MPT 1 - Sample Answer # 1

Memorandum of Law
Statement of Issues

The State has charged Daniel Soper with killing Vincent Pike. The crux of the case rests on Pike's identification of Soper in a 911 call and a statement to a police at the hospital before his death. Soper seeks to exclude both identifications. He argues that the statements in the 911 and at the hospital call constitute inadmissible hearsay under the Franklin Rules of Evidence (FRE) 801. He also argues that the admission of the statements violates his right to confront his accusers under the Sixth Amendment of the US Constitution.

Analysis

I. Evidentiary Issues: Hearsay and Exceptions

Hearsay is a statement made out of court offered into evidence to prove the truth of the matter asserted. FRE 801. This evidence is inadmissible unless it falls into an exception. Pike's statements were made out-of-court and are now offered to prove Soper's identity. They are hearsay statements unless an exception applies. The excited utterance exception and dying declaration exception are the most applicable exceptions to the statements in the 911 call and at the hospital, respectively.

A. Excited Utterance Exception

The FRE provide an exception to the hearsay rule for "excited utterances": those statements relating to a startling event or condition made while the declarant was under the stress of the excitement that it caused. FRE 803(2). This exception will apply regardless of whether the declarant is available to testify. In evaluating whether the statement was made under stress, the court will consider the lapse of time between the event and the statement, the declarant's physical and mental condition, his observable distress, the character of the event and the subject of statements (State v. Friedman).

Pike's statement to the 911 operator described being shot and identified the shooter as driving a black pickup. In Friedman, a similar statement identifying a shooter was held to "relate to" the startling event. Pike's statement was made at some time after the shooting, though it is unclear how much time had passed. However, the excited utterance need not occur at the same time as the event to which it relates provided the surrounding circumstances lend themselves to establishing the statement occurred while under the stress of a startling event (See Friedman, citing State v. Cabras). Here, Pike was slumped in his car with blood on his chest and stomach, he lapsed into silence twice during the call, and he appears disoriented. This is similar to the case in Friedman where the victim was bleeding, fell silent within moments of arrival.

B. Dying Declaration Exception

The dying declaration exception is available only when the declarant is unavailable to testify because of death, infirmity, or illness (FRE 804 et seq). Here, Pike has died and is thus unavailable to testify. To fall within the dying declaration, the statement must meet the

following criteria: 1) the declarant must have died by the time of trial, 2) the statement must be offered in a prosecution for homicide or in a civil case, 3) the statement must concern the cause of death or the circumstances of the declarant's death, and 4) the declarant must have made the statement while believing that death was imminent. (Friedman). The policy behind this exception is that imminent death encourages truthfulness (see State v. Donn, State v. Leon).

In proving belief in imminent death, the prosecution can rely on many factors including the declarant's language, severity of wounds, conduct or by other circumstances which shed light on the declarant's state of mind. (Friedman. There, the court noted the victim was in a fetal position, bleeding profusely, and repeatedly said he did not want to die, which all pointed to his belief in imminent death despite assurances of survival from emergency medical personnel). When he identified Soper as the shooter, Pike had been at the hospital for some time. He was told by the investigating officer that he was "fading fast." Pike then took a deep breath, identified Soper, and lost consciousness. The circumstances surrounding his statement tend to establish it was made under the belief that he was going to die.

Recommendation

I recommend the motion to exclude on hearsay grounds be overruled. The circumstances surrounding Pike's statements show that the first was made as a reaction to the exciting event and that the second was made under a belief of impending death. Thus, though the statements are hearsay, they are admissible under exceptions to the rule.

II. Constitutional Law Issues: Confrontation Clause

The Confrontation Clause of the Sixth Amendment provides "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with witnesses against him." Thus, statements which can otherwise be admitted under a hearsay exception are nonetheless inadmissible if they are testimonial hearsay and the defendant has not had a chance to cross-examine the declarant. (Friedman).

A. Testimonial Statements

Hearsay statements are only excluded under the Sixth Amendment if they are "testimonial" in nature. "Testimony" is a solemn declaration or affirmation made for the purpose of establishing or proving some fact (Michigan v. Bryant, citing Crawford v. Washington). Thus, to establish whether statements are testimonial, the court employs the "primary purpose" test first raised in Crawford. If a statement is made during a police interrogation for the primary purpose of proving past events related to a later criminal prosecution, it is testimonial. If it is made to enable the police to assist in an ongoing emergency, it is not testimonial (see Crawford, Davis v. Washington). Statements to 911 operators, like Pike's, are subject to this analysis because the operator acts as the agent of law enforcement (see Davis).

Whether an emergency exists is a fact and context-specific determination. (Bryant.) It depends on the medical condition of the victim, the informality of the encounter, the questions asked and responses thereto, and the threat to the public at large posed by the defendant. Both statements were informal and fluid, similar to the statements in

Washington, Davis, and Bryant.

In the case at bar, Pike's statements to the 911 operator were non-testimonial in nature. In Davis, the court held a harried 911 call was nontestmonial in nature because the purpose of the questions was to address the emergency and neutralize the threat. This situation is similar; Pike was asked questions necessary to assess the injuries and other danger. The fact that Pike was shot with a gun makes it more like an emergency (see Bryant).

Pike's statement at the hospital is a closer call. The statement was in response to a police request to "help us . . . put this guy away". The question begged an accusatory response, making it more likely testimonial (Bryant). However, Pike informed the officers Soper was going after Vanessa Mears, the ex-girlfriend. The officer had already spoken to Ms. Mears, who said she had been threatened by Soper numerous times. Thus, the question might better be seen as an attempt to locate the shooter and neutralize the threat to Ms. Mears and the public at large.

B. Declarant unavailable for cross-examination

The Confrontation Clause protects a defendant's right to cross-examine the declarant, opening him up for impeachment on the statements. The court has held that, at a minimum, this requires the opportunity to cross on prior testimony at a preliminary hearing, before a grand jury, or at a former trial and police interrogations. (Bryant citing Crawford). Pike is dead; Soper will not have the opportunity to cross-examine him about these statements.

C. Dying Declaration Exception

The Crawford court held that even statements violating the Confrontation Clause could be admitted as an exception. Specifically, the court discussed in dicta dying declarations. Moreover, our sister states have explicitly held that the Confrontation Clause does not bar admission of evidence of dying declarations (See State v. Karoff and State v. Wirth). Pike's statement at the hospital, though most likely testimonial in nature, was a dying declaration as discussed above. However, the prosecution must establish the testimony is a dying declaration for it to constitute an exception. (See Bryant. The factual basis for admission was an excited utterance, and thus it could not come in.)

Recommendation

I recommend that the statements be admitted despite the fact Soper has not had an opportunity to cross-examine Pike. First, Pike's statement to the 911 operator was nontestimonial: it was in response to an ongoing emergency. Pike's statement at the hospital was similarly necessary to neutralize the threat Soper posed to Ms. Mears and the public at large. Even if it was testimonial, if the prosecution can establish it is a dying declaration, it will be an exception to the Confrontation Clause rule and can come in despite Soper's inability to cross-examine Pike.

MPT 1 - Sample Answer # 2

TO: JUDGE SAND

FROM: EXAMINEE

STATEMENT OF ISSUES

(1) Should the statements made by victim, Vincent Pike (Pike), in a 911 call on March 27, 2012 be admitted as evidence under the excited utterance or dying declaration hearsay exception?

(2) Should the statements made by Pike in response to questioning by Officer Holden (Holden) on March 27, 2012 be admitted as evidence under the excited utterance or dying declaration hearsay exception?

(3) If either or both of the aforementioned statements are admissible, does the 6th Amendment's Confrontation Clause bar either from being admitted as evidence?

ANALYSIS

Hearsay (Rule 801) is an out of court statement offered to prove the truth of the matter asserted. Generally, such a statement is inadmissible. However, two relevant exceptions - excited utterance and dying declaration - may apply. Per Rule 803, an excited utterance is a statement relating to a startling event or condition made while the declarant was under the stress of excitement that it caused. Per Rule 804, a dying declaration is admissible if the declarant is unavailable, is being offered in a homicide or civil case, declarant made said statement believing his death is imminent, and such statement was made about the cause of death. Per Rule 804, one is unavailable if not present to testify at trial because of death. For both statements, Pike, the declarant, is unavailable as he is deceased.

(1) 911 Call

The 911 call is a statement made out of court that is being offered by Pike to show the truth of the matter asserted. Here, the 911 call is being offered to prove that his shooter drives a black pickup truck. If the analysis were to end here, such a statement would be inadmissible as hearsay per Rule 801. However, the prosecutor would like to offer this statement as either an excited utterance or a dying declaration.

As noted above, to be considered an excited utterance and thus admissible, the prosecution must show that the statement was related to a startling event and made while the declarant was under the stress of the event's excitement. During the call, it does appear Pike was under the stress of the event. His first words spoken to the 911 operator were that he did not feel good. He also went in and out of silent moments and stated that he was shot, thus it appears he was struggling with his wounds given his silence and the fact that he only spoke after the 911 operated prompted him. Moreover, he barely got more than a few words out and then went silent. This implies that he was under the stress of the event thereby meeting the second prong of the excited utterance analysis.

His statements also relate to this startling event. He stated he didn't feel well, that he was

shot, and that the shooter was driving a black pickup truck. While his answers were in response to questions and not given voluntarily, it does appear that he struggled even to say the few words he did, and his only statements were related to having been shot - he made no other extraneous remarks.

Per *State v. Friedman (Friedman)*, we also consider factors such as the timing between the statement and the event, the declarant's physical and mental condition, his observable distress, the character of the event, and the subject of his statements. We do not know when he was shot, however his statements made to the 911 operator were made almost immediately after having been found by his neighbor and the wound was fresh enough for him to still be alive (he died only hours later). Thus the timing should not be an issue. Additionally, his physical and mental condition appear to be such that he was not able to fabricate anything - he could barely get out the few words he did speak and often went silent. He also mentioned that he didn't feel well and his neighbor encouraged him to "hang in there". It therefore seems the 911 call would be considered an excited utterance.

In regards to a dying declaration, Pike is now unavailable, this is a homicide case, and the statements made during the 911 call related to the cause of this death (the gunshot). Thus, all that is left to analyze is whether Pike believed his death to be imminent. While Pike didn't actually say he felt like he was dying, he did know that he had been shot and he also stated he didn't feel well. Moreover, he could barely speak and was often silent during the phone call. What is more, his neighbor kept reassuring him and telling him to hang in there which implies that Pike's condition must have been such that his neighbor felt the need to try and reassure him, which is circumstantial evidence that Pike was acting a way consistent with one who believes they are dying. Finally, Pike lost consciousness 4 minutes after this call was made and died less than 3 hours later.

However, despite these facts, its not clear whether Pike knew death was imminent or whether he merely thought he was seriously wounded. Therefore, I recommend this admitted as an excited utterance, not a dying declaration.

(2) Police Report

Using the above mentioned analysis for excited utterance in regard to the police report, the time lapse between the event and the officer's conversation with Pike presents a problem for the prosecution. The Officer didn't speak to Pike until 8:12pm, over 2 hours after the 911 call. *Friedman* does state that time alone is not dispositive and the other above-mentioned factors should be considered. Pike had lost consciousness between the 911 call and the officer's questions, however its unclear when he regained consciousness and he may have been conscious long enough to have the initial excitement from the shot wear off. Thus, it appears the report isn't an excited utterance.

Regarding a dying declaration, Pike is unavailable, this is a homicide and his statements are about the cause of death. *Friedman* states that we can ascertain whether one believes death is imminent based on the circumstances which might shed light on the declarant's state of mind. The officer told Pike that he was fading fast and that they didn't want to lose him. It is reasonable to infer that one who was told this would assume they were dying. And, Pike did in fact die 30 minutes later. As such, I recommend admitting the report as a dying declaration.

<u>(3) 6th Amendment</u>

Under the 6th Am, an accused is allowed to confront adverse witnesses. *Bryant.* Thus, to admit a statement over a 6th Am objection, the witness must be unavailable and the accused must have had a chance for prior cross-examination. If a witness's statement is considered testimonial, per *Bryant* & *Friedman,* such a statement is not admissible over a hearsay objection with the exception of dying declarations, per *Friedman,* are admissible despite the 6th Am Confrontation Clause requirement. Per *Bryant,* a statement is testimonial if primarily made for later criminal prosecution & non-testimonial when made primarily to assist police in an ongoing emergency.

The 911 call is likely an excited utterance, meaning to be admissible per the 6th Am, it needs to be deemed nontestimonial and likely will be. A nontestimonial statement is one in which the primary purpose is to enable police assistance to meet an ongoing emergency. *Bryant.* Per *Davis*, statements made to a 911 operator for this purpose are considered nontestimonial. Here, Pike's statement to the 911 operator that his shooter drove a black truck were made in order to find the shooter, who at this point had not been apprehended which means the emergency is ongoing. The scope of an emergency can turn on the weapon used, the medical condition of the victim, and the informality of the encounter with the victim and the police. *Bryant.* Here, Pike still needed medical attention for his gunshot wound and the suspect was still at large. Also, the 911 call wasn't a structured interrogation, instead she asked what happened, who the shooter was & what the shooter was driving, which implies she was trying to find the shooter and see what medical or police help was needed.

The police report is likely a dying declaration, and per *Friedman,* not barred by the 6th Am. However, even absent such an exception, this too is likely considered non-testimonial. The officers still hadn't found the shooter and Pike told them the shooter was after his girlfriend, thus the emergency was still ongoing. Moreover, this wasn't a structured interrogation. Instead, the officer stated they wanted to apprehend the shooter & needed to know quickly who it was so they could find him. Arguably, because the officer said "we need to put this guy away" this conversation could be more for conviction than to end a threatening situation. However, given that a deadly weapon was used & the shooter hadn't been apprehended and was still after Pike's girlfriend, the factors weigh in favor of this still being an ongoing emergency versus questions being asked solely for the purpose of using the statements in later criminal prosecution.

Accordingly, both the 911 call & police report statements are likely nontestimonial and therefore not barred by the 6th Am Confrontation Clause.

MPT 1 - Sample Answer # 3

TO: Judge Leonard Sand
FROM: Examinee
RE: *State of Franklin v. Soper*, Case No. 2012-CR-3798 - Bench Memo

Statement of Issues

(1) Whether Vincent Pike's statements made to the 911 dispatcher and subsequent statements made to Police Officer Timothy Holden while in the ICU, are admissible under the excited utterance and/or dying declaration exceptions to hearsay under the Franklin Rules of Evidence.

(2) Whether Vincent Pike's statements made to the 911 dispatcher and subsequent statements made to Police Officer Timothy Holden while in the ICU, are admissible under the Confrontation Clause of the 6th Amendment of the United States Constitution as non-testimonial statements.

Analysis

Excited Utterance - Exception to Hearsay Under FRE 803(2)

Franklin Rules of Evidence ("FRE") 801(c) defines "hearsay" as an out-of-court statement offered to prove the truth of the matter asserted. Under FRE 802, hearsay is generally inadmissible unless it falls under one of the hearsay exceptions in the FRE, a Franklin statute, or other Supreme Court rules.

Under FRE 803(2), an excited utterance is "a statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused." Thus, pursuant to 803(2) and the State v. Friedman case ("Friedman"), there are three main elements to the excited utterance exception: (1) a "startling event," (2) a statement relating to the event, and (3) the statement must have been made "under the stress" of the startling event with "no time for reflection." Friedman, State v. Cabras. When examining the third element of the rule, the court should pay close attention to the amount of time between when the event occurred and the statement was made, along with other factors, including the declarant's physical and mental condition, observable distress, character of the events, and subject of the declarant's statements.

Here, Pike's statements on the telephone call with the 911 dispatcher, qualify as hearsay. His statements to the operator, those reflected in the Transcript of 911 Telephone Call, are out-of-court statements offered to prove the truth of the matter asserted. They are offered to prove that he didn't feel good, that he was shot, that the shooter ("he") drove away, that the shooter is "going to get her," and that the shooter was in "[a] black pickup." Therefore, these statements are hearsay.

The issue is whether they qualify as excited utterances. First, as stated in Friedman, being shot is an event sufficient to satisfy the "startling event" requiremenf of 803(2). Thus, because the evidence suggests Pike was shot, this element seems to be satisfied. Second, his statements seem to relate to the event. He told the dispatcher he didn't feel good, he was shot, who the shooter was, and further information about the shooter.

Therefore, because these statements relate to being shot, the second element is satisfied. For the third element, we are unaware of the amount of time that has lapsed between the alleged shooting and the statements to the police officer. However, his statements show he was physically not feeling good and was coming in and out of consciousness, and the subject of his statements concerned his health and the alleged shooter. Further, earlier statements from Jake Snow indicate Pike was bleeding real bad at the time he was encountered. Therefore, it would seem that the statements were made "under the stress" with "no time for reflection." Thus, his statements are likely admissible under the excited utterance exception.

Pike's statements to the Police Officer, also are hearsay. However, his statements were made almost 2 hours later after the telephone call and after having been given some treatment by the hospital, so these statements likely are not admissible under the excited utterance exception.

Dying Declaration - Exception to Hearsay Under FRE 804(b)(2)

Under FRE 804(b)(2), hearsay is admissible as a dying declaration. Pursuant 804(b)(2) and Friedman, to be admissible under this exception, the statement must meet the following criteria: (1) "declarant must have died by the time of the trial, (2) the statement must be offered in a prosecution for homicide [ ], (3) the statement must concern the cause or the circumstances of the declarant's death, and (4) the declarant must have made the statement while believing the death was imminent." Proof of the last element can be shown by the declarant's express language and conduct, severity of the wounds, and other similar circumstances. Friedman.

Here, Pike's statements on the telephone call with the 911 dispatcher, even though hearsay, may qualify as a dying declaration. Pike has died, satisfying the first element. Second, the statement is offered in a prosecution for homicide conviction. Third, the statements concern the cause or circumstances of his death - he tells the dispatcher he has been shot and what car the alleged assailant was driving. The issue is whether he made the statements under a belief of impending death. He had been shot and was coming in and out of consciousness. These facts suggest he may have had the belief of impending death. Even if not, the statements are likely admissible as excited utterances.

Pike's statements to the Police Officer, though hearsay, may fall under the dying declaration exception. Again, Pike has died and the statements are offered in a homicide case. The main statement - that "[i]t was Dan, my girlfriend's ex-boyfriend, and he's going after her' - concerned the cause of death (who had shot him). However, the part of the statement where Pike said "and he's going after her" may not be admissible because it does not concern him being shot, but rather what may happen in the future. Further, it appears the statements were made under Pike's impending belief of death. The Officer told him he was "fading fast," and he was in the ICU, suggesting he probably knew he was going to die. Therefore, it is likely this statement is admissible as a dying declaration.

Confrontation Clause - Testimonial v. Non-Testimonial

Even if admissible as hearsay exceptions, the statements still may be excluded if they violate the Confrontation Clause. The Crawford case held that any "testimonial" statement is inadmissible if the declarant is unavailable, because the individual against whom the statement is offered is deprived of his right to confront the declarant.

Whether a statement is "testimonial" depends on the primary purpose. The Michigan v. Bryant case ("Michigan"), applying the Davis and Hammon cases, helps define the parameters of a "testimonial" statement. In Davis, the court said a statement is "nontestimonial" if the primary purpose of the statement "is to enable police assistance to meet an ongoing emergency." The court also stated a statement is "testimonial" when the primary purpose of the statement "is to establish or prove past events potentially relevant to later criminal prosecution." The determination should be objective, but the courts will look to the nature of the threat (whether it is continuing), the duration and scope of the situation, the medical condition of the declarant, and the informality of the statement.

Lastly, the Friedman court held that, pursuant to dicta from the Karoff and Wirth cases, even if testimonial, it is admissible as a dying declaration.

Here, Pike's statements on the telephone call with the 911 dispatcher appears to be "nontestimonia.l" Pike's statements regarding his own condition medical condition - that he was not feeling well and had been shot - help the dispatcher judge the severity of his medical state (the emergency at hand) and the magnitude of the threat to his life. Further, his statements about the assailant's plans - that "he's going to get her" - suggest that the threat was ongoing. As the court found in Michigan, when an armed shooter is on the loose, an ongoing emergency is at hand. Thus, these statements appear to be nontestimonial.

Pike's statements to the Police Officer appear more "testimonial" in nature. At this point, Pike was at the hospital and the threat of him being further attacked had ended. However, his answer was given in response to what appears to be an interrogation about events relevant to later prosecution. The Officer wanted the statements before he perished. Notably, the portion of his statement relating to the continuing threat to his girlfriend - "her" - may be considered nontestimonial, as part of an ongoing emergency. Overall, though, it is likely Pike's statement is "testimonial." Nonetheless, it may be admissible as an exception because it was a dying declaration.

Recommendation

As to the first issue, the motion to exclude should be denied because Pike's statements to the dispatcher are excited utterances and dying declarations and Pike's statements to the police officer are dying declarations.

As to the second issue, the motion to exclude should be denied because Pike's statements to the dispatcher are nontestimonial and Pike's statements to the police officer are testimonial, but admissible as dying declarations.

MPT 2 - Sample Answer # 1

III. Argument

Ms. Ashton should be granted a preliminary injunction against the dumping of dirt in the vacant lot behind her home because she can prove a likelihood of success on the merits, the potential for irreparable injury if the injunction is not granted, and that the balance of equities is tipped in her favor.

A. Ms. Ashton is likely to succeed on the merits because the loud screeching and crashing sounds caused by trucks, the 20-foot pile of dirt, the residential character of the neighborhood, and Indigo's refusal to move its activities to a different location are a substantial and unreasonable interference with the use of Ms. Ashton's land.

Private nuisance is "a non-tresspassory invasion of another's interest in the private use and enjoyment of land." *Parker v. Blue Ridge Farms, Inc.* The fundamental inquiry of such a claim is whether there was an interference with the use and enjoyment of land. In order to recover, a plaintiff must prove that the defendant's conduct was the proximate cause of an unreasonable interference with the plaintiff's use and enjoyment of his or her property, and that the interference was intentional or negligent.

Indigo's conduct was the proximate cause of the interference because their dump trucks were using the roadways, entering the vacant lot, and dumping the dirt onto the property. The trucks they used made noise, and the dirt that they dumped foreseeably was blown, or was carried with runoff, from the vacant lot onto Ms. Ashton's property. The interference was, if not intentional, at least negligent, because Indigo knew that the neighborhood members were upset by the activity and nonetheless refused to change their behavior.

Most importantly, the unreasonable interference created and caused by Indigo was a serious impairment to Ms. Ashton's use and enjoyment of her property. The factors regarding the reasonableness of the interference with Ms. Ashton's use include: the nature of the interfering use and the use and enjoyment invaded; the nature, extent, and duration of the interference; the suitability for the locality of both the interfering conduct and the particular use and enjoyment invaded; and whether the defendant is taking all feasible precautions to avoid any unnecessary interference.

First, the nature of Indigo's use involves loud dump trucks that travel through a residential neighborhood an average of 17 times per day. They make sounds including the revving of engines, pervasive screeching, crashing, grinding, and loud beeping. They have also left a mound of dirt that is 20 feet high in a vacant lot just behind several homes. When there is wind, the wind blows dust and dirt onto the residences behind the lot. When there is rain, runoff from the dirt pile flows into the backyards of the residential lots. Before Indigo's activity, the residents affected were able to sit outside, read outside, garden, and visit with neighbors on their front porch. They are not only unable to do those things now, but the value of their property has decreased and the cleaning expenses for their homes has increased.

Second, the interference used to last day and night, and only recently Indigo has chosen to stop dump trucks from entering the vacant lot past 8 p.m. Now, dump trucks are entering the property and using the roadway from 6 a.m. to 8 p.m., more than 14 hours of loud interference per day. This began in April of 2012 and has continued steadily for the past

three months. There is no indication that the interference is going to stop in the near future.

Third, the neighborhood at issue is not a suitable location for dumping dirt and is much more well suited to quiet residential enjoyment. It is in the heart of the old Graham District and has been referred to as a "neighborhood of peaceful homes and shady trees." *Appling Gazette*. It is one of the largest residential communities and does not have a "single business located within its borders." *Appling Gazette*. Even though the lot is zoned for mixed use, it is in an area that is much better suited to residential use and is an unreasonable place for Indigo to dump its dirt.

Finally, Indigo is not taking all precautions to avoid unnecessary interference. Although Indigo did change the hours of its dump truck operation, it is still working more than 14 hours during the day. Furthermore, Indigo owns a 50-acre tract of land that is on the outskirts of Appling. Although that property is not zoned at the moment, is has paved roads and would be a much more suitable location. It is on the outskirts of town and would not interfere with residences, and is 50 acres, rather than 1 acre, so that the dirt likely would not blow or run onto other people's property.

As the court noted in *Parker*, an unreasonable interference can still be the part of otherwise reasonable, legal conduct--even "a business enterprise that exercises utmost care to minimize the harm . . . may still be required to pay for the harm it causes to its neighbors." Because Ms. Ashton can prove that the travel of dump trucks and the dumping of dirt onto the vacant lot is an unreasonable interference with her land that is unsuitable for the residential neighborhood, Ms. Ashton has a high likelihood of success on the merits.

B. Ms. Ashton will suffer irreparable injury if the provisional relief is withheld because land is unique and Indigo's activities create a serious impairment of Ms. Ashton's ability to read, garden, or otherwise enjoy the use of her land.

As in *Timo Corp. v. Josie's Disco, Inc.*, Ms. Ashton can show that she will suffer irreparable injury if the injunction is withheld. According to *Timo*, "land is unique and . . . any severe or serious impairment of the use of land has no adequate remedy at law." Even though Ms. Ashton is likely to prevail in a case for damages, therefore, she is also likely entitled to equitable relief. The prospect of continued pervasive loud noises, continued runoff of dirt onto her property, and continued blowing of dirt onto her garden, her house, and her windows, creates a harm "for which the law provides no adequate remedy." *Timo*.

C. The balance of equities tips in Ms. Ashton's favor because Indigo's usage is unreasonable in the area and because Indigo has other property that it could use to deposit dirt, reducing the hardship and in keeping with the general public's interest.

The balance of equities clearly tips in Ms. Ashton's favor because the harm to her use of her property substantially outweighs the social value, legitimacy, and reasonableness of Indigo's use. The factors that courts generally look to in this balancing include: the respective hardships to the parties; the good faith or intentional misconduct of each; the interest of the general public; and the degree to which the defendant's activities comply with or violate applicable laws. *Timo*.

First, there is substantial hardship on Ms. Ashton. She cannot engage in any of the activities that she enjoyed prior to Indigo's use of the vacant lot, and therefore cannot enjoy

her property to the fullest extent. Furthermore, she continues to have more expenses for cleaning the outside of her house and her windows than she did previously. Finally, if she chooses to move she will get less for her property than before because the value has gone down as a result of the pile of dirt directly behind her home. Conversely, there would be minimal hardship on Indigo because they have access to another, much larger, tract of land on which they could place their piles of dirt. Although the area would have to be properly zoned, there are already paved roads reaching it. This makes the hardship on Indigo minimal.

Second, it is unclear that either party has acted in bad faith or with intentional misconduct. Both parties met to discuss the timing of the interference, with Indigo eventually agreeing to stop dumping dirt after 8 p.m. Ms. Ashton, in turn, has asked Indigo repeatedly to do something about the damage to her home before choosing to proceed with litigation. This factor weighs equally for both parties.

Third, although the general public has an interest in keeping Indigo's business, they do not have an interest specifically relating to where Indigo places its dirt. Although Indigo has "a good record on environmental matters, . . . an even better one on home construction," and is providing jobs for young families, they can continue to do these things even if they have to move their dirt pile to another location. In fact, moving the pile of dirt to the 50-acre tract of land might add even more jobs because they would be able to continue dumping dirt during all hours of the night, rather than being limited or restricted by time.

Finally, the activity does comply with applicable laws because Indigo is dumping dirt on a vacant lot that is zoned for mixed, rather than residential, use. All of the affected lots, however, are for residential use.

In conclusion, because there would be significant hardship to Ms. Ashton without the injunction and relatively little hardship on Indigo, the balance of equities tips in Ms. Ashton's favor. The court should grant Ms. Ashton a preliminary injunction.

MPT 2 - Sample Answer # 2

III. Argument

A plaintiff seeking a preliminary injunction must establish a likelihood of success on the merits, the prospect of irreparable injury if the provisional relief is withheld, and that the balance of equities tips in the plaintiff's favor. [*Otto Records*]

A. Defendants trucks and the mounds of dirt on its property result in dirt and noise that makes it impossible for Plaintiff to use and enjoy her property in a reasonable manner.

To establish a likelihood of success on the merits for a private nuisance claim, a plaintiff must show that the Defendant's conduct was the proximate cause of plaintiff's harm, that defendant's acts resulted in an unreasonable interference with plaintiff's use and enjoyment of her property, and that this interference was intentional or negligent. Here, plaintiff has established a prima facie case because defendant's trucks and dirt were the direct and proximate cause of plaintiff's harm, plaintiff can no longer enjoy her garden or front porch at any time during the day because of defendants's activities, and defendant was aware of its interference with plaintiff's use and enjoyment of its property after plaintiff petitioned the defendant for redress directly, yet despite plaintiff's pleas defendant continues to engage in these harmful activities.

Defendant's activities are the proximate cause of plaintiff's harm. Defendant selected and purchased a lot zoned for mixed residential and commercial use in the middle of a residential neighborhood. On this lot, Defendant deposits loads of dirt on a continuous basis on an average of 17 times per day, from 6 a.m. to 8 p.m. at night. Defendant's dump trucks have loud, roaring engines and screeching brakes, and when the trucks dump their materials directly behind Plaintiff's home it makes loud crashing, grinding and beeping sounds. The sounds emanating from the activity of these trucks on a continuous daily basis makes it impossible for Plaintiff to enjoy her rose garden or sit and socialize on her front porch with her visitors. Further, in just three months, the dirt piles have reached heights in excess of 20 feet. Run-off and dust from these piles also invades the plaintiff's property, covering her flowers and home with dirt. During rainstorms, the run-off from the dirt piles flows directly on and through plaintiff's yard, onto the street and into neighboring yards, resulting in added cleaning and maintenance costs to Plaintiff.

Plaintiff's is entitled to enjoy her property in a reasonable manner. Gardening, socializing with visitors on one's front porch, and being able to sit outside and read are normal, daily activities homeowners have a right to engage in. While defendant has a need to store its dirt, and zoning regulations do not prohibit its activities on the property in question, an interference with a plaintiff's use of his property can be unreasonable even when the defendant's conduct is reasonable. Further, defendant has managed to cause irreparable harm to the Plaintiff in just three short months. As dirt continues to pile in on a daily basis and the piles reach heights in excess of 20 feet, there is no telling how much more severe the damage will be to Plaintiff's use of her property if the court does not take action. A residential neighborhood with almost no other commercial activity is not the proper locale for storing dirt; in fact, defendant has another 50 acre property outside of the city that would be ideal for the storage of dirt. Finally, while the defendant did agree to cease the transport of dirt after 8 p.m., it has no need to start at 6 a.m., when many residents are still in bed. There also is no evidence of a fence or retaining wall on defendant's property that would prevent the flow of dirt into plaintiff's and her neighbors property, or a fence that

would prevent neighborhood children from climbing on the mounds of dirt at risk of injury to themselves. [Appling Gazette, "Kids like nothing better than big trucks and a huge pile of dirt"] Defendant could be doing a lot more to minimize its interference with plaintiff's property.

Finally, Defendant's interference is intentional because it the neighborhood appealed to it for redress, yet Defendant continues its unreasonable operations.

B. The unrelenting noise from defendant's trucks and the dirt invading plaintiff's property has resulted in irreparable harm for which only equity provides relief.

Land is unique and any severe or serious impairment of the use of land has no adequate remedy at law. [*Davidson v. Red Devil Arenas*] Mere noise has been held a sufficient intrusion for which the law provides no adequate remedy. [*Timo Corp*] Here, plaintiff has suffered not just the banging and screeching of dump trucks, but also the physical invasion of her property by the defendant's dirt and dust. Thus there is no adequate legal remedy available.

C. Defendant, as the owner of alternative property and a corporation with significant financial resources, is best situated to redress the harm it knowingly continues to inflict on the plaintiff.

Here, the respective hardships to the defendant from ceasing its activities is far less than that to the plaintiff. Defendant owns a large property outside the city, away from residential neighborhoods and single-family homes, that is far better situated to the long term storage of mass amounts of dirt. Defendant could easily move its dirt storage activities to this property. Defendant could even continue to store a small amount of dirt on the property for its construction projects in such a way that would not cause noise and dirt to invade the plaintiff's property all day everyday, perhaps by constructing a retaining wall that would prevent washout and covering its dirt piles to minimize the resulting dust (costs that would likely be minimal to a successful construction company). Plaintiff, however, would be forced to abandon the home she has lived in for over three decades or stay and be barred from gardening or enjoying her front porch in a reasonable manner.

Further, plaintiff is the party that has acted in good faith throughout this ordeal. Plaintiff appealed directly to the defendant to address her harms. Even though defendant knew that it was dumping dirt in an almost completely residential area, it made almost no efforts to accommodate their interests or minimize the intrusiveness of its activities. Limited trucks to between 6 a.m. and 8 p.m. is not a significant modification in the interests of fairness, and despite complaints about the dust and the dirt flow, defendant has taken no remedial measures to prevent those activities from occurring again. Instead, defendant continues to act in bad faith, knowing the harm it is causing.

Although defendant has contributed substantially to the creation of jobs and homes for young families, this is not a direct result of the storage of dirt behind plaintiff's home. In fact, the benefits defendant has brought to the Appling community occurred before it purchased this lot and began storing its dirt there. Thus, there is no reason to believe that the defendant cannot continue to contribute meaningfully to the community or would be hindered in its efforts or stifled in its business if it was required to store the majority of its dirt outside the community on a larger property it already owns that is far better suited to its needs.

Finally while defendant's property does not violate any applicable zoning laws, even a business that exercises the utmost care to minimize the harm it causes, or one that serves society well, may still be required to stop its harmful uses if they are so unreasonable or undesirable that simply absorbing the costs of altering the activity would not be enough. Here, the defendant is not just causing noise to invade plaintiff's property to the point she can't think or sleep, it is causing dust to cover her garden and destroy her flowers, cote her home and windows, and flood into her property when it rains. Defendant can easily redress this problem, at little cost to itself, by transporting its significant dirt storage activities to property outside the city. This is not like a restaurant or bar that loudly serves patrons on the weekends, where an injunction would put the bar out of business and stifle legitimate business activity; this is a daily and continuous activity that physical impacts the plaintiff's property in an unreasonable way that can be easily redressed by a preliminary injunction, ordering the defendant corporation to be aware of and respect other property owners, and take its dirt elsewhere.

MPT 2 - Sample Answer # 3

The standard for granting a preliminary injunction is well established in this jurisdiction. The Court has found that the moving party must show a likelihood of ultimate success on the merits, the prospect of irreparable injury if the provisional relief is withheld, and that the balance of equities tips in the plaintiff's favor. Otto Records Inc. v. Nelson. For the following reasons, Plaintiff Margaret Ashton should be granted a preliminary injunction preventing Defendant Indigo Construction from depositing dirt in the vacant lot at 154 Winston Dr. pending final disposition of this suit.

1. Plaintiff has a strong likelihood of success on the merits, because she can show that Defendant intentionally and unreasonably interfered with her use and enjoyment of her land.

In a suit for private nuisance, the plaintiff must show that "the defendant's conduct was the proximate cause of an unreasonable interference with the plaintiff's use and enjoyment of his or her property, and the interference was intentional or negligent." Restatement 2nd of Torts.

In the present case, Defendant's conduct has proximately caused an interference with the Plaintiff's use and enjoyment of her land. Plaintiff has lived in her present home for 32 years. Her home is in a neighborhood that consists entirely of single family homes. In fact, this neighborhood is one of the few in the city that remains free from commercial establishments. In April, however, the Defendants began to dump dirt into the vacant lot behind the Plaintiff's property. This activity has interfered with the Plaintiff's use and enjoyment of her land in a number of ways. First, the drivers and the vehicles they are using have created a pervasive noise disturbance consisting of roaring engines, screeching brakes, crashing, grinding, and beeping sounds. These continual noises have prevented the Plaintiff from enjoying spending time on her porch or gardening or reading outside, all activities that the Plaintiff enjoyed prior to introduction of the Defendant's trucks. Further, the dirt pile has reached upwards of 20 feet high, effectively blocking the Plaintiff's view of anything besides a dirt pile. Additionally, this dirt blows onto the Plaintiff's property whenever there is even the slightest of breezes. These dirt deposits entering the Plaintiff's property have destroyed the Plaintiff's flowerbeds and required the Plaintiff to spend additional funds to clean the outside of her house. Finally, when it rains, the dirt pile turns to mud, which runs into the Plaintiff's backyard, preventing her from using and enjoying the outside land of her property.

Mere interference with use and enjoyment is not enough to show private nuisance, however. That interference must be unreasonable. Whether the interference is unreasonable rests on a number of factors, including "the nature of both the interfering use and use and enjoyment invaded; nature, extent, and duration of interference; the suitability for the locality of both the interfering conduct and the particular use and enjoyment invaded; and whether the defendant is taking all feasible precautions to avoid any unnecessary interference with the plaintiff's use and enjoyment of his or her property." Parker v. Blue Ridge Farms, Inc.

These factors also weigh in favor of the Plaintiff. The nature of the interfering use is merely that of a dirt dumping ground, while the use and enjoyment invaded is that of a private citizen living in their private home. The interference is continual. The noise and dumping activities occur continually from 6 in the morning until 8 at night, and the trespass of dirt

and mud on the property occur whenever there is even the slightest bit of unfavorable weather. This interference is extensive and is of potentially unlimited duration. As discussed above, this locality is completely unsuitable for creation of a commercial dirt pile. This is a private neighborhood, filled primarily with lots zoned for single family use. Finally, the Defendant has not taken all feasible precautions to avoid unnecessary interference. Initially, the Defendant was running its trucks all day and all night. Even after limiting the time of trucking, the trucks run continually for more than 12 hours per day. Additionally, the Defendant has not taken any precautions to prevent the dirt and mud they are creating from encroaching onto the Plaintiff's property, despite her continued complaints. These taken together clearly demonstrate that the Defendant's interference was unreasonable.

Finally the conduct was not only unreasonable and interfering, it was intentional. The Court in Timo Corp. v. Josie's Disco, Inc., found that "intentional action can be inferred from evidence that the defendants were aware of the intrusion and chose to continue their behavior." The record is uncontested that the Defendant's have received numerous complaints from not only the Plaintiff, but also from other homeowners in the affected neighborhood. Their refusal to mitigate the damage they are causing, knowing about the interference, is clear evidence that their actions were intentional. Because the Plaintiff can clearly make out a case for private nuisance, she has satisfied the requirement of probable success on the merits.

2. Land is unique and interference with the Plaintiff's use of her land will have no adequate remedy at law, so the Plaintiff will suffer irreparable injury if provisional relief is withheld

The Court has long held that "land is unique and any severe or serious impairment of the use of the land has no adequate remedy at law." Davidson v. Red Devil Arenas. Because Plaintiff will have no adequate remedy at law for the serious impairment of the use of her land caused by the Defendant's aforementioned conduct, she will suffer irreparable injury if this relief is withheld. Therefore, the Plaintiff satisfies the requirement of irreparable injury.

3. The Defendant's use is so unreasonable that it should be stopped completely, causing the balance of the equities to tip in the Plaintiff's favor

When balancing the equities, the court must seek to distinguish between those uses which should continue while paying costs, and those which are so unreasonable or undesirable that they should be stopped completely. Timo. When determining this, the Court must balance the social value, legitimacy, and reasonableness of defendant's use against ongoing harm to the plaintiff. Factors to consider include: respective hardships to the parties from granting or denying the motion, good faith or misconduct of each party, the interest of the general public in continuing the defendant's activity, and the degree to which the defendant's activity complies with or violates applicable laws. Timo.

In this case, the Defendant's are engaging in an activity that does have social value. They are a construction company that has certainly offered jobs and opportunities for housing for those who may not have gotten them normally. However, the legitimacy of the Defendant's general use must be weighed against the unreasonableness of their conduct in so using. The Defendant's own a parcel of land that is outside of the city and is nowhere near a residential area. Therefore, the social value of the Defendant's overall conduct is outweighed by the fact that they would be able to engage in this socially responsible

conduct without interfering with anyone's land. Again, although the Defendant's conduct is within the legal and zoning requirements for the vacant lot, the Defendant could be dumping the dirt in an area of land where the activity would not interfere with anyone's use and enjoyment of their land, making the conduct unreasonable. Because of this additional land, the Defendant will not gain any unreasonable hardship from moving its dumping operations, while the Plaintiff will continue to be unable to use her land if the injunction is not granted. The Defendant's possession of the additional plot of land means that the Defendant can continue its legitimate operations and can continue to provide social value, while the Plaintiff and the rest of the neighborhood can have their use and enjoyment of their land returned as well. Because of this, the Defendant's use of the vacant lot is so unreasonable that it should be stopped completely, causing the balancing of the equities to favor the Plaintiff.

For the foregoing reasons, this Court should grant the Plaintiff a preliminary injunction pending outcome of the nuisance trial on the merits.