APPENDIX

Exhibits:

1. Florida Statute Section 316.3045 (2007)

2. Easy Way of Lee County, Inc. v. Lee County, 674 So. 2d 863 (Fla. 2d DCA 1996).

3. Fla. Admin. Code R. 15B-13.001

4. Second DCA Opinion (Consolidated)

5. Order Granting Defendant's Motion to Suppress, State v. Middlebrooks, Fifteen Judicial Circuit in and for Palm Beach County, Florida, Case No. 2008CT043699AXX

Exhibit 1

Select Year: 2011 Go

The 2011 Florida Statutes

Title XXIII
MOTOR VEHICLES

Chapter 316
STATE UNIFORM TRAFFIC CONTROL

View Entire Chapter

316.3045 Operation of radios or other mechanical soundmaking devices or instruments in vehicles; exemptions.—

(1) It is unlawful for any person operating or occupying a motor vehicle on a street or highway to operate or amplify the sound produced by a radio, tape player, or other mechanical soundmaking device or instrument from within the motor vehicle so that the sound is:

(a) Plainly audible at a distance of 25 feet or more from the motor vehicle; or

(b) Louder than necessary for the convenient hearing by persons inside the vehicle in areas adjoining churches, schools, or hospitals.

(2) The provisions of this section shall not apply to any law enforcement motor vehicle equipped with any communication device necessary in the performance of law enforcement duties or to any emergency vehicle equipped with any communication device necessary in the performance of any emergency procedures.

(3) The provisions of this section do not apply to motor vehicles used for business or political purposes, which in the normal course of conducting such business use soundmaking devices. The provisions of this subsection shall not be deemed to prevent local authorities, with respect to streets and highways under their jurisdiction and within the reasonable exercise of the police power, from regulating the time and manner in which such business may be operated.

(4) The provisions of this section do not apply to the noise made by a horn or other warning device required or permitted by s. 316.271. The Department of Highway Safety and Motor Vehicles shall promulgate rules defining "plainly audible" and establish standards regarding how sound should be measured by law enforcement personnel who enforce the provisions of this section.

(5) A violation of this section is a noncriminal traffic infraction, punishable as a nonmoving violation as provided in chapter 318.

History.—s. 1, ch. 90-256; s. 220, ch. 99-248; s. 9, ch. 2005-164.

Exhibit 2

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674 So.2d 863
21 Fla. L. Weekly D1234

EASY WAY OF LEE COUNTY, INC., a Florida corporation d/b/a Club Nouveau After Dark; Luis C. Catania; and Mark A. Sanders, Appellants,

v.

LEE COUNTY, a political subdivision of the State of Florida; John McDougall, duly elected Sheriff of Lee County, Florida; and Joseph D'Alessandro, duly elected State Attorney for the Twentieth Judicial Circuit of the State of Florida, Appellees.

No. 95-02905.
District Court of Appeal of Florida,
Second District.
May 24, 1996.

Steven Carta of Simpson, Henderson, Savage & Carta, Fort Myers, for Appellants.

James Yaeger, County Attorney, and Thomas E. Spencer, Assistant Lee County Attorney, Ft. Myers, for Appellees Lee County and Joseph D'Alessandro.

Kenneth W. Sukhia of Fowler, White, Gillen, Boggs, Villareal and Banker, P.A., Tallahassee, for Appellee John J. McDougall.

CAMPBELL, Acting Chief Judge.

Appellants, Easy Way of Lee County, Inc., doing business as Club Nouveau After Dark, Luis C. Catania and Mark A. Sanders, challenge a final summary judgment upholding the facial constitutionality of Lee County Noise Control Ordinance, chapter 241/4, Lee County Code, as amended by Lee County Ordinance 94-17. We find a portion of that ordinance to be unconstitutionally overbroad and vague as we will explain. The remainder of the ordinance is determined to be a severable and valid exercise of police power by Lee County. Accordingly, we reverse in part and affirm in part.

That portion of the Lee County Noise Control Ordinance which is the subject of this appeal is contained within the amendment enacted by Ordinance 94-17, and provides as follows:

SECTION TWO:

....

C. Specific Prohibitions

....

3. Radios, television sets, exterior loudspeakers and similar devices.

In the case of any radio receiving set, musical instrument, television, phonograph, drum, exterior loudspeaker, or other device for the production or reproduction of sound, it shall be unlawful to create or permit to be created any noise that exceeds:

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a. 60 dBA during the hours between 10 a.m. to 10 p.m. from the property line of the noise source.

b. 55 dBA during the hours between 10 p.m. to 12:00 a.m. from the property line of the noise source.

Operating or permitting the use or operation of any radio receiving set, musical instrument, television, phonograph, drum, exterior loudspeaker, or other device for the production or reproduction of sound in such a manner as to cause noise disturbance so as to disturb the peace, quiet and comfort of the neighborhood and vicinity thereof; operating any such device between the hours of 12:01 a.m. and the following 10:00 a.m. in such a manner as to be plainly audible across property boundaries or

through partitions common to two (2) parties within a building or plainly audible at fifty (50) feet from such device when operated within a public space or within a motorboat.

4. For purposes of subsection 3 above, the term "plainly audible" shall mean any sound produced, including sound produced by a portable soundmaking device that can be clearly heard by a person using his or her normal hearing faculties, at a distance of fifty (50) feet or more from the source. Any law enforcement personnel or citizen who hears a sound that is plainly audible, as defined herein, shall be entitled to measure the sound according to the following standards:

a. The primary means of detection shall be by means of the complainant's ordinary auditory senses, so long as their hearing is not enhanced by any mechanical device, such as a microphone or hearing aid.

b. The complainant must have a direct line of sight and hearing to the source producing the sound so that he or she can readily identify the offending source and the distance involved.

c. The complainant need not determine the particular words or phrases being produced or the name of any song or artist producing the sound. The detection of a rhythmic bass reverberating type sound is sufficient to constitute a plainly audible sound.

(Emphasis supplied.)

We focus particularly on the emphasized portions of the amended ordinance (the last clause of section C(3) and all of section C(4)) and appellants' challenge against the facial validity of that portion as an overly broad restriction against the right of free speech provided for and protected by the First, Fifth and Fourteenth Amendments to the Constitution of the United States and sections 4 and 9 of article I of the Florida Constitution.

This appeal arises from the final summary judgment in a declaratory action filed by appellants seeking a determination as to whether the contested ordinance was facially invalid or invalid as applied to appellants. The facial validity of the ordinance is the sole issue presented on this appeal.

Appellant Club Nouveau is an after hours bottle club located in the Omni Center, a commercial shopping center adjacent to South U.S. 41 in Lee County. The center leases space to at least seventeen commercial businesses, twelve of which are open for business for all or a portion of the regulated time period of 12:01 a.m. to 10:00 a.m.

Appellants Catania and Sanders were managers of Club Nouveau. The club hires an independent DJ who plays pre-recorded music. No external loudspeakers are used. On July 27, 1994 and July 31, 1994, the Sheriff issued a citation to appellants Catania and Sanders for alleged violations of the above-quoted section of the ordinance. The citation charged that appellants had operated a device between 12:01 a.m. and 10:00 a.m., in such a manner as to be plainly audible at fifty feet from such device.

When the officer first arrived at the scene, he entered the club and requested appellant Catania to accompany him outside to a point fifty feet from the front door of the club. Catania complied and could not hear any sound, but was cited for music which could be heard fifty feet from the front door. At no time did the officer display a decibel meter or tell Catania that the music exceeded any specific decibel level. Similar procedures

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and events took place at the time of the subsequent citations. Informations were later filed against appellants Sanders and Catania on the basis of those citations.

At the time the first citation was issued, the club was warned by the Sheriff that unless it turned down its music to comply with the fifty-foot restriction, further citations would be issued. The club complied, resulting in a loss of

business. The club also soundproofed its interior walls and made periodic sound checks from a fifty-foot radius. Despite those attempts to comply with the ordinance, at least two more citations were issued to employees of the club after the trial court declaratory action proceedings were commenced. Those criminal proceedings remain pending.

The established business hours of Club Nouveau are from 1:30 a.m. to 6:30 a.m., Thursday through Monday. The club is located approximately fifty-eight feet from a residential community, commonly known as "The Forest." The amplified music played by the club immediately created problems for these residential neighbors. John Bullard attested that he resided 200-300 feet away from the club and that his residence was established approximately twelve years prior to the establishment of the club. Bullard stated he could hear the club's music during operating hours, and that he could regularly hear a bass boom beat which physically vibrates the pillow in his bedroom.

Other residents of The Forest had similar complaints. John Morse, the past president of the Forest Property Owner's Association, he attested that he received repeated complaints from property owners concerning noise from the club.

In addressing the constitutionality of the ordinance, we stress the fact that this appeal focuses only on the provisions of the ordinance emphasized above. We do not address whether the complaints of the adjacent residents can be or have been properly addressed under that portion of the ordinance we find to be valid and which prohibits "[o]perating or permitting the use of any radio receiving set, musical instrument, television, phonograph, drum, exterior loudspeaker, or other device for the production or reproduction of sound in such a manner as to cause noise disturbance so as to disturb the peace, quiet and comfort of the neighborhood and vicinity thereof; ...."

The United States Supreme Court has considered the permissible scope of government's efforts to protect citizens from disturbing or distracting sounds as those efforts relate to the "preferred position of freedom of speech." See Saia v. People of State of New York, 334 U.S. 558, 68 S.Ct. 1148, 92 L.Ed. 1574 (1948); Kovacs v. Cooper, 336 U.S. 77, 69 S.Ct. 448, 93 L.Ed. 513, reh'g denied, 336 U.S. 921, 69 S.Ct. 638, 93 L.Ed. 1083 (1949).

In Ledford v. State, 652 So.2d 1254 (Fla. 2d DCA 1995), this court considered a "begging" ordinance of the City of St. Petersburg as it related to free speech rights. In holding the "begging" ordinance in Ledford unconstitutionally overbroad and vague, we applied a strict scrutiny standard as follows:

In the present case, since the ordinance restricts speech on the "public ways," a traditional public forum, the regulation is subject to intense scrutiny. Such regulations survive only if: (1) they are narrowly drawn to achieve a compelling governmental interest; (2) the regulations are reasonable; and (3) the viewpoint is neutral.

In subjecting the ordinance to strict scrutiny, we hold that section 20-79 of the City of St. Petersburg Code is unconstitutionally overbroad and infringes on Ledford's free speech rights in a manner more intrusive than is necessary. We embrace the holding in CCB that the aim of protecting citizens from annoyance is not a "compelling" reason to restrict speech in a traditionally public forum. See CCB, 458 So.2d at 50. Although section 20-79 does not ban begging in all public places, the ordinance is overbroad; it does not distinguish between "aggressive" and "passive" begging. Furthermore, section 20-79 is vague. To withstand a challenge for vagueness, an ordinance must provide adequate notice to persons of common understanding concerning the behavior prohibited and the specific intent required: it must provide "citizens, police officers and courts

alike with sufficient guidelines to prevent arbitrary enforcement." City of Seattle v. Webster, 115 Wash.2d 635, 645, 802 P.2d 1333, 1339 (Wash.1990), cert. denied, 500 U.S. 908, 111 S.Ct. 1690, 114 L.Ed.2d 85 (1991). The ordinance under review does not define the terms "beg" or "begging," nor is its intent expressed. Consequently, the danger of arbitrary enforcement exists.

652 So.2d 1254 at 1256.

Similarly, in the case before us, the Lee County ordinance does not define its crucial terms "plainly audible" so as to secure against arbitrary enforcement.

In Reeves v. McConn, 631 F.2d 377 (5th Cir.1980), reh'g denied, 638 F.2d 762 (5th Cir.1981), the court had occasion to construe a Houston sound abatement ordinance in light of Saia and Kovacs. The Reeves court struck down as unconstitutionally overbroad the following sections of the Houston ordinance:

(1) The operation of sound amplifying equipment is prohibited Monday through Saturday within the downtown business district. A permit must be obtained for the operation of such equipment in these areas on Sundays. Any such Sunday permit shall state the business district to which same applies and shall be valid for only one day. Each separate Sunday must have a separate permit. Provided, however, that the provisions of this section shall not apply to parade permits which have been obtained from city council.

(2) The operation of sound amplifying equipment is prohibited between the hours of 7:00 p.m. and 10:00 a.m. daily, and further prohibited on Sunday between 10:00 a.m. and 1:00 p.m.

....

(5) The operation of sound amplifying equipment is prohibited within one hundred (100) yards of any hospital, school, Church or courthouse.

631 F.2d at 380.

In doing so, the Reeves court explained its standard of review for overbreadth and vagueness as follows:

2. Overbreadth

If, at the expense of First Amendment freedoms, a statute reaches more broadly than is reasonably necessary to protect legitimate state interests, a court may forbid its enforcement. But the Supreme Court has cautioned that invalidation of state laws for facial overbreadth is a remedy that should be applied "sparingly and only as a last resort." Broadrick [v. Oklahoma], 413 U.S. at 613, 93 S.Ct. [2908] at 2916 [37 L.Ed.2d 830 (1973)]. Accordingly, we will label a provision of the Houston ordinance unconstitutional only if a limiting construction could not readily be placed on the challenged section, Dombrowski v. Pfister, 380 U.S. 479, 491, 85 S.Ct. 1116, 1123, 14 L.Ed.2d 22 (1965), and if the overbreadth of the challenged provision is both real and substantial. Broadrick, 413 U.S. at 615, 93 S.Ct. at 2918.

3. Vagueness

Several provisions of subsection (b) were also challenged and invalidated for vagueness under the due process clause of the Fourteenth Amendment. The traditional standard of unconstitutional vagueness is whether the terms of a statute are so indefinite that "men of common intelligence must necessarily guess at its meaning and differ as to its application." Connally v. General Construction Co., 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322 (1926). See also Hynes v. Mayor and Council of Borough of Oradell, 425 U.S. 610, 620, 96 S.Ct. 1755, 1760, 48 L.Ed.2d 243 (1976). This standard is applied even more strictly to statutes that inhibit free speech because of the value our society places on the free dissemination of ideas. Id. at 620, 96 S.Ct. at 1760.

631 F.2d at 383. However, the Reeves court also sustained the provision of the Houston ordinance that provided as follows: "The volume

of sound amplified shall be controlled so that it is not unreasonably loud, raucous, jarring, disturbing or a nuisance to persons within the area of audibility."

In sustaining that portion of the Houston ordinance, the Reeves court stated:

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Subparagraph 6 requires the volume of sound amplification to be controlled so that it is not "unreasonably loud, raucous, jarring, disturbing, or a nuisance to persons within the area of audibility." The district court found that the terms "unreasonably" and "nuisance" are imprecise, do not give the ordinary person fair notice of prohibited conduct, and allow arbitrary and discriminatory enforcement by officials. The court therefore found this subparagraph to be void for vagueness under the Fourteenth Amendment. We disagree. The Supreme Court has approved the use of the word "unreasonably" in similar statutes that are otherwise precise and narrowly drawn. Cameron v. Johnson, 390 U.S. 611, 615-16, 88 S.Ct. 1335, 1338, 20 L.Ed.2d 182 (1968). The Court has also approved the terms "loud" and "raucous" as standards of prohibited sound amplification. Though these words are abstract, "they have through daily use acquired a content that conveys to any interested person a sufficiently accurate concept of what is forbidden." Kovacs v. Cooper, 336 U.S. 77, 79, 69 S.Ct. 448, 450, 93 L.Ed. 513 (1949). [Footnote omitted.] We approve the words "jarring" and "nuisance" on the same grounds, even though they fall short of providing "mathematical certainty." Grayned [v. City of Rockford], 408 U.S. at 110, 92 S.Ct. [2294] at 2299 [33 L.Ed.2d 222 (1972)]. "Flexibility and reasonable breadth, rather than meticulous specificity," is acceptable in this area. Id.

The remainder of the prohibitory language in subparagraph 6, "disturbing ... to persons within the area of audibility", presents a closer question. The Supreme Court has expressed reservations about the word "disturbs" in a similar ordinance. But in the expectation that a state court would interpret the term objectively to mean "actual or imminent interference with ... 'peace or good order' ", the Court eventually found the term not unconstitutionally vague or overbroad. Grayned, 408 U.S. at 109-112, 92 S.Ct. at 2299-2301. We have a similar expectation with regard to subparagraph 6. If actual experience with the ordinance were to demonstrate that it represents a subjective standard, prohibiting a volume that any individual person "within the area of audibility" happens to find personally "disturbing," we would not hesitate to change our judgment accordingly. Taking subparagraph 6 as a whole, we must at this time reverse the district court's finding that it is unconstitutionally vague.

631 F.2d at 385.

We hold that the "plainly audible" standard in the Lee County ordinance represents exactly such a "subjective standard, prohibiting a volume that any individual person 'within the area of audibility' happens to find personally disturbing," that would have caused the Reeves court to strike down the remaining portion of the Houston ordinance. We likewise find it objectionable for being both overly broad and vague and, accordingly, declare that portion of the Lee County ordinance emphasized earlier as being unconstitutional.

Reversed and remanded for further proceedings consistent herewith.

PARKER and WHATLEY, JJ., concur.

Exhibit 3

15B-13.001 Operation of Soundmaking Devices in Motor Vehicles.

(1) The purpose of this rule is to set forth the definition of the term "plainly audible" and establish standards regarding how sound should be measured by law enforcement personnel who enforce s. 316.3045, Fla. Stats.

(2) "Plainly Audible" shall mean any sound produced by a radio, tape player, or other mechanical or electronic soundmaking device, or instrument, from within the interior or exterior of a motor vehicle, including sound produced by a portable soundmaking device, that can be clearly heard outside the vehicle by a person using his normal hearing faculties, at a distance of 100 feet or more from the motor vehicle.

(3) Any law enforcement personnel who hears a sound that is plainly audible, as defined herein, shall be entitled to measure the sound according to the following standards:

(a) The primary means of detection shall be by means of the officer's ordinary auditory senses, so long as the officer's hearing is not enhanced by any mechanical device, such as a microphone or hearing aid.

(b) The officer must have a direct line of sight and hearing, to the motor vehicle producing the sound so that he can readily identify the offending motor vehicle and the distance involved.

(c) The officer need not determine the particular words or phrases being produced or the name of any song or artist producing the sound. The detection of a rhythmic bass reverberating type sound is sufficient to constitute a plainly audible sound.

(d) The motor vehicle from which the sound is produced must be located upon (stopped, standing or moving) any street or highway as defined by s. 316.002(53), Fla. Stats. Parking lots and driveways are included when any part thereof is open to the public for purposes of vehicular traffic.

(4) The standards set forth in paragraph (3) above shall also apply to the detection of sound that is louder than necessary for the convenient hearing of persons inside the motor vehicle in areas adjoining churches, schools, or hospitals.

Specific Authority 316.3045 FS. Law Implemented 316.3045 FS. History–New 12-25-90.

Exhibit 4

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

STATE OF FLORIDA, Petitioner, v. RICHARD T. CATALANO, Respondent,	Case No. 2D10-973
STATE OF FLORIDA, Petitioner, v. ALEXANDER SCHERMERHORN, Respondent.	Case No. 2D10-974 CONSOLIDATED

Opinion filed May 11, 2011.

Petition for Writ of Certiorari to the Circuit Court for the Sixth Judicial Circuit for Pinellas County; sitting in its appellate capacity.

Pamela Jo Bondi, Attorney General, Tallahassee, and Helen Brewer Fouse, Assistant Attorney General, Tampa, and Scott D. Makar, Solicitor General, and Timothy D. Osterhaus, Deputy Solicitor General, Office of the Attorney General, Tallahassee, for Petitioner.

Richard T. Catalano, pro se.

Richard T. Catalano, Clearwater, for
Respondent Alexander Schermerhorn.

Andrea Flynn Mogensen, Sarasota,
Cooperating Attorney for Amicus Curiae
ACLU Foundation of Florida Inc., and
Randall C. Marshall, Miami, for Amicus
Curiae ACLU Foundation of Florida, Inc.

BLACK, Judge.

Defendants, Richard T. Catalano and Alexander Schermerhorn, were issued traffic citations under section 316.3045, Florida Statutes (2007).[1] Section 316.3045 restricts the volume at which a car stereo system may be played on a public street, but it exempts vehicles being used for business or political purposes, which in the normal course of conducting such business use soundmaking devices. For the reasons stated below, we deny the State's petition for certiorari.

I. Factual Background

Mr. Catalano, a practicing attorney, and Mr. Schermerhorn were cited for playing their car radios too loudly, in violation of section 316.3045, which states as follows:

> **Operation of radios or other mechanical soundmaking devices or instruments in vehicles; exemptions—**
>
> (1) It is unlawful for any person operating or occupying a motor vehicle on a street or highway to operate or amplify

[1]These cases were consolidated for purposes of this opinion because the circuit court issued the same opinion in both cases, and the briefs, the arguments, and the attorneys were identical on appeal. The only difference in these cases was that Mr. Catalano was issued a traffic citation under section 316.3045 on November 13, 2007, and Mr. Schermerhorn's citation was issued on April 11, 2008.

> the sound produced by a radio, tape player, or other mechanical soundmaking device or instrument from within the motor vehicle so that the sound is:
>
> (a) Plainly audible at a distance of 25 feet or more from the motor vehicle; or
>
> (b) Louder than necessary for the convenient hearing by persons inside the vehicle in areas adjoining churches, schools, or hospitals.
>
> (2) The provisions of this section shall not apply to any law enforcement motor vehicle equipped with any communication device necessary in the performance of law enforcement duties or to any emergency vehicle equipped with any communication device necessary in the performance of any emergency procedures.
>
> (3) The provisions of this section do not apply to motor vehicles used for business or political purposes, which in the normal course of conducting such business use soundmaking devices. The provisions of this subsection shall not be deemed to prevent local authorities, with respect to streets and highways under their jurisdiction and within the reasonable exercise of the police power, from regulating the time and manner in which such business may be operated.
>
> (4) The provisions of this section do not apply to the noise made by a horn or other warning device required or permitted by s. 316.271. The Department of Highway Safety and Motor Vehicles shall promulgate rules defining "plainly audible" and establish standards regarding how sound should be measured by law enforcement personnel who enforce the provisions of this section.
>
> (5) A violation of this section is a noncriminal traffic infraction, punishable as a nonmoving violation as provided in chapter 318.

In county court, Mr. Catalano and Mr. Schermerhorn both pleaded not guilty and moved to dismiss their citations on the grounds that section 316.3045(1) is unconstitutionally vague and overbroad, invites arbitrary enforcement, and impinges

free speech rights. The trial judge denied the motions, whereupon Mr. Catalano and Mr. Schermerhorn changed their pleas to nolo contendere and reserved the right to appeal the denial of their motions to dismiss. The trial judge accepted the pleas, withheld adjudication, and imposed court costs. Mr. Catalano and Mr. Schermerhorn appealed the decision to the circuit court.

On appeal, the circuit court focused its analysis on two Florida decisions that discuss the meaning of the term, "plainly audible" in the context of whether that phrase is vague and invites arbitrary enforcement. In Easy Way of Lee County, Inc. v. Lee County, 674 So. 2d 863, 867 (Fla. 2d DCA 1996), the court held that the "plainly audible" standard in a county noise ordinance was unconstitutionally vague, overbroad, and invited arbitrary enforcement. Although Easy Way involved a county noise ordinance and not a traffic control statute, Mr. Catalano argued that section 316.3045(1)(a) must also fail, inasmuch as the statute utilized the "plainly audible" standard.

The State argued that Easy Way was not controlling, but rather the Fifth District's decision in Davis v. State, 710 So. 2d 635 (Fla. 5th DCA 1998), compelled the conclusion that section 316.3045(1) is constitutional. In Davis, a previous version of section 316.3045 was deemed to be constitutional against a vagueness and overbreadth challenge. Id. at 635.[2]

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[2]We note that in 2005, after the Davis decision was rendered, the Florida Legislature amended section 316.3045 to change the distance of the plainly audible standard from 100 feet to 25 feet. See ch. 05-164, § 9, Laws of Fla. At least one federal court case finds that Davis is nonbinding due to this amendment. See Cannon v. City of Sarasota, No. 8:09-CV-739-T-33TBM, 2010 WL 962934, at *3 (M.D. Fla. March 16, 2010) (distinguishing Davis as dealing with the constitutionality of the prior version of the statute and finding two counts in a civil complaint that challenged the

The circuit court carefully considered each argument and concluded that the issue ruled on by the two district courts was essentially the same, i.e., whether the "plainly audible" standard was too vague and overbroad to pass constitutional scrutiny. The court concluded that the decision in Davis conflicts with the decision in Easy Way. The court reasoned that the different purpose of the ordinance and the statute—one addressing general county noise ordinance standards and the other addressing the safe operation of motor vehicles on highways—did not change the fact that the test to determine the facial constitutionality of nearly identical language was the same. Since the Second District had decided the issue, the court held the statute must fail because the court was "obliged to follow the ruling of the Second District." See Pardo v. State, 596 So. 2d 665, 667 (Fla. 1992) ("[I]f the district court of the district in which the trial court is located has decided the issue, the trial court is bound to follow it.") (quoting State v. Hayes, 333 So. 2d 51, 53 (Fla. 4th DCA 1976)).

The State of Florida filed this timely petition for certiorari review arguing that the circuit court departed from the essential requirements of the law because section 316.3045 does not invite arbitrary enforcement, it comports with free speech rights, and binding precedent found this section constitutional.

II. Standard of Review

In a petition for certiorari that seeks review of an appellate decision from the circuit court, the standard of review is narrow. Bennett v. State, 23 So. 3d 782, 787-88 (Fla. 2d DCA 2009). The district court is typically limited to reviewing "instances where the lower court did not afford procedural due process or departed from the

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constitutionality of section 316.3045, under a First Amendment content-based challenge, were sufficient to withstand a 12(b)(6) motion to dismiss).

essential requirements of law." Allstate Ins. Co. v. Kaklamanos, 843 So. 2d 885, 889 (Fla. 2003). In order for a writ of certiorari to issue, a departure from the essential requirements of the law must be more than a simple legal error. Ivey v. Allstate Ins. Co., 774 So. 2d 679, 682 (Fla. 2000) (citing Stilson v. Allstate Ins. Co., 692 So. 2d 979, 982 (Fla. 2d DCA 1997)). "A district court should exercise its discretion to grant certiorari review only when there has been a violation of a clearly established principle of law resulting in a miscarriage of justice." Kaklamanos, 843 So. 2d at 889 (citing Ivey, 774 So. 2d at 682). A " 'clearly established principle of law' can derive from a variety of legal sources, including recent controlling case law, rules of court, statutes, and constitutional law." Kaklamanos, 843 So. 2d at 890. "[I]n addition to case law dealing with the same issue of law, an interpretation or application of a statute, a procedural rule, or a constitutional provision may be the basis for granting certiorari review." Id.

III. Easy Way/Davis Analysis

The State argues that the circuit court departed from the essential requirements of the law by applying Easy Way instead of Davis. The State asserts that Easy Way was decided based on a county's subjective enforcement of a general noise ordinance and the challenge in this case is based on a facial challenge of a statute that addresses safety on the highways. The State reasons that Davis is binding precedent because it addresses the specific statute that is under attack in this case. Specifically, the State asserts that the circuit court's holding was due to the subjective application and arbitrary enforcement of the "plainly audible" standard in the ordinance. The State points to the language in Easy Way that states: "If actual experience with the ordinance were to demonstrate that it represents a subjective standard, prohibiting a volume that

any individual person 'within the area of audibility' happens to find personally 'disturbing,' we would not hesitate to change our judgment accordingly." Easy Way, 674 So. 2d at 867 (quoting Reeves v. McConn, 631 F.2d 377, 385 (5th Cir. 1980)).

We do not agree with the State's position. The challenge in Easy Way was a facial challenge. 674 So. 2d at 863. Although the court did quote the Reeves language cited above, it also stated that "the ordinance does not define its crucial terms 'plainly audible' so as to secure against arbitrary enforcement." Id. at 866. The court reasoned that the "plainly audible" standard represented the subjective standard that was discussed in the Reeves decision—"any individual person 'within the area of audibility' happens to find personally 'disturbing,' "—not because the term "plainly audible" was being applied subjectively, but because the term "plainly audible" was a subjective term on its face; thus, the court found it vague. Id. at 867.

Because this case presents a facial challenge to the term "plainly audible" and because both Easy Way and Davis dealt with the issue of whether the term "plainly audible" is constitutional, we hold that the circuit court did not depart from the essential requirements of the law in applying the binding precedent from the Easy Way decision. We agree with the circuit court that whether the "plainly audible" standard is applied in a noise ordinance or in a traffic statute, the test for constitutionality is the same. Because we find the circuit court afforded procedural due process and did not violate clearly established principles of law, we deny the State's petition. In doing so, we certify a question of great public importance:

> IS THE "PLAINLY AUDIBLE" LANGUAGE IN SECTION 316.3045(1)(a), FLORIDA STATUTES, UNCONSITUTIONALLY VAGUE, OVERBROAD,

ARBITRARILY ENFORCEABLE, OR IMPINGING ON FREE SPEECH RIGHTS?

IV. Content-Based Analysis

Additionally, while recognizing our agreement with the reasoning and conclusion reached by the circuit court, we note that section 316.3045 suffers from a more fundamental infirmity. In this case, Mr. Catalano argued that this statute should be found unconstitutional because it is not "content-neutral," and there is no compelling governmental interest requiring disparate treatment of commercial or political speech versus amplified music. The State argues that either the statute in question is content-neutral, or that the distinctions drawn in the statute are permissible because of their lower threat to public safety and intrusiveness. At oral argument, the State attempted to distinguish the commercial and political speech exception in the statute by stating that the exception applied to vehicles and not the content of the speech. However, we find this a distinction without a difference. It is not the vehicle that the statute is seeking to restrict; it is the sound emanating from the vehicle. Thus, commercial and political speech may emanate from the vehicle at a louder volume than other types of speech, making the statute a content-based restriction on free speech. The State has advanced no compelling state interest that can rescue the statute from being an unconstitutional suppression of protected speech.

A. Preliminary Discussion

As a starting point, it is necessary to first determine whether the First Amendment protects the conduct at issue in the challenged statute, playing music on a street or highway. The Supreme Court has clearly stated that the First Amendment applies to this form of speech. Ward v. Rock Against Racism, 491 U.S. 781, 790

(1989). Although the First Amendment protects the right to broadcast recorded music, the government may, nevertheless, impose reasonable restrictions on the time, place and manner in which persons exercise this right, subject to certain provisos. Daley v. City of Sarasota, 752 So. 2d 124, 126 (Fla. 2d DCA 2000). "Those provisos are that: 1) the restrictions are content-neutral; 2) they are narrowly tailored to serve a significant governmental interest, and 3) they leave open ample alternative channels of communication." DA Mortg., Inc. v. City of Miami Beach, 486 F.3d 1254, 1266 (11th Cir. 2007) (citing Ward, 491 U.S. at 791). However, "ordinances that regulate speech based upon the content of the message are presumptively unconstitutional and are subject to a higher level of scrutiny as a result." Id. at n.8. (citing Solantic, LLC v. City of Neptune Beach, 410 F.3d 1250, 1258-59 (11th Cir. 2005)).

B. The Statute is Not Content-Neutral

Analysis of the regulation of speech begins with whether the regulation is content-based or content-neutral. See KH Outdoor, LLC v. City of Trussville, 458 F.3d 1261, 1268-69 (11th Cir. 2006). An intermediate level of judicial scrutiny is used where the regulation is unrelated to content. Turner Broad. Sys., Inc. v. Fed. Commc'ns Comm'n, 512 U.S. 622, 642-43 (1994). On the other hand, where a regulation suppresses, disadvantages or imposes differential burdens upon speech because of its content, "the most exacting scrutiny" must be applied. Id. Such content-based discrimination is "presumptively impermissible" and will be upheld only if it is narrowly tailored to serve a compelling state interest with the least possible burden on expression. City of Ladue v. Gilleo, 512 U.S. 43, 59 (1994); Widmar v. Vincent, 454 U.S. 263, 270 (1981). "At the heart of the First Amendment lies the principle that each

person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence." Turner Broad. Sys., 512 U.S. at 641.

In DA Mortgage, the court upheld a county noise ordinance because it was content-neutral, was narrowly tailored to achieve a significant government interest, and left open ample alternative channels of communication. 486 F.3d at 1266-69. In upholding the statute against a challenge of being content-based, the court stated:

> Accordingly, when we apply this standard to the ordinance at issue, we find, as the district court did, that the ordinance is content-neutral. On its face, it does not disallow certain types of recorded noise or particular viewpoints. It does not distinguish, for example, between excessively loud singing, thunderous classical music recordings, reverberating bass beats, or television broadcasts of raucous World Cup soccer finals. It simply prohibits excessively loud noise from recorded sources, whether radio, television, phonographs, etc.

Id. at 1266. Unlike the statute in DA Mortgage, the statute in our case does distinguish between different types of recorded noise or particular viewpoints.

A case that is directly on point, and was cited favorably in Cannon, is People v. Jones, 721 N.E.2d 546 (Ill. 1999). In that case, the court held that a sound amplification statute, which prohibited the use of sound amplification systems in motor vehicles that could be heard from a specified distance away from a vehicle and which contained an exception for vehicles engaged in advertising, was a content-based regulation of speech, in violation of the First Amendment. Id. at 551-51. In Jones, the Illinois Supreme Court, citing Carey v. Brown, 447 U.S. 455, 462 (1980), noted that "generally, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content-based." Id. at 550. The court struck the statute, finding, "the statute favors advertising messages over other

messages by allowing only the former to be broadcast at a particular volume." Id. at 552. In so ruling, the court rejected the State's argument that the statute was content-neutral because it was not enacted with the purpose of discriminating against any particular expression. Id. The fundamental problem with the analysis, according to the court, was that "on its face" the statute discriminated based on content. Id. This is the same fundamental problem with the statute in our case.

Finally, the United States Supreme Court discussed the content-neutrality requirement for permissible "time, place or manner" regulations in City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410 (1993). In that case, the city refused to allow distribution of commercial publications through freestanding newsracks on public property but allowed the distribution of newspapers in that manner. Id. at 412-14. The city argued that its regulation was designed to limit the total number of newsracks, for reasons of safety and aesthetics. Id. at 428-29. Therefore, according to the city, the regulation was a permissible time, place and manner restriction. Id. The Court rejected this argument. Id. In so ruling, the Court gave the following illustration which is instructive in our case: "[A] prohibition against the use of sound trucks emitting 'loud and raucous' noise in residential neighborhoods is permissible if it applies equally to music, political speech, and advertising." Id. at 428-29 (emphasis added) (citing Kovacs v. Cooper, 336 U.S. 77 (1949)).

Turning our attention to the Florida statute at issue, on its face it is not content neutral. The statute excepts from its provisions "motor vehicles used for business or political purposes, which in the normal course of conducting such business use soundmaking devices." § 316.3045(3). In other words, an individual using a

vehicle for business purposes could, for example, listen to political talk radio at a volume clearly audible from a quarter mile; however, an individual sitting in a personal vehicle that is parked next to the business vehicle is subject to a citation if the individual is listening to music or religious programming that is clearly audible at twenty-five feet. Clearly, different forms of speech receive different treatment under the Florida statute. That is, the statute in question does not "apply equally to music, political speech and advertising," which is what the Supreme Court requires in order for the statute to be deemed, "content-neutral." See City of Cincinnati, 507 U.S. at 428.

Given that the statute is a content-based restriction on protected expression, it is presumptively invalid and may be upheld only if it is necessary to serve a compelling state interest and is narrowly drawn to achieve that end. Jones, 721 N.E.2d at 550. We fail to see how the interests asserted by the State are better served by the statute's exemption for commercial and political speech. As in Jones, the State provides no explanation as to why a noncommercial message broadcast at a particular volume poses a danger to the public, while a commercial or political message does not. Further, as with the statute in Jones, the Florida statute is peculiar in protecting commercial speech to a greater degree than noncommercial speech. Commercial speech is typically in a "subordinate position" in the scale of First Amendment values. U.S. v. Edge Broad. Co., 509 U.S. 418, 430 (1993).

V. Conclusion

We deny the petition for certiorari because the circuit court afforded the parties due process and it did not depart from the essential requirements of the law in finding the statute unconstitutional. Additionally, we conclude that the statute is a

content-based restriction on free expression which violates the First Amendment. We also certify a question of great public importance, pursuant to Florida Rule of Appellate Procedure 9.030(a)(2)(A)(v).

Petition denied; question certified.

KELLY, J., Concurs specially with opinion.
RAIDEN, MICHAEL E., ASSOCIATE JUDGE, Concurs with opinion.

KELLY, Judge, Concurring specially.

I concur in parts I, II, and III of the majority opinion.

RAIDEN, Michael E., Associate Judge, Concurring.

I endorse Judge Black's opinion without reservations. The statute's failure to observe content neutrality is fatal. Further, while I am not totally convinced that the term "plainly audible," as employed in subsection (a) of the statute, is unconstitutionally vague, I refrain from any further analysis because subsection (b) permits citations, at least "in areas adjoining churches, schools, or hospitals," for sound that is "louder than necessary for the convenient hearing by persons inside the vehicle." See § 316.3045(1)(b). I believe this language is subjective enough to run afoul of Easy Way of Lee County, Inc. v. Lee County, 674 So. 2d 863 (Fla. 2d DCA 1996), even if subsection (a) standing alone might not be.

My decision to write separately is based on a marked difference between the present version of section 316.3045 and that construed in Davis v. State, 710 So. 2d 635 (Fla. 5th DCA 1998). As noted in footnote two of Judge Black's opinion, now this law can be violated by soundmaking equipment "plainly audible" from a distance of only twenty-five feet —that is, one fourth of the distance covered by the earlier version. See § 316.3045(1)(a). This substantial reduction makes me question whether section 316.3045 should be analyzed as a noise ordinance at all.

We have been made aware of two different courses of action taken by county courts faced with motions to invalidate section 316.3045. In the case at bar, the trial courts were asked to—and the circuit court, on appeal, did—apply Easy Way. However, our attention has also been directed to the unpublished "Order Granting Defendant's Motion to Suppress" in State v. John O. Middlebrooks, Case No. 2008CT043699AXX (Palm Beach Cty. Ct. August 6, 2009), in which the trial court took testimony from an expert in audiology and "psychoacoustics." I recognize that the decisions before us did not involve the taking of evidence and that we are not in a position to rule on the correctness of Middlebrooks. Nevertheless, I find that decision worth mentioning because of the Palm Beach County Court's concern that section 316.3045, as amended, now penalizes conduct that may not constitute a nuisance.

The county court in Middlebrooks was actually called upon to make two separate, if related, findings. It is clear from the opinion that the audiologist's testimony was given great weight by the trial judge with respect to both these questions. First, the court tried the civil infraction on its merits. The officer had testified that he heard music emanating from Middlebrooks's car from a distance of "well over 100 feet away,"

whereas a passenger stated the music had been playing at a level low enough to permit normal conversation within the passenger compartment. The judge did not find the officer's testimony sufficiently credible to convict. However, because the officer apparently discovered evidence of an unrelated crime or crimes post-stop, the county court also had to determine whether the stop was legally supportable. (The decision to stop and ticket a motorist requires only probable cause, not proof beyond reasonable doubt.) The county court resolved the motion to suppress by declaring section 316.3045 unconstitutional because, as amended, it had "ceased to operate with a legitimate governmental interest and now allows arbitrary and discriminatory enforcement." It appears the audiologist also convinced the trial judge that sounds audible from twenty-five feet are, basically, not loud enough to justify police intervention.

The version of section 316.3045 passed upon in Davis is clearly a noise ordinance. Such enactments are justified by the proven effect of excessive noise upon the public health and safety. At such levels, it does not matter what is being broadcast. (Emphasis added.) The question thus arises why the statute was changed. This is an important question in the event the legislature seeks to revisit section 316.3045 in light of our holding. At oral argument, counsel for the State suggested the legislature may have been concerned that music played over a certain volume level might cause a distraction for the driver, not unlike the use of a cell phone or the playing of video equipment—that is, that the amended statute could be aimed more at the interior of the vehicle than the right of the world at large to remain free from unhealthful decibel levels. Absent clearer guidance, however, I am unwilling to speculate. Apart from the change

in distance, the statute is the same one construed on free-speech grounds by the Davis court.

Exhibit 5

IN THE COUNTY COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA
CRIMINAL DIVISION "E"

STATE OF FLORIDA

v. CASE NO.: 2008CT043699AXX

JOHN O. MIDDLEBROOKS,
Defendant.
_____/

ORDER GRANTING DEFENDANT'S MOTION TO SUPPRESS

THIS CAUSE having come before the Court upon Defendant's Motion to Suppress on June 8, 2009 and July 27, 2009, and the Court having reviewed said Motion, hearing argument of counsel and being otherwise duly advised in the premises, this Court makes the following findings of fact and conclusion s of law:

I. FACTUAL FINDINGS

On December 23, 2008, at approximately 2:00 a.m. Officer Marc Bujnowski from the Jupiter Police Department was parked at an intersection of Greenway Drive and West Community Drive in Jupiter, Florida. That night Officer Bujnowski was working a routine road patrol detail and was observing traffic at that time on Greenway Drive. He had positioned his vehicle on the east side of West Community Drive with the front of his vehicle close to Greenway Drive. Officer Bujnowski's patrol vehicle had it's window down and engine running. Officer Bujnowski testified that he believed that he was parked approximately 100 feet south of Indian Creek Parkway when he first heard loud music and observed Defendant's vehicle. He also testified that he could hear loud music and bass coming from the vehicle despite it being "well over 100 feet away" from his stationary location. As Defendant's vehicle approached and passed Officer Bujnowski's location, Bujnowski

testified that he was able to identify that the loud music was coming from Defendant's vehicle.

Officer Bujnowski further testified that he immediately began to follow Defendant's vehicle after it passed him. He could not remember if Defendant's windows were up or down nor could he see in the vehicle if there were any passengers. This was the observations of an officer who testified that he began to observe the vehicle in his "field of vision"from at least "100 feet away" and maintained visual contact with the vehicle as it passed him. Marissa Raiford, a friend of Defendant's for more than ten years and a passenger the night of the incident, testified that Defendant's vehicle's rear passenger windows are legally tinted and the front driver's window and passengers windows are not. She also testified that there were three other passengers in the vehicle at the time they passed Officer Bujnowski- three in the rear and one in the front. She further testified that Defendant's windows were up.

Officer Bujnowski proceeded to follow the vehicle for more than a quarter mile before initiating the traffic stop shortly after Defendant made a left turn onto Indian Creek Parkway. Undisputed photographic evidence was presented to this court by Defendant that showed that the intersection of Greenway Drive and West Community Drive, the location where Officer Bujnowski was actually parked when he first heard and observed Defendant's vehicle, was approximately 243 yards from Indian Creek Parkway. In actuality, Officer Bujnowski was parked approximately 729 feet from the intersection of Indian Creek Parkway and not 100 feet as he initially testified to and believed. These distances were more consistent with Officer Bujnowski's testimony that he followed Defendant for the better part of a quarter mile before initiating the stop. He further testified that Defendant failed to signal before making a left turn onto Indian Creek Parkway and also failed to use his turn signals after moving into the right lane and then moving back into the left lane. Although

Defendant was cited for violating section 316.074(1), *Florida Statute* (violation of a traffic control device), Officer Bujnowski conceded at the hearing that the Defendant did not commit any moving traffic violations and only stopped him for violating section 316.3045(1)(a), *Florida Statutes,* otherwise known as the "noise statute".

Shortly before 2:00 a.m on the night in question, Defendant left with several friends from Rooney's, which is a bar/restaurant located in the Abacoa shopping plaza. Defendant, along with his friends, got into his vehicle and decided to drive to Talyor Mackley's house to drop her off. Marissa Raiford testified that the group was listening to music and talking on the way home. The music was not loud as she was able to clearly hear the conversation between her friends. She further testified that the air conditioner was on, "which was common for Jack [the Defendant]". Ms. Raiford also testified that she was familiar with the Defendant's vehicle and that the radio was factory standard and that there had been no after market accessories added to enhance the sound and volume.

At the hearing, Defendant called Dr. Terri Hamill as an expert in the field of audiology. Dr. Hamill is a professor of Audiology at Nova Southeastern University where she teaches the doctoral students. She has a wide array of scholarly publications and is the author of the textbook *Hearing Science*, which covers acoustics and psycho acoustics.[1] Dr. Hamill testified to the general scientific principles of sound and how it is perceived and received, including the notion of ambient noise and masking.[2] She also testified that a "known rule of physics called the inverse square law" predicts how much sound is lost as distance is changed. If you travel from one distance twice as far

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[1] Psycho acoustics is the perception of sound in anatomy and physiology.

[2] Ambient noise is any noise in the environment. When the ambient noise prevents the audibility of another sound, it is called "masking".

away from the sound source, you lose six decibels. As you keep doubling the distance six decibels is lost. She further testified that the difference in intensity of sound heard at 25 feet and sound heard at 100 feet is 12 decibels. The perceived difference is four times louder. She further elaborated that she used the 25 foot and 100 foot examples because the current statute includes a 25 foot proscription and the old "noise statute", before it was amended to 25 feet, included a 100 foot proscription. She then testified that she performed and recorded numerous test using these distances.

Dr. Hamill then provided the test results to this court using both measurements. This court notes that prior to hearing the tests results, Dr. Hamill set up her audio equipment using a sound measuring meter to insure that the court would hear the tests results as close as possible as to the actual tests that were performed outside the court. Dr. Hamill further testified that the tests she performed were to simulate as close as possible the events that occurred on December 23, 2008. Dr. Hamill testified that before performing any of the tests, she first met with Defense counsel to go over the facts of the case, reviewed the relevant police reports, *Florida Statutes* and applicable portions of the *Florida Administrative Code*. The sound source used for the tests was a Nokia factory equipped stereo in a Scion XB.

Dr. Hamill then presented the following tests: In the first test she was situated in the driver's seat and turned up her stereo to its maximum level and measured the decibel level at 93. Dr. Hamill testified that at this level OSHA would require an employee to wear protective hearing devices. She further testified that at this level an individual three feet away would not be able to converse with you. The next test Dr. Hamill performed was one where she dropped the decibel level inside the Scion to 81 dba, 12 less then the first test. Although she testified that at this level the music was still louder than her comfort level she used this as a standard because it was a level that

people inside the car can talk loudly to each other and still communicate. She testified that with this test she wanted to show what it sounded like outside the vehicle with the vehicle running at idle and the windows closed. She then took her sound level meter which indicated that at 25 feet it, the music was audible. She testified that she reduced the decibel level 12 decibels because the statute had effectively done that by changing the distance from 100 feet to 25 feet. Dr. Hamill testified that at this new level standing 25 feet away, with only the ambient noise from the wind and birds chirping, she was barely able to detect the music, nevertheless a violation of the statute. She opined that given a scenario where the music is played at the same volume during the day along a highway street, one would not be able to detect the music because of the added ambient noise. She further elaborated that if the car was running the audibility would be further reduced if not inaudible. The next test she performed measured the 81 decibel level at 100 feet. At this distance the music was inaudible.

Dr. Hamill then recorded her car's stereo on a comfortable listening level with the windows down on her residential street at a distance of 25 feet. The stereo was audible. The next measurement was at 100 feet with the same conditions. The stereo was not audible.

Dr. Hamill then performed the next test with the stereo played at maximum, windows up and the car traveling at a speed of 30 mph. At 25 feet with the car traveling at 30 mph, the music was inaudible. She then performed a test with the car stopped 25 feet from the sound meter, the sound was audible, but as soon as the car started up the music was inaudible due to the ambient nose from the moving vehicle. Finally, Dr. Hamill testified that she could not create a situation with her vehicle traveling at 30 mph where the sound from the radio would be audible at 25 feet.

II. CONCLUSIONS OF LAW

Defendant argues that this court should invalidate the stop as Defendant committed no traffic violation, there was no violation of section 316.3045(1)(a), *Florida Statues*, and because the statute is unconstitutionally vague. For the following reasons this court agrees on all grounds.

As testified by the officer and conceded at the hearing, the only basis for the stop of Defendant was the violation of section 316.3045(1)(a), *Florida Statues*. Specifically, section 316.3045(1)(a), *Fla.Stat.*, states in part:

> It is unlawful for any person operating or occupying a motor vehicle on a street or highway to operate or amplify the sound produced by a radio, tape player, or there mechanical sound making device or instrument form within the motor vehicle so that the sound is:
>
> (a) Plainly audible at a distance of 25 feet or more from the motor vehicle.

Officer Bujnowski testified he could hear loud music and bass coming from the vehicle despite it being "well over 100 feet away" from his stationary location. He also testified that he believed his patrol vehicle was 100 feet from the intersection of Greenway Drive and Indian Creek Parkway when in actuality the officer was located 729 feet from that intersection. Officer Bujnowski then testified that his vehicle was parked at an intersection on a service road close to Greenway Drive. After listening to the testimony of all the witnesses and hearing the multiple audio tests performed by Dr. Hamill, this court finds that the officer could not have heard music from Defendant's vehicle which was traveling at a speed of at least 30 mph from more than 100 feet away. Officer's Bujnowski's measurements are simply not credible and it is unlikely that he heard the music from Defendant's vehicle.

This court heard testimony from Marissa Raiford which it found credible and uncontroverted. She testified to the following; Defendant was traveling within the posted speed limit, the windows were up, the air conditioner was on, and the music was playing at a level as to allow a normal conversation among the four passengers and Defendant. The music could not have been heard under these conditions.

Dr. Hamill further provided this court with numerous audio tests that simulated various situations that could have presented itself on the night in question. One test of specific note that this court found extremely enlightening was the one where her vehicle's stereo was playing at full volume- a decibel level of 93, which would require hearing protection if used in the workforce, and had the vehicle traveling at 30 mph pass her from a distance of 25 feet. This court could not detect any music and the only audible sound was the ambient noise from the vehicle. This court also notes that this test was used in its analysis because it was one that was done in a light most favorable to the State- having the music played at maximum level and passing at the least amount of distance to be in violation of the statute. Although the State did not present any evidence to the contradict the testimony that the music was louder than a normal listening level, the court nevertheless used this test to help determine whether the music from Defendant's SUV Tahoe was heard from the officer at a distance of 25 feet or more. Additionally, this court notes that there was also no evidence presented as to the distance of where the officer's vehicle was parked from Greenway Drive and accordingly in relation to Defendant's vehicle as it passed him. Officer Bujnowski placed an "X" on Exhibit 3 to show its approximate location, however, there was no testimony as to how many feet it was to the roadway. Based on the foregoing the State has failed to prove that the music from Defendant's vehicle was heard from a distance of at least 25 feet.

This court will now address the issue of the constitutionality of the statute. Section 316.3045, *Fla.Stat.*, was enacted in 1990. The statute set forth prohibitions on the use and operation of radios. Specifically, section 316.3045(1)(a) made it unlawful for a radio to be "plainly audible at a distance of 100 feet or more from the motor vehicle." On June 8, 2005, section 316.3045(1)(a) was amended and the distance criteria related to the radio and or sound- making device in the motor vehicles was reduced from 100 feet to 25 feet. (See Chapter 2005-164 (H.B. No.:1697.))

Plainly audible is defined as follows: " any sound produced by a radio, tape player, or other mechanical electronic soundmaking device, or instrument, from within the interior or exterior of a motor vehicle, including sound produced by a portable soundmaking device, **that can be clearly heard outside the vehicle by a person using his normal hearing faculties, at a distance of 25 feet or more from the motor vehicle**. Rule 15B-13.001, *Fla. Admin. Code*.

In *Davis v. State*, 710 So.2d 635 (Fla. 5th DCA 1998), a case of first impression, the Fifth District addressed the constitutionality of Section 316.3045(1)(a), *Fla.Stat.* (herein the "noise statute"). At the time the Fifth District addressed the noise statute, the sound needed to be plainly audible 100 feet or further in order to rise to the level of a violation of law. In *Davis*, the court upheld the constitutionality of the statute against a vagueness challenge by holding that the language of the statute set forth the conduct that was prohibited, that is "one may not play his or her car radio so loudly that it is plainly audible to another standing 100 feet or further away." *Id.* at 636. This court finds that *Davis* is no longer controlling because the amendment to section 316.2045 reduced the distance to 25 feet.[3] As a result of the distance reduction, the statute fails to give adequate

[3] That statute was revised in 2005 amending the distance from 100 feet to 25 feet. (See Chapter 2005-164 (H.B. No.:1697) (West).

notice of what conduct is prohibited and invites "arbitrary and discriminatory enforcement." *Habie*, 642 So.2d at 140.

This court has reviewed several cases from other jurisdictions that have stuck down "noise statutes"on constitutional challenges. In *Lutz v. City of Indianapolis*, 820 N.E. 766 (Ind. App. 2005), the court held that the city's noise ordinance was unconstitutionally vague as the ordinance failed to include an objective "reasonableness" test for determining what noise constituted a violation. The city ordinance provided in part the following:

> (a) Except as otherwise provided in this section, it shall be unlawful for any person to make, continue or cause to be made or continued any loud, unnecessary or unusual noise, or any noise which either annoys, disturbs, injures or endangers the comfort, repose, health and peace or safety of others within the city. Accordingly, the following acts, among others, are declared to be loud, disturbing and unnecessary noises and in violation of this section, but such enumeration shall not be deemed to be exclusive:
>
> (2) *Radios and phonographs.* Playing, using or operating, or permitting to be played, used or operated, any radio or television receiving set, musical instrument, phonograph, calliope or other machine or device for producing or reproducing sound in such a manner as to disturb the peace, quiet and comfort of the neighboring inhabitants, or at any time with louder volume than is necessary for convenient hearing for the person or persons who are in the room, vehicle or chamber in which such machine or device is operated, and who are voluntary listeners thereto, except when a permit therefor for some special occasion is granted. The operation of any such set, instrument, phonograph, machine or device between the hours of 11:00 p.m. and 7:00 a.m. in such a manner as to be plainly audible at a distance of fifty (50) feet from the building, structure or vehicle in which it is located shall be prima facie evidence of a violation of this subsection.
>
> Indianapolis, Ind., Rev.Code of the Consol. City and County § 391-302(a)(2).

Id. At 767. The *Lutz* court held that the myriad of noises that the ordinance in the instant case prohibits is exactly the reason that it is unconstitutionally vague. "The ordinance in *Lutz*...does not include an objective test; instead, it prohibits *any* noise that is "loud," "unnecessary," or "unusual," or that annoys or disturbs others." *Id.* The *Lutz* court specifically struck section (a) of the ordinance

as unconstitutional and did not address the constitutionality of the other sections. Like the language in the Indianapolis ordinance, the Florida Statute prohibits any noise that is audible from a distant of 25 feet. It does not provide an objective reasonableness test, it simply makes it unlawful for an officer to hear music or a sound at a distance of 25 feet or more. The music or sound does not have to be unnecessarily loud or unreasonable, it only has to be audible. As heard by this court from the tests of Dr. Hamill, most normal conversations, absent ambient noise, can be heard from a distance of 25 feet. *See also People v. New York Trap Rock Corp.*, 442 N.E. 2d 1222, 1224-27(1982) (Court of Appeals of New York considered the constitutionality of an anti-noise ordinance that prohibited "unnecessary noise," which was defined as "any excessive or unusually loud sound or any sound which either annoys, disturbs, injures or endangers the comfort, repose, health, peace or safety of a person. The ordinance was held unconstitutionally vague, and the court stated that "the ordinance's definition of 'unnecessary noise' as 'any excessive or unusually loud sound *or* any sound which ... annoys ... a person' impermissibly would support a conviction on any sound which annoys another person....").

In *Duffy v. City of Mobile*, 709 So. 2d 77(Ala. Crim. App.,1997), the court declared a portion of the City's anti-noise ordinance unconstitutional. The standard used by the city regulated without reasonable reference to time, place and manner, and such standard regulated constitutionally protected speech more broadly than necessary to achieve city's interest in regulating noise.

Sec. 39-96. Of the City's Noise Nuisance ordinance read as follows:

> "1) It shall be unlawful for any person to make, continue, or cause to be made or continued, any loud, unnecessary or unusual noise or any noise which either annoys, disturbs, injures or endangers the comfort, repose, health, peace or safety of any law enforcement official or other individual of normal sensibilities within the City, or its police jurisdiction. The

following acts, among others, are declared to be loud, disturbing and unnecessary noises in violation of this section and a municipal nuisance, but such enumeration shall not be deemed to be exclusive, namely:

"(a) *Radios, phonographs, 'boom boxes,' car stereos, etc.-Generally.* The using or operating, or permitting to be played, used or operated any radio receiving set, stereo, 'boom box,' musical instrument, phonograph, sound amplifying equipment or other machine or device for the producing or reproducing of sound either stationary or mobile, in such a manner as to disturb the peace, quiet and comfort of any law enforcement official or other individual of normal sensibilities at any time with a louder volume than is necessary for convenient hearing for the one or more persons who are in the premises, vehicle or immediate vicinity, not to exceed a radius of more than fifty (50) feet, in which such machine or device is operated and who are voluntary listeners thereto.

709 so. 2d at 78.

In *Duffy*, the court stated that the standard before them for consideration was whether a police officer is disturbed or annoyed at a noise audible at fifty feet. In fact, subsection (a) provides that if the sound is merely "plainly audible" at a distance of 50 feet, it is prima facie evidence of a violation of the ordinance, which seems to remove or negate the requirement that anyone be annoyed or disturbed by the noise." Id. At 80. The court held that the "Mobile ordinance is an absolute prohibition of any amplified sound that is plainly audible at greater than fifty feet, anywhere in the City and at any time of day or night. This sweeping restriction of sound is not narrowly drawn, and restricts constitutionally protected speech "beyond the point necessary to accomplish the objective for which the ordinance was created." Section (a) to the City of Duffy's noise ordinance is similar to Florida's noise ordinance because it does not have a time place or manner restriction on it and it can be enforced anytime of the day or night. In fact the Florida Statute is more restrictive at 25 feet and more vague in that the officer only has to hear the music where the Duffy ordinance required that the music be disturbing or annoying.

In both the *Lutz* case and the *Duffy* case, the court did not address whether the portions of

those ordinances that included time place and manner restrictions were unconstitutional. The Florida statute is unique in that it has no time place or manner restrictions in any section of the statute and as such, it can be enforced at any time throughout the day or night and can be enforced under any context. In *Lutz* the ordinance set forth time restrictions 11:00p.m. to 7:00 a.m and the music had to be plainly audible from a distance of 50 feet. In *Duffy* the ordinance set froth decibel level conditions at different hours throughout the day and in different zoning districts. The later the hour the lower the decibel level. Unlike the Florida statute, the portions of these ordinances that weren't struck down at the very least set forth reasonable time place and manner restrictions that were more tailored to accomplish the legitimate purpose of the noise ordinances- to protect the public from excessive noise. See also *Village of Kelly Island v Joyce*, 765 N.E. 2d 387 (Ohio Ct. App., 2001)(Court upheld constitutionality of city noise ordinance which was sufficiently definite and reasonable where time place and manner restriction that limited noise to a distance of 150 feet from its source and also set forth time restriction from 11:00 p.m. to 8:00 a.m.).

This Court has discussed numerous hypotheticals with counsel and although they are hypotheticals, this Court is sensitive to the fact that these hypothetical are in fact very real and present themselves in our daily lives. When the court addressed the State and asked if there would be a problem if the statute was reduced to ten feet or even five feet, the State was unable to answer the question. The statute in question is not a statute that was created to protect the safety of the public. It is solely a nuisance statute. A statute that prohibits unwarranted noise or excessive noise must "be narrowly tailored to serve a significant government interest". *Duffy*, 709 So. 2d at 80 *quoting Ward v. Rock Against Racism*, 491 U.S. 781, 800 (1989). However, at the current criteria of 25 feet, an amendment that seems to have been done without any thought, logic or research. It

is not narrowly crafted. It fails to provide objective statutes. The law has ceased to operate with a legitimate governmental interest and now allows arbitrary enforcement.. "A vague statute is one that fails to give adequate notice of what conduct is prohibited and which because of its imprecision, may also invite arbitrary and discriminatory enforcement. *Wells*, 965 So.2d. at 838 *citing Habie v. Krischer*, 642 So.2d 138, 140 (Fla. 4th DCA 1994). For the foregoing reasons, it is hereby :

ORDERED AND ADJUDGED that Defendant's Motion is **GRANTED**. The stop in question was invalid because:

(1.) Defendant committed no traffic infraction,

(2.) The court finds that the officer could not hear music emanating from defendant's vehicle; and

(3.) FL. Statute 316.3045 is unconstitutional for reasons set forth herein. Accordingly, all evidence seized subsequent to the stop or Defendants vehicle is suppressed.

DONE AND ORDERED at West Palm Beach, Palm Beach County, Florida, this 6th day of August, 2009.

HONORABLE PAUL O. MOYLE
County Court Judge

copies furnished:

Richard G. Lubin, Esq., counsel for Defendant
ASA Marco Masullo