STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

VOCES DE LA FRONTERA, INC. and
CHRISTINE NEUMANN-ORTIZ,

Petitioners-Respondents,

v.

Appeal No. 2015AP001152
Milwaukee County Case 2015CV002800

DAVID A. CLARKE JR.,

Respondent-Petitioner-Appellant.

**APPEAL FROM THE JUDGMENT OF THE
MILWAUKEE COUNTY CIRCUIT COURT
THE HONORABLE DAVID L. BOROWSKI PRESIDING**

REPLY BRIEF AND APPENDIX OF RESPONDENT-PETITIONER-APPELLANT

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I. FEDERAL REGULATION 8 C.F.R. § 236.6 PROTECTS THE DISCLOSURE OF INFORMATION RELATING TO FEDERAL IMMIGRATION DETAINEES IN LOCAL LAW ENFORCEMENT CUSTODY

A. Sheriff Clarke did not waive the right to rely upon the federal regulation to support the redaction of the federal immigration forms.

Petitioners-Respondents Voces and Neumann-Ortiz contend that Sheriff Clarke forfeited his right to rely on 8 C.F.R. § 236.6 to support the redaction of the federal immigration I-247 detainer forms because the regulation was not relied upon or cited before the circuit court. While Wisconsin case law generally holds that a party may not raise an *issue* for the first time on appeal, parties are permitted to make new arguments or cite additional authority for an argument on appeal, even when not raised before the circuit court.

As a general rule, an appellate court should not consider issues raised for the first time on appeal. *State v. Gove,* 148 Wis. 2d 936, 940-41, 437 N.W.2d 218 (1989); *Shadley v. Lloyds of London,* 2009 WI App 165, ¶ 25, 322 Wis. 2d 189, 776 N.W.2d 838. This rule is applied where the circuit court did not have an opportunity to pass on the issue. *Hopper v. City of Madison,* 79 Wis. 2d 120, 137, 256 N.W.2d 139 (1977). However,

new arguments are permitted on an issue that was properly raised in the circuit court. *See State v. Holland Plastics Co.,* 111 Wis. 2d 497, 505, 331 N.W.2d 320 (1983) (holding that an additional argument on issues already raised in the circuit court does not violate the general rule against raising issues for the first time on appeal).

An "issue" is defined as "a point in question of law or fact," including "a single material point of law or fact depending in a suit that is affirmed by one side and denied by the other and that is presented for determination at the conclusion of the pleadings." *State v. Weber*, 164 Wis. 2d 788, 789 n. 2, 4, 476 N.W.2d 867 (1991). In contrast, an "argument" is defined as "a reason given for or against a matter under discussion," or, alternatively, "a coherent series of reasons, statements, or facts intended to support or establish a point." *Id.* Therefore, "[a]lthough [an appeals court] will not generally review an issue raised for the first time on appeal, [an appeals court] will permit a new argument to be raised on an issue which was raised below." *L.L.N. v. Clauder*, 203 Wis. 2d 570, 590 n. 14, 552 N.W.2d 879 (Ct. App. 1996) (citation omitted), *rev'd in part on other grounds,* 209 Wis. 2d 674, 563 N.W.2d 434 (1997).

In the case at hand, Sheriff Clarke raised the issue concerning the confidentiality of the information contained on the I-247 forms before the circuit court. He argued that Wisconsin's Public Record Law, especially in light of the exemptions contained under the federal Freedom of Information Act (FOIA), precluded the production of information contained on the federal immigration detainer forms. That 8 C.F.R. § 236.6. was not specifically cited to does not result in a waiver of that argument, as the general issue concerning the confidentiality and non-production of the forms was clearly raised before the trial court.

Our situation is closely analogous to *City of Superior v. Bachinski,* 2013 WI App 94, 349 Wis. 2d 528, 835 N.W.2d 292 (unpublished). Before the circuit court, Bachinski argued that he should not have been issued a speeding ticket because the speed limit sign was not posted in accordance with the Manual on Uniform Traffic Control Devices (MUTCD). After the circuit court rejected the application of the MUTCD, Bachinski argued for the first time on appeal that he was not guilty of speeding because the speed limit sign was obscured by a tree branch. In making that argument, he relied upon Wis. Stat. § 346.02(7) – a statutory provision that had not been relied upon before the trial court. *Id.* at ¶ 7. The Court of Appeals

nevertheless determined that Bachinski's reliance on the statutory provision to support his argument should be considered on appeal because it "was nothing more than a variation of the argument made in the circuit court." *Id.* at ¶ 12 (*citing Weber*, 164 Wis. 2d at 789-91). A similar result must be found here, as 8 C.F.R. § 236.6 merely represents a variation of the same argument made by Sheriff Clarke before the circuit court.

Additionally, the general rule against issues being considered for the first time on appeal is merely one of judicial administration. *See Segall v. Hurwitz,* 114 Wis. 2d 471, 489, 339 N.W.2d 333 (Ct. App. 1983). This means that even when a new issue is raised for the first time on appeal, an appellate court may still exercise its discretion and consider that issue depending on the facts and circumstances of the case, particularly where "compelling circumstances" exist or where there is a reason to do so.[1] *Hopper,* 79 Wis. 2d at 137; *see also Sears v. State,* 94 Wis. 2d 128, 140, 287 N.W.2d 785 (1980); *Segall,* 114 Wis. 2d at 489-90.

One such circumstance involves questions of law that are not dependent on further fact-finding and the parties overlooked applicable

[1] It is noteworthy that Sheriff David A. Clarke Jr. is represented by different counsel on appeal than represented him before the circuit court. He is currently represented by the law firm of Lindner & Marsack, S.C., while before the circuit court he was represented by the Milwaukee County Corporation Counsel's Office.

legal authority before the circuit court. *See Helgeland v. Wisconsin Municipalities,* 2006 WI App 216, ¶ 9 n. 9, 296 Wis. 2d 880, 724 N.W.2d 208; *Estate of Hegarty ex rel. Hegarty v. Beauchaine,* 2001 WI App 300, ¶ 12, 249 Wis. 2d 142, 638 N.W.2d 355. The application of 8 C.F.R. § 236.6 is purely a legal issue and is exactly the type of authority that should be considered by this Court regardless of whether it was cited by parties in the circuit court.

B. Federal regulation 8 C.F.R. § 236.6 applies to the present situation as Sheriff Clarke held the immigration detainees on behalf of INS.

Petitioners-Respondent further contend that the language of 8 C.F.R. § 236.6 should be construed narrowly as to limit its application to information regarding federal immigration detainees who are in *custody* of the federal government, but being housed in state, local or private facilities. This impermissibly narrow interpretation of the regulation is contrary to both the express language of the regulation, as well as at least one court decision interpreting it. There is no language in 8 C.F.R. § 236.6 that limits its application to federal immigration detainees that are in federal *custody* – it applies to information and records relating to federal immigration detainees regardless of their custodian.

This dispute involves the interpretation of the clause "that houses, maintains, provides services to, or otherwise holds any detainee on behalf of the Service." While, Petitioners-Respondents seek to limit the application of this language only to situations in which the individual is in federal *custody*, nothing in the language of the regulation supports this very narrow interpretation. The regulation, by its express terms, applies to a broad range of situations in which a local law enforcement agency is housing, maintaining, providing service to, or otherwise holding an immigration detainee on behalf of INS. It is not limited to a single situation. It applies to a broad range of situations in which a local law enforcement agency is providing some service to the INS. *See, e.g., Commissioner of Correction v. Freedom of Information Comm.*, 307 Conn 53, 52 A.3d 636 (2012) (holding that nothing in the language of 8 C.F.R. § 236.6 differentiates between information about detainees who have been transferred to the custody of another governmental entity and information about detainees who have been released).

One such situation is where the local law enforcement agency is being requested by INS to temporarily hold the individual in local law enforcement custody for a period up to 48 hours on behalf of INS. This

detention extends beyond the period of time the individual would otherwise be held. While the detainee is not technically yet in federal custody, the individual is clearly being held *on behalf* of the INS. There is nothing in the federal regulation that requires the individual to be in *custody* of INS for the regulation to apply.

Case law interpreting this relatively obscure federal regulation is admittedly scarce. However, the case of *Ricketts v. Palm Beach County Sheriff*, 985 So.2d 591 (Fla. Dist. Ct. App. 2008) supports Sheriff Clarke's position that the federal regulation applies regardless of whether the immigration detainee is in local, state or federal custody. The case involved an individual who was held in the custody of a county sheriff following the filing of state charges pursuant to an immigration detainer I-247 form. It does not appear that the individual was ever in federal custody. The court noted that after being detained for 48 hours pursuant to a I-247 form, an I-203 form *may* be filed, at which time the individual is considered to be in federal custody. *Id.* at 592. The court noted that "*if* he had posted the $1,000 bond on the state charges, then he *would* have been booked on the federal I-203." *Id.* However, because the sheriff refused to accept the $1,000 bond, Ricketts was never booked on the federal I-203 and

therefore never in federal custody. Nevertheless, the district court noted that the sheriff withheld copies of the immigration documents under state law on the basis of 8 C.F.R. § 236.6. The court made no distinction between whether the federal immigration detainee was in local, state or federal custody.

As a practical matter, it should not matter whether an immigration detainee held by a local law enforcement agency is in federal custody or not. The critical point is that the individual is being detained at the request of the federal government for an immigration related purpose. The individual is no longer being held on state charges, but is being held because INS authorized and requested that the individual be held on a federal immigration-related matter. At that point in time, the same rationale that supports the confidentiality of records relating to the immigration detainees in federal custody would apply to immigration detainees in local custody being held at the behest of INS.[2]

[2] If this Court nevertheless determines that the status of the individual detainees is dispositive in this matter, Respondent-Petitioner-Appellant would respectfully request that the case be remanded to the circuit court for a determination as to whether the individual detainees identified on the I-247 forms were in the custody of INS at the time the request for the immigration detainer forms was made.

Federal regulation 8 C.F.R. § 236.6 controls this matter and protects the disclosure and release of the information contained on the I-247 forms that was redacted and withheld by Sheriff Clarke.

II. THE I-247 FORMS WOULD ALSO BE PROTECTED FROM DISCLOSURE PURSUANT TO THE BALANCING TEST ENCOMPASSED IN THE WISCONSIN PUBLIC RECORD LAW

In the alternative, Sheriff Clarke contends that the balancing test contained in the Wisconsin Public Record law similarly supports the non-disclosure of the requested information. The parties do not dispute the applicability of the balancing test; rather, the dispute involves whether Sheriff Clarke established the presumption in favor of openness was overcome in this matter based on the sensitive nature of the law enforcement information at issue. Sheriff Clarke maintains the policy considerations encompassed in the exemption under the Federal Freedom of Information Act (FOIA), with respect to sensitive law enforcement records, support his redaction of the I-247 forms.

Where there is no specific statutory or common law exception that either requires or precludes disclosure, the "balancing test" is employed to determine whether the presumption of openness is overcome by another

public policy concern. *Hempel v. City of Baraboo*, 2005 WI 120, ¶ 4, 284 Wis. 2d 162, 699 N.W.2d 551. In the context of law enforcement information and records, Wisconsin courts have noted that policy interests against disclosure frequently outweigh the interests in favor of release. *See Linzmeyer v. D.J. Forcey*, 2002 WI 84, ¶¶ 15-18, 30, 254 Wis. 2d 306, 646 N.W.2d 811; *Milwaukee Journal v. Call,* 153 Wis. 2d 313, 318-22, 450 N.W.2d 515 (Ct. App. 1989); *Journal/Sentinel, Inc. v. Aagerup*, 145 Wis. 2d 818, 826, 429 N.W.2d 772 (Ct. App. 1988).

In addressing a request under the Wisconsin Public Records law, the exemptions for law enforcement records contained under FOIA preclude production of law enforcement records or information compiled for law enforcement purposes that satisfy certain specific conditions. As argued in our principal brief, these exemptions cover the information contained on the federal immigration forms. Indeed, the exemptions have been embraced by the Wisconsin Supreme Court as "concisely list[ing]" the factors that should be considered and that weigh against production. *Linzmeyer*, 2002 WI 84 at ¶ 32.

It is clear that Captain Trimboli conducted this balancing test in determining whether to disclose the subject records. Nevertheless, Voces is

critical of for the manner in which she conducted the balancing test and the factors that she considered compelling in that analysis. Voces also contends that the argument made on appeal is a variation of the justification advanced by the records custodian. However, a court of appeals may consider a clear statutory exception to disclosure, even if the records custodian did not rely on the exception in its response to the open records request. *Journal Times v. City of Racine Bd. of Police & Fire Comm.*, 2015 WI 56, ¶¶ 62-75, 362 Wis. 2d 577, 866 N.W. 683 (*citing State ex rel. Blum v. Board of Education, School District of Johnson Creek,* 209 Wis. 2d 377, 565 N.W.2d 140 (Ct. App. 1997)). "[A] reviewing court's *de novo* determination whether certain information is statutorily exempted from disclosure is not aided by anything a custodian might say in a denial letter, nor is it deterred by the custodian's silence." *Id.*, 209 Wis. 2d at 387-88.

In the present case, the record custodian conducted the balancing test and considered the nature of the information requested in determining whether to make the production and/or redactions. She testified that she determined that certain information on the I-247 forms (Subject ID, A-number, event number, file number, etc.) constituted personally identifiable and law enforcement sensitive information. R. 19: 31-32. She therefore

contacted ICE to determine whether this information was regarded by ICE as sensitive and confidential. R. 19: 32.

As a preliminary response, ICE notified Captain Trimboli on March 31, 2015, that the requested information was regarded by ICE as law enforcement sensitive per the federal Privacy Act, 5 U.S.C. § 552a. R. 3: 12-13. ICE provided further guidance on April 3, 2015, and notified Captain Trimboli that several exemptions under the federal FOIA protected the requested records, including exemptions contained in 5 U.S.C. § 552(b)(6), (b)(7)(C), (b)(7)(E). R. 14: 2. She was notified that based on these exemptions, if ICE was responding to a FOIA request for the same I-247 forms, "[it] would redact this same information." R. 14: 2.

ICE also asserted that based on the nature of the information requested, there were serious concerns with the production of the forms. For instance, if internal identifying numbers and codes were released, ICE noted that an individual could illicitly gain access to the ICE system and modify or circumvent law enforcement. R. 14:2. ICE also identified concerns relating to the disclosure of this information as constituting an unwarranted invasion of personal privacy of the affected individuals. R.14: 2-3.

There is nothing improper about Captain Trimboli concluding that records in the custody of the Milwaukee County Sheriff's Office should not be disclosed based on information received from another law enforcement agency. This is particularly appropriate where the requested records originated from that other law enforcement agency. A records custodian is not expected to examine a public records request "in a vacuum." *Seifert v. School District of Sheboygan Falls*, 2007 WI App 207, ¶ 31, 305 Wis. 2d 582, 740 N.W.2d 177. The public records law contemplates examination of all relevant factors, considered in the context of the particular circumstances. *Id.* As the Supreme Court has observed, "[i]t is the nature of the documents and not their location which determines their status under [the public records law]. To conclude otherwise would elevate form over substance." *Nichols v. Bennett*, 199 Wis. 2d 268, 274, 544 N.W.2d 428 (1996).

This was not a situation in which Captain Trimboli determined that the requested records were 'categorically exempt' or in which she did not consider the open records request on a case-by-case basis. The fact that she carefully considered the request and contacted ICE to receive more information about the requested records demonstrates conclusively that she

did not adopt a blanket exemption or fail to independently consider the particular request. *See Portage Daily Register v. Columbia County Sheriff's Dept.*, 2008 WI App 30, ¶ 17-20, 308 Wis. 2d 357, 746 N.W.2d 525 (cautioning against application for categorical exemption for prosecutorial records in law enforcement custody).

ICE specifically identified the subject information as sensitive and confidential and advised Captain Trimboli that they would redact such information under FOIA if they received a similar request for information. R. 14: 2. A requester should not have any greater access to federal records simply because they are the possession of local law enforcement. As argued in our principal brief, the policies reflected in the FOIA exemptions are compelling and applicable to the federal immigration forms at issue and were properly redacted by Sheriff Clarke. *See Linzmeyer*, 2002 WI 84 at ¶ 32.

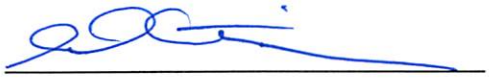
CONCLUSION

The records being sought pursuant to the Wisconsin Public Records law are sensitive federal law enforcement records relating to immigration detainees. Based on the arguments presented herein and in its principal brief, Sheriff Clarke respectfully requests that the decision of the circuit court be reversed and the petition for a writ of mandamus be dismissed.

Dated this 12th day of October 2015.

Respectfully Submitted,

LINDNER & MARSACK, S.C.,
Counsel for Respondent-Petitioner-Appellant



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CERTIFICATE OF SERVICE

The undersigned counsel for Respondent-Petitioner-Appellant hereby certifies that on October 12, 2015, three copies of the Reply Brief and Short Appendix of Respondent-Petition-Appellant were delivered by U.S. Mail to:

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Subscribed and sworn to before me
this 12th day of October, 2015.

KAREN GUMM NOTARY PUBLIC STATE OF WISCONSIN

Notary Public, State of Wisconsin.
My Commission expires: 3/18/17

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19 for a brief produced with a proportional serif font: minimum printing resolution of 200 dots per inch, 13-point body text, 11-point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per full line of body text.

The length of this brief is 3000 words.

Dated this 12th day of October, 2015.

Oyvind Wistrom

-CERTIFICATE OF COMPLIANCE -
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I hereby certify that:

I have submitted an electronic copy of this Brief excluding the Appendix of Respondent-Petitioner-Appellant which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on October 12, 2015.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 12th day of October, 2015.

Oyvind Wistrom

Subscribed and sworn to before me
this 12th day of October, 2015.

Notary Public, State of Wisconsin
My Commission expires: 9/1/19