks; however, a good faith argument that the exception applied should spare the attorney from rebuke.[121] While it may

119. R.I. R. Prof. Conduct R. 3.3(a)(2).

120. *Id.* R. 3.3, cmt. 3.

121. The tension created between the appellate attorney's duty to the client and his duty to the court with regards to preservation issues is far from conjecture:

> Both [appellants] now complain that the eventual admission of the handguns into evidence violated the order excluding evidence not provided pursuant to discovery orders. Indeed, both claim that this issue is preserved by the trial court's ruling on that motion.
>
> It is very clear that after this Court's review of the record that the motion to exclude evidence not provided pursuant to discovery orders was not aimed at the handguns; more importantly, it is clear that the trial court's order granting this motion did not cover that evidence. That this could not be clearer is shown by the facts that a *separate* motion specifically addressed the handguns, that this motion was discussed just a moment before the discovery-order motion, and that the court separately ruled on this motion. *In presenting their arguments as they have and ignoring the separate motions made at trial, it seems that appellate counsel either did not review the record very carefully or they have decided to push the boundaries of the duty of candor to a tribunal to its limits.* [One of the two attorneys] at least, appears to have recognized that there were two different motions and rulings, but she argues that the trial court's rulings were inconsistent and arbitrary. Because the motion to exclude evidence not provided under the discovery orders and the

be strategically beneficial for the attorney to raise the defect in the topside brief in an attempt to "take the sting out,"[122] waiting to address the defect in the reply brief (assuming the opposing side identifies it) can be equally tempting. Ultimately, this is an internal strategic debate that the law should aspire to eliminate.[123] Both the advocates who rely upon the rule as well as the judges who must administer it would benefit from additional, objective guideposts for determining whether an unpreserved issue should be considered.

III. THE FUTURE OF RAISE OR WAIVE

Rhode Island's raise or waive rule is neither a statutory mandate nor a constitutional imperative; it is a prudential limitation imposed on the court by the court. Unlike personal jurisdiction or a statute of limitations, the court could abandon the doctrine (or its exception) tomorrow. In that sense, raise or waive

> court's resolution of this motion did not cover the guns, they cannot be deemed to have preserved this issue for appellate review.

Swan v. Commonwealth, 384 S.W.3d 77, 88 (Ky. 2012) (second emphasis added) (footnote omitted).

122. There are certainly benefits of affirmatively raising preservation defects for appellate courts. *See, e.g.*, Landie v. Century Indem. Co., 390 S.W.2d 558, 567 (Mo. Ct. App. 1965) ("Defendant, although admitting with commendable candor that it has not preserved any allegation of error as to Instruction No. 7, insists that this court should consider its allegation . . . as constituting 'plain error.'"); State v. Reid, 367 S.E.2d 672, 674 (N.C. 1988) ("[T]he defendant conceded with commendable candor that the objection at trial came too late and that this question was not properly preserved for appellate review."). However, such benefits rarely extend beyond mere compliment. *See, e.g.*, *Landie*, 390 S.W.2d at 568 ("[T]his is not a case wherein this court should exercise its discretion under [the plain error exception]."); *Reid*, 367 S.E.2d at 674 ("[W]e decline the defendant's invitation to suspend the rules of appellate procedure.").

123. There are other strategic reasons why an attorney may raise an issue despite its obvious preservation defects. The doctrine of cumulative error, for instance, recognizes that "at some point trial errors may combine so that together they operate to infect the trial fundamentally and thus violate the defendant's due process rights." State v. Powers, 566 A.2d 1298, 1305 (R.I. 1989). The doctrine, first discussed in *State v. Pepper*, 237 A.2d 330 (R.I. 1968), states that "[w]hile an error may not be prejudicial when examined in isolation, a series of errors may have a cumulative effect which supports reversal." State v. Roderick, 403 A.2d 1090, 1093 n.4 (R.I. 1979). This appellate "Hail Mary" requires, as one might imagine, a substantial number of errors, and accordingly, an attorney relying on the doctrine may want to raise an unpreserved issue in an attempt to increase the aggregate.

is analogous to stare decisis. Both are self-imposed restraints on the court's clear authority to decide a legal issue.[124] Both are historically rooted in the predictability of the law and the efficient administration of justice.[125] However, with regards to stare decisis, the United States Supreme Court has candidly provided litigants and judges with particularized circumstances where the court may depart from the doctrine.[126] Yet, in the realm of raise or waive, litigants have been left to struggle with the meaning of a "novel constitutional rule."

In 1982, the First Circuit decided *United States v. Krynicki*.[127] In *Krynicki*, the district court dismissed stolen gun charges under the Speedy Trial Act given that the indictment was returned more than thirty days after the defendant's arrest.[128] The government appealed and argued that, because the indictment charged the defendant with counts additional to those for which she was originally arrested, the additional counts should not have been dismissed under the Speedy Trial Act.[129] The defendant rebutted that the government had not presented that argument to the district court on the motion to dismiss.[130] Given that there was no transcript of the district court hearing, the First Circuit assumed that the government had indeed failed to raise the argument at

124. *See* Payne v. Tennessee, 501 U.S. 808, 828 (1991) ("*Stare decisis* is not an inexorable command; rather, it 'is a principle of policy and not a mechanical formula of adherence to the latest decision.'" (quoting Helvering v. Hallock, 309 U.S. 106, 119 (1940)).

125. *See* Solem v. Helm, 463 U.S. 277, 312 (1983) (Burger, J., dissenting) ("While the doctrine of *stare decisis* does not absolutely bind the Court to its prior opinions, a decent regard for the orderly development of the law and the administration of justice requires that directly controlling cases be either followed or candidly overruled.").

126. In Planned Parenthood of Se. Pa. v. Casey, Justice Sandra Day O'Connor recognized that, in deciding whether to abandon stare decisis, a court should consider: (1) whether the rule at issue has historically defied practical workability; (2) whether the rule has been detrimentally relied upon in a manner that removing it would result in inequitable circumstances; (3) whether related principles of law have developed in a manner to render the original rule "no more than a remnant of abandoned doctrine"; and (4) whether the facts surrounding the rule have so changed "as to have robbed the old rule of significant application or justification." 505 U.S. 833, 854–55 (1992).

127. 689 F.2d 289 (1st Cir. 1982).

128. *Id.* at 290–91.

129. *Id.* at 291.

130. *Id.*

the district court level.[131]

The three judge panel, consisting of Judges Levin Campbell, Stephen Breyer, and Raymond Pettine (sitting by designation), began by reiterating that "[t]he ordinary rule is that appellate courts will not consider issues not raised below. . . . However, appellate courts *do* have discretion to examine issues raised for the first time on appeal."[132] The court identified four principles for determining whether an unpreserved issue falls within this exception: (1) whether the unpreserved issue is purely legal and no further development of the factual record is necessary to its resolution; (2) whether the party's argument is "highly persuasive"; (3) whether the issue is almost certain to arise in future cases, and therefore, declining to decide the matter will hinder judicial economy and the fair administration of criminal justice; and (4) whether declining to reach the issue would constitute "a miscarriage of justice."[133] The court concluded that the government's argument satisfied these principles and decided the issue on the merits, ultimately agreeing with the government and reversing the district court's dismissal.[134] The First Circuit has subsequently used the principles of *Krynicki* on multiple occasions to justify ruling on unpreserved arguments.[135]

While the second and fourth principles set out in *Krynicki* are admittedly no more concrete than the Rhode Island Supreme Court's current jurisprudence, the first and third principles are objective, sensible criteria which would give appellate advocates more guidance as to whether an unpreserved argument will be heard on the merits.

One of the primary concerns underlying the raise or waive rule is that an appellate court's knowledge of the case is strictly limited to the trial record.[136] Continually remanding matters to the trial courts for further factual findings on unpreserved issues would be an enormously unwieldy procedure. Accordingly,

131. *Id*.
132. *Id*.
133. *Id*. at 291–92.
134. *Id*. at 295.
135. *See, e.g.*, United States v. Patrick V., 359 F.3d 3, 8 & n.2 (1st Cir. 2004); Castillo v. Matesanz, 348 F.3d 1, 12 (1st Cir. 2003); United States v. La Guardia, 902 F.2d 1010, 1012–13 (1st Cir. 1990).
136. *See* Martineau, *supra* note 3, at 1038.

Krynicki's first criterion—requiring that the unpreserved issue be purely legal with no further factual development required—is a logical limitation on the exception to raise or waive.[137] Appellate consideration of such unpreserved, purely legal issues does not deprive the opposing party "of an opportunity to introduce relevant evidence."[138]

Yet and still, whether appellate courts are equipped to determine if additional evidence is necessary to resolve an unpreserved, legal issue has been questioned.[139] To some, the suggestion that "an appellate court can look at the record and conclude that no additional, relevant evidence could have been introduced on a completely new legal issue had the parties known it would be decisive in the case simply flies in the face of what we know about the trial process."[140] For example, one wonders whether *Moten* would have met this criterion. While the dissent felt confident in deciding that the ophthalmologist's statements were not testimonial based on the existing record,[141] certainly additional evidence regarding the precise purpose for the statements as well as the reason why the ophthalmologist was unavailable would have been helpful. On the other hand, analysis under *Krynicki*'s first criterion would be very similar to determining whether an issue is a question of fact, a question of law, or a mixed question of fact and law—an analysis that the Rhode Island Supreme Court performs on a regular basis.[142] If the court concludes that the appellant's unpreserved argument implicates unresolved questions of fact, then the preservation defect should not be excused and the merits should not be considered.

However, if the issue is a purely legal question requiring no additional facts, the matter should next be reviewed in light of *Krynicki*'s third criterion. This criterion—requiring an issue that is almost certain to arise again—permits the court to carefully

137. *See Krynicki*, 689 F.2d at 291–92.
138. *Id.* at 292.
139. *See* Martineau, *supra* note 3, at 1038.
140. *Id*. at 1037.
141. *See* State v. Moten, 64 A.3d 1232, 1245–48 (R.I. 2013) (Flaherty, J. and Indeglia, J., dissenting in part and concurring in result).
142. *See, e.g.*, Banville v. Brennan, 84 A.3d 424, 431 (R.I. 2014); Tedesco v. Connors, 871 A.2d 920, 924–25 (R.I. 2005); Robitaille v. Brousseau, 339 A.2d 738, 741 (R.I. 1975).

select only those unpreserved arguments that will save parties confusion on the same issues in future cases.[143] "[D]eclining to reach [a] straight-forward legal issue will neither promote judicial economy, nor aid the administration of the criminal justice system."[144] Recall that the dissent in *Moten* emphasized the fact that the Rhode Island Supreme Court (prior to Moten's trial) had "provided little guidance on the application of *Crawford*."[145] If the unpreserved issue is likely to arise in future cases, the court should exercise its discretion in favor of eliminating future confusion.

The criticism of this criterion is that if "[t]here is every likelihood that the issue will be raised properly in future cases . . . the court will be able to rule on the issue without making an exception to the general rule."[146] This criticism, of course, ignores the harm done to the litigant in the pending appeal and assumes that the trial counsel in the next case will properly raise the argument without any further guidance from the appellate court.[147] The great benefit of this criterion is that it impliedly

143. *Kyrnicki*, 689 F.2d at 292; *see also* United States v. Golon, 511 F.2d 298, 301 (1st Cir. 1975) ("[W]e are loath to pass over a question, squarely before us, which is almost certain to be presented in identical terms in other cases.").

144. *Krynicki*, 689 F.2d at 292. In *United States v. Patrick V.*, the First Circuit, citing *Krynicki*, stressed that:

> [B]ecause this legal question is likely to arise in other cases—all the more likely because of the paucity of case law regarding federal juvenile dispositions in general and restitution in particular—declining to hear the issue will neither promote judicial economy nor aid in the administration of the juvenile justice system.

359 F.3d 3, 8 n.2 (1st Cir. 2004) (citing *Krynicki*, 689 F.2d at 292).

145. *Moten*, 64 A.3d at 1245 (Flaherty, J. and Indeglia, J., dissenting in part and concurring in result). The dissent cited *State v. Feliciano*, 901 A.2d 631, 642 (R.I. 2006) and *State v. Harris*, 871 A.2d 341, 345 n.12 (R.I. 2005) as cases wherein the court had set aside for another day the task of clarifying the contours of *Crawford*. *Moten*, 64 A.3d at 1245.

146. Martineau, *supra* note 3, at 1041.

147. For example, nine years before the Rhode Island Supreme Court rejected the defendant's unpreserved Confrontation Clause argument in *Moten*, it did the same in *State v. Lynch*, 854 A.2d 1022, 1039–40 (R.I. 2004). In *Lynch*, the defendant argued that the introduction of extrajudicial statements made by a witness to a police officer violated the Confrontation Clause. *Id*. at 1036. As in *Moten*, trial counsel in *Lynch* limited his objection to the hearsay rules, and the Rhode Island Supreme Court determined that the Confrontation Clause argument was unpreserved. *Id*. at 1039. The court

embodies the "novelty" standard without explicitly requiring it. Reaching an unpreserved legal issue that has already been addressed by the courts on previous occasions would neither promote judicial economy nor aid the administration of the justice system. Therefore, the court may continue to consider novelty, but not be bound by it.

Far from a cure-all, *Krynicki* provides a modest clarification for appellate advocates and judges alike. Certainly, other paradigms abound,[148] and therefore, *Krynicki* is not trumpeted as *the* solution, but rather *a* solution—a humble alternative—to the current "novel constitutional rule" regime.

IV. CONCLUSION

Simply put, the fact that the Rhode Island Supreme Court justices in *Moten* spent twelve well-researched, well-written pages debating the precise contours of an exception (that has existed for nearly fifty years) to a rule (that has existed for twice that long) tends to negate any claim that the doctrine faithfully serves judicial economy. Hopefully, at this point of the Article, it is clear that its intended purpose is neither to intentionally increase nor decrease the overall amount of unpreserved issues considered by the court. A stark increase, given Rhode Island's limited appellate resources, would seriously detriment the speedy administration of justice in the state, while a stark decrease would frankly be impossible given the few unpreserved arguments that the court currently agrees to consider. The purpose of the Article is to merely suggest a modest alternative to the current novel constitutional rule exception. The purpose is to allow attorneys to

also rejected the defendant's attempts to fit within the novel constitutional rule exception because any error was harmless. *Id.* at 1040.

148. Connecticut appellate courts, for example, require the following elements before agreeing to consider unpreserved arguments on appeal:

> [W]e hold that a defendant can prevail on a claim of constitutional error not preserved at trial only if *all* of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation clearly exists and clearly deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt.

State v. Golding, 567 A.2d 823, 827 (Conn. 1989) (footnote omitted).

spend less time considering whether to devote precious pages in their appellate briefs (and minutes at oral argument) on an unpreserved issue if the court does not intend to excuse the defect. The actual raise or waive rule—requiring an objection be made at trial to preserve the argument for appeal—is fairly simple to understand and easy to apply; one hopes that, at some point, its exception will follow suit.