United States Senate

Impeachment Trial Committee

Impeachment of Judge G. Thomas Porteous, Jr., U.S. District Judge For the Eastern District of Louisiana

Volume III

Wednesday, September 15, 2010

Dirksen Senate Office Building

Washington, D.C.

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U.S. GOVERNMENT
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P R O C E E D I N G S (8:38 a.m.)

CHAIRMAN MC CASKILL: The hearing will commence. I apologize that we're starting a few minutes late.

The House has 12 hours and 38 minutes remaining in their case, and Judge Porteous has 13 hours 56 minutes remaining in their case.

And I believe we are ready for the cross-examination of Professor Geyh.

CROSS-EXAMINATION

BY MR. TURLEY:

Q Good morning, Professor.

A Hi, Mr. Turley.

Q I want to make sure -- it's Professor Geyh, not gay; correct?

A That's correct.

Q Professor, as the House did yesterday with its own witnesses, I'm going to be asking you to be somewhat brief today. I'm going to be asking you some yes-or-no questions, but some I'll be asking for your opinion.

I don't want you to think that I'm rude if I cut you off. It's just that because you were taken out of order, we have witnesses that are trying to catch flights and so --

A I understand.

Q Thanks. Now, first of all, I wanted to get an idea of how you approached your testimony. Is it correct to say that in preparing for your review and your final analysis, you just assumed that all of the facts alleged were true?

A No. What I did do, however -- that's close to true. In other words, I don't perceive myself as a fact witness. I looked at the House report and based my analysis of the ethics on the facts as found in the House report and looked at additional deposition testimony to conclude that in my judgment, there were no findings that were outlandish or crazy.

But for the most part, I simply looked at the allegations and looked at the conclusions reached and made assessments of the ethics based on those.

Q Fair enough. Were there any facts that when you finished that process, you rejected and said, okay, this is a fact that's not true or --

A No.

Q Okay. Did you -- did you observe any of the testimony in the case?

A Live? No.

Q When you say "live," you mean the deposition?

A In person, in person I did not. The only testimony I was privy to was of other professors on the House side when we were testifying as ex- -- on the house sides.

Q Oh, I see. I'm speaking of the Senate proceeding.

A Correct, I didn't. I have not seen them live.

Q Okay. Thank you, sir. Let me also ask you, yesterday you spoke about the unethical aspects of one of the allegations, which is the amending of two sentences. Do you recall this business with Duhon and Wallace?

A Correct.

Q Okay. Now, are you aware of the testimony yesterday that it was Judge Richards, not Judge Porteous, that set aside the offense for Mr. Duhon?

A I am not. I was not privy to that.

Q Now, in the case of Aubrey Wallace, did you take a look at Section 893 that's the basis of the Government's argument that --

A I didn't read it, but I read of it in the materials.

Q So you didn't look at the -- you didn't --

A I didn't read the statutory section itself, no.

Q How about Section 88.1, which is also raised as to the Government's argument that it was unlawful?

A No.

Q That's fine. That's fine.

Now, I'm going to be asking you a couple of questions about your background. And as you know, we didn't object to your being an expert --

A Uh-huh.

Q -- on ethics. We certainly commend your record. I'm just trying to isolate what your background is.

A Sure.

Q It's fair to say that you're not an expert in Louisiana legal ethics?

A That's correct.

Q And I understand you made a very good point, you said that, you know, a lot of states model on the -- on the model code itself; correct?

A Including Louisiana.

Q Including Louisiana. And I understood that.

Did you review any Louisiana judicial misconduct opinions?

A I did not review misconduct opinions. I reviewed the model code -- excuse me, some of the code materials from Louisiana.

Q Did you review the code -- the codes going back to 1984 that were relevant for the period?

A I did.

MR. TURLEY: Okay. Madam Chair, I'd like to move in at this time those -- those codes. There were some changes, but we've put them all together as Porteous Exhibits 1001A to 1001Y, and we'd like to move them into evidence.

CHAIRMAN MC CASKILL: Are these all published codes by the State of Louisiana?

MR. TURLEY: Yes, they are.

CHAIRMAN MC CASKILL: Then the committee will take notice of any statutes or published legal codes as evidence.

MR. TURLEY: That's very helpful, Madam Chair. Should I -- just to clarify, then, we don't have to, for example, put into the record any published opinions either?

CHAIRMAN MC CASKILL: I think that anything that is a statute or a published opinion, I

think, I don't want to use the term "judicial notice," because this is not -- we are not a judge. But the same legal principle should apply, and we would -- the committee would take notice of any published statutes, published ethical codes or published legal opinions.

MR. TURLEY: Thank you, Madam Chair.

BY MR. TURLEY:

Q I think I know this answer already, but you're not a member of the Louisiana bar, are you?

A Correct.

Q Okay. And you've never taught at a Louisiana law school?

A Correct.

Q Now, you're aware, of course, that many of these ethical allegations occurred when Judge Porteous was a state judge; correct?

A Yes.

Q Okay. Now, I'd like to -- maybe you can help educate us a little bit on a few of these questions, that -- is it correct to say that -- first of all, did you -- you said you didn't review any opinions. Did you review any of the material from the Louisiana Judiciary Commission?

A No.

Q Okay. Well, let me ask you this, then. When a judge is accused of misconduct, and just as a general principle, aren't most of the responses when judges are accused of judicial misconduct is generally a written opinion as opposed to a formal sanction? Isn't most of these cases handled in sort of written reprimands through opinions?

A It will vary dramatically, anything from private admonitions, you know, to off-the-record discussions all the way up to disbarment, or not disbarment, removal from office.

And in some cases it will culminate in a formal opinion of censure or something less.

Q Fair enough. Would you say, from your review of these cases, that the majority of questions that come up every year with regard to judicial misconduct, the majority of them, are generally handled by those types of private or public, I forgot how you described it, reprimands or recriminations?

A You know, I'm not prepared to -- to speculate about that.

Q Okay.

A I -- complaints are filed, they're investigated, and they go in different directions,

depending upon what is discovered at that point in the process.

Q Fair enough. And so you mentioned that you could -- there's a reprimand, I think you mentioned censure. Can --

A Private reprimand, public reprimand, suspension for a period of time, to removal from office. It's a continuum.

Q And, in fact, Judge Porteous was suspended; correct?

A I'm un -- I mean, I don't know.

Q Okay.

A That could be. I mean, I don't know.

Q Now, did the -- did the House give you ethics opinions that we had marked as an exhibit before trial that -- on judicial ethics cases?

A No.

MR. TURLEY: Madam Chair, those opinions, as opposed to our earlier discussion, may not be -- we believe that they are publicly available. But for the ease of the Senate, as opposed to the other ones, we would suggest putting these in the record as Exhibit 1111A through L. And we'd like to move those into evidence.

CHAIRMAN MC CASKILL: Is there any

objection?

MR. SCHIFF: Madam Chair, we would need to take a look at these. Could we perhaps have a chance to discuss it with counsel?

MR. TURLEY: They were produced and marked with all of our exhibits.

MR. SCHIFF: If we could get a chance to discuss with counsel, perhaps after this witness. We probably don't have any problem with it, but I want to make sure what we're agreeing to have introduced.

CHAIRMAN MC CASKILL: What are these, Counselor?

MR. TURLEY: Specific judicial opinions on how these types of ethics questions are handled.

CHAIRMAN MC CASKILL: But they're not published opinions?

MR. TURLEY: Yeah, they are published but they're not readily available. That is, you can't just pick them up off of some standard sites that's --

CHAIRMAN MC CASKILL: I don't know how it could be published if they're not readily available.

MR. TURLEY: They're published but not readily available, in terms of other opinions where

you could just go on LEXIS-NEXIS and pull them up.

CHAIRMAN MC CASKILL: With the objection without -- I need to look at them.

MR. TURLEY: Sure.

CHAIRMAN MC CASKILL: And I think we need to look at them. I think that we will hold off on entering them into evidence until we have a chance to see what they are and make sure that there is not an objection. Even if there is objection, they may fully well be admitted into the record.

MR. TURLEY: Understood.

CHAIRMAN MC CASKILL: I think you can feel free to use them to pose hypotheticals to this expert witness, however.

MR. TURLEY: Yes, that's fine. And your staff had -- we submitted it a few weeks ago. But I understand entirely, I thank the chair.

CHAIRMAN MC CASKILL: Thank you.

MR. SCHIFF: Thank you.

BY MR. TURLEY:

Q Well, let me ask, you had talked about perjury. One of the reasons I was raising some of the cases that we submitted earlier and marked as that exhibit deal with perjury, and you talked about that yesterday.

Is perjury something generally that judicial counsels deal with when committed by a judge?

A It's certainly within the zone of -- of conduct that would be subject to a judicial discipline, yes.

Q Now, let me ask you about -- I understand that you haven't looked at those cases, which is fair enough. I'm not going to, you know, force you to talk about cases you haven't read.

One of the cases that we put in -- and feel free -- if you feel you don't want to comment on it, I can understand. But one of the cases that we put in was with a bankruptcy judge. And I just want to read you a sentence from the opinion to see if you agree with it.

A Uh-huh.

Q The opinion -- and this is Case Number 91-8500. The court said, "perjury is an extremely sensitive problem for the judicial system, but an allegation that a judge gave perjurious testimony in a matter unrelated to his own judicial duties and unrelated to activities occurring while he is a judge falls outside the statute authorizing disciplinary action."

Would you generally agree with that statement?

A No.

Q Okay. Fair enough. Let's look at just your view on the perjury thing.

A Let me just add one small point, which is that to me, there's also a difference between construing what behavior may fall specifically within the confines of a disciplinary statute, however written, and the larger question of whether the behavior itself is ethical, which was the scope of my -- of my testimony.

Q Fair enough. I think that's a fair point. As a professor, I don't want to do the Socratic method with you. If I'm being unfair, tell me and I can move on. Although since we're both trained as to speak in 50-minute increments, this could be a disaster; right?

A It's hard, yes.

Q Now, with the false statements, have you reviewed a lot of cases involving judges accused of making false statements, for example, in the Senate Judiciary Committee?

A A lot of cases, no. I have -- I mean, in the course of writing the judicial ethics treatise,

we are involved with judges who are accused of fraud and, in some cases, false swearing.

Q False swearing. Do you remember what the false statement cases were?

A I'd have to look them up.

Q Don't worry about it. It's fine.

A It's in --

Q But from those cases, did you -- was it your conclusion that generally, they required not just a false statement but a showing of an intentional false statement?

A I think the -- well, the starting point really is that you tether these things to the relevant code, which speaks in terms of judges having to comply with the law.

And if you are talking about false swearing or perjury, the operative issue is have they violated the law, have they committed perjury. And the more willful the action, certainly the more -- generally, the more egregious the violation in those terms.

But it's a relatively cut and dried proposition, I think most of the time, is have they violated the law, does it reflect badly on their honesty. And that's where it would --

Q So have they violated the law and does it reflect badly on their honesty.

A Right.

Q Okay. I'm not going to ask you about the cases again, but I would like to give you another quote, see if you agree with it, a very short quote. This is actually from a case marked JC 04-35 and 5-16. Just as a background, this involved a federal judge who took a case of a former client and was accused of being involved in a cabal and accused of making false statements to the Senate Judiciary Committee.

A Uh-huh.

Q And the judicial counsel wrote, "even if the alleged inconsistencies in testimony and submissions to the Senate Judiciary Committee were a proper subject for a complaint, dismissal would be required."

He went on to say, "there's no evidence that respondent intentionally mislead or knowingly made false statements to the Senate."

And so do you agree with generally that, in your review of cases, that that's the standard that is often applied?

A Certainly, I think the knowing nature of

the wrong is a relevant consideration. I mean, whether -- whether the judge was -- and I think -- it's important to recognize that it's got to be from an objective standpoint, in other words, that you look at it from the perspective of an objective person, knowing what the judge would have known, would he have, you know, been aware of information that would have made the misstatement intentional, rather than just relying on the judge saying well, I didn't know.

But taking that, I think that intent is one of the things one would look at, yeah.

Q Thank you for that, Professor. Now, you talked briefly in your conversations with the House about the use of a pseudonym for a few days.

A Yes.

Q Which the judge is accused of using his correct Social Security number but using a pseudonym. Are you familiar with the prior statements of Mr. Claude Lightfoot?

A As to what?

Q As to that issue.

A I'm aware of him saying that he was responsible for the idea.

Q That it was based on his legal advice?

A That it was -- that it was his idea. I'm not sure that it's legal advice to tell someone to use a false name.

Q You think that Mr. Lightfoot acted unethically?

A Yes. That said, I think that Judge Porteous, being a lawyer and a judge, was able to exercise independent legal judgment, and he did not.

Q Let me ask you just this. Have you seen judicial opinions dealing with the so-called advice of counsel defense?

A Some. I haven't reviewed them for my testimony today.

Q Okay. That's fine. Are you aware that other judges, in fact, many judges, have been accused of lying or omitting material and embarrassing issues from their questionnaires and background statements before the Senate Judiciary Committee?

A I'm not aware of a lot. Let me put it -- I am not aware of this issue arising. It's discussed. I mean, it's discussed in the abstract by academics saying that it should be -- should happen. But that's a different question entirely from does it happen. And I'm unaware of other -- of

other cases.

Q Did you review any of those -- you haven't reviewed those cases?

A No, I'm not aware of those -- I'm not aware of other cases of that sort.

Q Let me ask you about one case. This is JC Number 97-80629, which is also in these cases. And this involves a judge, James Ware, United States District Court judge. Are you familiar with Judge Ware, James Ware?

A No.

Q Because he's still a judge, a district court judge. Now, he was accused of lying to the Senate Judiciary Committee. And in this case, it was a -- it got a lot of national attention because he was accused of lying about his brother being shot while they were bicycling in a very famous case, the same day as a group of children died in a fire bombing. And this was a very big part of his statement and his public statement.

And it turned out that that was all untrue. Do you remember that case?

A No.

Q So you're not familiar with the fact that he was never charged or disciplined for that?

A I'm not. But by itself, that doesn't surprise me, honestly.

Q Why wouldn't he be -- why wouldn't he be disciplined if he lied to the Senate Judiciary Committee?

A I think the point is that there is a context to all cases. I would like to learn more about the context of that case. And where you have the culmination of a long history of misconduct with a dozen different tendrils, culminating in lies to the Senate at the point of decisionmaking as to confirmation, that strikes me as being a reasonable thing to talk about in this larger context.

When you're looking at isolated inquiries in isolated cases, I would like to look at the context of why this was raised, by whom it was raised, what the circumstances were, before I would say I'm surprised they didn't pursue it.

Q I understand. And feel free, if -- I think I'm only going to give you one more example, and if you don't feel like you can comment on it, that's fine.

A Yeah.

Q This one actually is a pretty famous one you may have heard about, involving Hugo Black. Are

you familiar with the Hugo Black accusation from his Senate confirmation hearing?

A It's ringing a vague bell. You can proceed. I'm -- I'm trying to contextualize it, but go ahead.

Q Can you give me your general idea of what happened in Hugo Black?

A No, I'm trying to recall, whether this has to do with clan ties and so forth, or if this is something else.

Q No, you're absolutely correct. The allegation was that Hugo Black, who was obviously, as you know, was nominated for being a United States justice, that he was asked whether he was -- had been a member of the KKK, and he was accused by a Senator of lying. This came up during the confirmation.

Then on the Senate floor, there was open debate as to whether he was a KKK member. And he came out later after he was confirmed and admitted that indeed he was.

Are you familiar with any disciplinary action that was taken against Hugo Black?

A No, I am not. You know, again, when -- putting the Senate in the role of -- or the House

and Senate in the role of prosecutor in this, the fact that there are examples where prosecutors exercise their discretion not to go forward doesn't mean all that much to me.

Q Sure.

A Could they have gone forward and if they had, would they have been warranted? Again, I'd ask context-dependent questions about that.

Q Understood, understood. I'm going to ask you a couple of general questions. I understood your testimony yesterday, and in fairness to you, you did -- you acknowledged that Senate -- you've acknowledged, excuse me, that judges will often have social relationships, but that you viewed this case as different. And I understand that.

I'd like to talk generally, though, about -- about something that you wrote. You've previously written that in small towns, it's particularly more common, that this problem comes up more often in small legal communities where judges know lawyers; correct?

A That's true. This is in the context of disqualification, yes, was when I was writing this.

Q And, in fact, I was struck by one of your quotes. You said, "to some extent, a judge's

familiarity with the parties and lawyers represents less of an appearance problem in a small town than in an urban setting."

A I think that's a fair point, yes. I made it. I hope that would be a fair point as far as I'm concerned. But yes, I agree.

Q You had mentioned, you talked about bankruptcy yesterday, some of the bankruptcy issues, you were sort of running through the articles.

Do you believe that the underlying rules and practices of the bankruptcy code are relevant in determining -- in making up your mind about the ethical questions?

A Not particular -- well, it depends. But I think not -- for the most part, probably not, that I would look at what the rules of bankruptcy proceedings are on the one hand and would look at ethics separately. Willful violation of the bankruptcy rules would be of concern to me, but I think that -- I mean, in the same way -- in the same way that I think that disqualification has a procedural dimension and an ethical dimension, I segregate in my own mind what the rules of bankruptcy are as distinct from what the ethical -- what the ethical implications of conduct is.

Q I understand. And I must tell you, I know nothing about bankruptcy, but I -- did you review any of the bankruptcy -- the underlying bankruptcy rules in part -- as part of your analysis?

A I didn't review the substantive rules, no. I reviewed the testimony and the materials that -- that the House produced. But I did not review -- I'm not a bankruptcy lawyer either, and so I did not review the bankruptcy rules.

Q So you reviewed the material that the House gave you and the House report?

A And the -- and the testimony of several of the witnesses. But yeah.

Q From those proceedings?

A Yeah.

MR. TURLEY: Thank you very much, Professor.

THE WITNESS: Thank you.

MR. TURLEY: We will pass the witness, thank you.

MR. SCHIFF: Madam Chair, we have a few questions. Can I have one moment, please?

CHAIRMAN MC CASKILL: Sure.

REDIRECT EXAMINATION

BY MR. BARON:

Q Good morning, Professor Geyh.

A Good morning.

Q Professor Geyh, Mr. Turley presented you with the fact that Judge Richards had participated in setting aside Mr. Duhon's conviction and you weren't familiar with that fact.

Do you recall that?

A That's correct.

Q But were you aware that Judge Porteous was the person who expunged Mr. Duhon's conviction, even though he took the case away from Judge Richards to do it?

A Yes.

Q And the testimony has been that this was done as a favor specifically at Mr. Marcotte's request?

A Right.

Q Would you regard that as an ethical act?

A No.

Q And why not?

A That it returns us to the core principle that a judge should not lend or abuse the prestige of office for the -- to advance the interests of others, and in this case, the Marcottes' interests were being advanced by the expungement, by the

judicial act.

Q Now, you talked about it made a difference, it was important whether a false statement was intentional as a matter of -- considering the ethical implications.

A On the sliding scale, yes, uh-huh.

Q There's been testimony that Judge Porteous took a trip to Las Vegas and that the Marcottes or their company paid for it, but there's also been testimony that when Judge Porteous was asked about that from something called the Metropolitan Crime Commission, which is sort of a citizens good government group in New Orleans, he denied that the trip had been paid for by the Marcottes.

A Uh-huh.

Q Do you regard that as having an ethical implication with regard to Judge Porteous?

A I think that it -- that we have an overarching ethical principle that a judge shall act at all times in a manner that promotes public confidence and the integrity of the judiciary.

If we are dealing with a judge who, I think, would pretty clearly have to know that he went to -- you know, on a trip, if he did, that lying to the --

Q Lying about who paid for it?

A Lying about who paid for it would be -- would have -- would impact adversely on his -- on his integrity.

Q You're familiar with the fact that when Judge Porteous filed his initial bankruptcy petition, he did it in the name of G.T. Ortous, O-r-t-o-u-s? Do you recall that?

A Correct, uh-huh.

Q And the testimony is that that wasn't a mistake; that was something that he -- that his bankruptcy counsel suggested and that he agreed to and proceeded to use that name, sign beneath it under penalty of perjury and also to obtain a post office box which was put on that initial bankruptcy petition instead of his actual residential address. The post office box was also at the suggestion of his counsel, Judge Porteous went out and got it and brought it.

Are you familiar with all that evidence?

A Yes.

Q And virtually uncontested. Do you find in that context that the advice of counsel obviates the ethical implications of Judge Porteous signing his initial bankruptcy petition in a false name under

penalty of perjury?

A It does not. In my -- in my -- the cross-examination, I quarrel with even the notion that it's advice of counsel in the traditional sense. It's a strategic choice designed to avoid embarrassment.

And it seems to me that in situations where you're dealing with a layperson, an undereducated person, a person who is unfamiliar with the legal process, when a lawyer who is all -- who is by that perspective all knowing comes to you and says, this is the way we should proceed, I'm likely to be a bit sympathetic.

But in the context of a judge, where I think, as was put in the record someplace, you expect the judge to cut square corners, that in that context, the judge knows that if a lawyer comes to him and says, I've got it, let's perjure ourselves, that that simply isn't acceptable, that a judge knows that that is a -- that that is an unacceptable thing, particularly for a judge with respect to whom integrity ought to matter.

Q Now, in Judge Porteous's bankruptcy, it appears that he completed the plan that was confirmed by paying his creditors roughly, I don't

know, 50 cents on the dollar, something like that.

Do you accept that it's okay, from an ethical perspective, to complete the bankruptcy aspect of this but, in the course of having done so, having lied under oath, having misrepresented facts with regard to assets, payments to creditors, et cetera, do you see those as two separate questions?

A I do. All is well that ends well is a perfectly fine adage when you are focused on the bankruptcy proceeding itself and trying to resolve matters equitably for the parties involved.

But it's a distinct matter to me as to whether the judge, in the course of that, is -- is perjuring himself, lying under oath.

Q And, finally, is there anything that Mr. Turley raised with you in his questioning, does any of that cause you to change your mind concerning any of the testimony you gave yesterday concerning the ethical implications of Judge Porteous's conduct?

A No.

MR. BARON: Thank you. I have no further questions.

CHAIRMAN MC CASKILL: Are there any

questions -- further questions by Judge Porteous's counsel? Any questions by the panel?

EXAMINATION

BY CHAIRMAN MC CASKILL:

Q I have one area of questioning I'd like to ask you, Professor, on the issue of disqualification.

A Yes.

Q When a judge has been asked to be recused -- there has been a significant amount of discussion in this proceeding about small towns versus large towns and the ability of a judge to do his or her work in small towns without having friends appear in the courtroom.

I'd ask you to drill down for a moment in terms of ethics of the situation and ask you about a judge bench-tried case versus a jury case and any distinction you might find between a state trial court that throughout this country we could find many in small towns and a federal district court.

I believe the facts before us, the allegations, are about a judge-tried case in a federal district court. Knowing that is the environment in which these allegations have been made, would you comment on the issue of

disqualification --

A Sure.

Q -- in terms of those situations?

A Sure. It's a question -- it's a compound question, and if I don't answer all --

Q I've always wanted to ask a professor a compound question.

(Laughter.)

A I deserve it.

First of all, I think it is true to say that one has to accept that everybody knows everybody in a small town. And, therefore, the notion that a lawyer will appear before a judge or a party will appear before the judge who the judge knows is something that goes with the territory of small-town practice.

And so I think that anyone who would tell you that merely because a lawyer appears before a judge because they are friends and that that's somehow disqualifying would be -- would be mistaken.

And to be clear, I think to me what makes this different is the presence of not just innumerable lunches but, more fundamentally, cash payments and ultimately kickbacks that makes a model situation uniquely difficult, and highly

problematic.

When you get into the business of bench trials versus jury trials, the cases go different directions, but I think there is a general sense that we are especially mindful of the need to disqualify when it is the judge who is hearing a case without a jury.

Because then the judge is not only the law concluder, but the factfinder. And so we are all the more sensitive.

I think that the cases that cut the other way basically say we still have the same standard, must -- can the judge's impartiality reasonably be questioned. And that, I think, is a -- you know, the same standard.

But I think we're especially mindful of that when the judge's job is going to be the assess the facts of the case, and it's all the more worrisome in those -- in those contexts.

As to the distinction between federal and state courts, I think it is true to say that the -- the tenure that comes with a lifetime appointment removes the judge a bit more from the setting, that judges at the trial level who are running for reelection are going to be more engaged in the

process.

But, again, I come back to the point that the standard for disqualification is the same, and that really is a point to reemphasize, that, you know, I don't profess to be an expert on Louisiana. But one of the -- the good things, I think, about the way our system has worked out is that the model code, which first came into being in '72, is essentially the rule in every state in the federal government, with the possible exception of Montana, I think. I think that virtually all states use some form of it.

And so the same kind of ethical guidance that would apply to a federal judge would apply to a state, even though I think the dynamic is a little different in federal court.

CHAIRMAN MC CASKILL: Thank you.

Senator Hatch?

EXAMINATION

BY VICE CHAIRMAN HATCH:

Q Professor, there's some indication in this matter that matters that occurred before elevation to the federal court should not be considered or at least should not be disqualifying with regard to -- with regard to service after being on the -- being

confirmed to the federal district court.

Do you have any opinion with regard to that?

A I do. I am not here as an expert on impeachment, and I will leave that to you, as far as what an impeachable offense would -- would cover.

As an ethical matter, it's pretty well understood that if a judge misbehaves in a prior judicial office or in private practice, that that can, indeed, bear on his discipline now.

And it makes perfect sense. If you are asking yourself whether a judge is acting at all times in a manner that promotes public confidence in the integrity of the judiciary and 15 minutes before the judge raised his right hand, that judge did something so grossly unethical that public trust in that judge is crushed, the idea that you would be somehow hamstrung and unable to take into account that information, as an ethical matter, and certainly in state proceedings, no, of course we can do that.

If a judge -- you can take the obvious case, right. The judge goes out and quietly murders half a dozen people before assuming office. Who would suppose that, well, once the judge assumes

office, we can't deal with that, you know, that behavior prior to office? It just is a matter of degree. Okay, if we can accept that, how far do we go with that?

VICE CHAIRMAN HATCH: Thank you so much.

CHAIRMAN MC CASKILL: Thank you, Professor Geyh. You are excused.

SENATOR UDALL: Madam Chair?

CHAIRMAN MC CASKILL: I'm sorry. We started a trend here. Senator Udall?

EXAMINATION

BY SENATOR UDALL:

Q Professor, could you -- there seems to be the thought out there, the indication out there, that there's one ethical standard in Louisiana and another standard in the rest of the country. Could you -- could you address that in terms of your thinking on that, some questions on that area?

A On the one hand, one needs to be somewhat sensitive to the fact that every state can adopt the rules that it wants to adopt, and that Louisiana -- there will be some state-to-state variations in ethics.

On the other hand, I think -- I was referring to this before -- there is -- the code of

conduct is a national document. And while there may be, you know, some variations, it is -- the ethics of judicial conduct are, within fairly limited limits, uniform.

And I think one also -- when we're talking about that's not how we do things in Louisiana or that's not how we do things in Gretna, on the one hand, as I say, we need to be somewhat sensitive on those variations.

On the other hand, when we can say, it seems to me, well, everybody is doing it or lots of people are doing it can be a slippery slope to hell.

But in some cases, the fact that a lot of people are doing something, as in the Marcottes' episode, which resulted in multiple people being sent to jail, the fact that multiple people were doing it by itself doesn't make it ethical. So I think that needs to be kept in mind.

But more fundamentally, my overriding reaction is to say when we're talking about kickbacks, when we're talking about quid pro quo, when we're talking about gifts, to say that's not how they do it in Louisiana is unfair to Louisiana, honestly. I think that it impugns the -- it creates the implication that in Louisiana we're not

concerned about ethics, if that's the message being given. And I think that's an inappropriate take-away.

SENATOR UDALL: Thank you, Madam Chair.

CHAIRMAN MC CASKILL: Any others?

You are excused, Professor Geyh. Thank you very much.

(Witness excused.)

CHAIRMAN MC CASKILL: House can call its next witness, please.

MR. SCHIFF: Madam Chair, the House calls Rhonda Danos.

CHAIRMAN MC CASKILL: Ms. Danos, I would need you to stand, please.

Whereupon,

RHONDA F. DANOS

was called as a witness and, having first been duly sworn, was examined and testified as follows:

CHAIRMAN MC CASKILL: Please be seated. Ms. Danos, the committee has been advised by the House managers that it may be your intention to assert your constitutional right against self-incrimination in response to all substantive questioning in these proceedings. Is it your intent to assert your right against self-incrimination

today?

THE WITNESS: No, ma'am.

CHAIRMAN MC CASKILL: Okay. Thank you. You may proceed.

MR. SCHIFF: Thank you.

DIRECT EXAMINATION

BY MR. SCHIFF:

Q Ms. Danos, can you state your full name for the record, please.

A Rhonda F. Danos.

Q Ms. Danos, where are you from?

A Marrero, Louisiana.

Q Can you tell us a little about your educational background.

A High school.

Q What type of work have you done over the years?

A Mostly secretarial.

Q At some point, did you become a legal secretary for a judge?

A Yes.

Q And who was the first judge that you became a secretary for?

A The first judge was Judge Roy Price.

Q And how long did you serve as his

secretary?

A It was a very short time. It was only a few months.

Q And what took place then?

A He was indicted and left the bench.

Q Shortly thereafter, did you go work -- go to work for another judge?

A Judge Magee filled in until Judge Porteous came on.

Q About how long did you serve as a legal secretary or as a secretary for Judge Porteous?

A Nearly 24 years.

Q Tell us a little bit about your job responsibilities as Judge Porteous's secretary.

A Pretty basic. Answering the phone, filing, scheduling his appointments, routing the -- the documents to the law clerks that they were assigned to. I think I said making appointments already. Doing status conferences and preparing the forms for Washington. That's about it.

Q Were they mostly administrative tasks as opposed to legal research or legal work?

A Administrative.

Q Did you serve as his secretary during his entire tenure on the state bench?

A Yes, I did.

Q As well his entire tenure on the federal bench?

A Yes.

Q During the course of your work for him, did you get to know some of the attorneys that were close friends of his?

A Yes, sir.

Q Would you describe Jake Amato and Bob Creely as close friends of his?

A Yes.

Q How often would he get together with them?

A When they were in the building, they usually stopped by and say hello.

Q Did they have lunches together?

A Yes, they did.

Q And about how often would you say that took place?

A Oh, gosh, it's hard to tell. Maybe once every couple of weeks.

Q Would he have lunch with both of them at the same time or have separate lunches?

A It wasn't always together.

Q During the time that the judge was on the federal bench, do you recall a case called the

Liljeberg case?

A Yes, sir.

Q Was that a case that, to your knowledge, was under advisement for a long time, where the attorneys were waiting for an opinion?

A Yes.

Q Was it a period of years?

A Yes.

Q At some point during the pendency of that case, did the judge ask you to pick up an envelope from Jake Amato?

A I don't know if it was during that case, but I did pick up an envelope.

Q And what were the circumstances in which you were asked to pick up the envelope?

A I was just asked to go run by the office and pick up something from Jake.

Q And who asked you to do that?

A The judge.

Q Did he ask you to pick up an envelope more than once?

A Not that I recall.

Q And on this occasion when he asked you to pick up the envelope, what did you do?

A I drove over to the West Bank, and when I

got on the street where the office was, I called Mr. Amato's secretary, told her I was in front of the building and if she would please hand it to me.

Q And what happened after that?

A She came to the car and handed it to me.

Q Were you curious about what was in the envelope?

A I just said, what's this? And she didn't respond, she just kind of rolled her eyes back. And I said, never mind, I don't want to know.

Q And did you say never mind, I don't want to know, or did she say you don't want to know?

A She didn't say anything.

Q And you said never mind, I don't want to know?

A Yes.

Q When the judge had been on the federal bench for five years, was there a party for him?

A An anniversary party, yes.

Q I'm sorry, what kind of party?

A An anniversary party, five-year anniversary on the bench.

Q And how was that party paid for?

A Amato & Creely paid for it.

Q Do you recall about what that cost?

A Oh, no. I don't recall.

Q Was there also an investiture party when the judge took office?

A Yes.

Q Did Amato & Creely help pay for that as well?

A Yes.

Q And about how much would they have contributed to that?

A I don't know. A group of his friends got together and contributed.

Q Do you know about how much each lawyer put in?

A I can't say for sure. I'm -- I'd say approximately maybe $500 each.

Q Was there a time when one of the judge's sons, Timmy, had an externship that you recall?

A Yes.

Q Did the judge ask you to raise some money for his son's externship?

A To get some sponsors to help out with his trip.

Q And what did he mean by sponsors?

A Just ones that were willing to put up some money to help with his costs, with Timmy's costs.

Q These would have been his son's costs of traveling to Washington, D.C.?

A His expenses traveling while he was there.

Q Would they have also been his expenses while he was living in Washington, D.C.?

A I would assume so.

Q And he asked you to call -- call some people to ask them to be sponsors?

A Sponsors.

Q And you understood that to mean call them and ask them for money?

A Sponsorships to help with his trip, yes.

Q Well, he wasn't asking for them to contribute a place to stay or anything of that nature; it was money he wanted; right?

A Yes.

Q Who did he call to see if they would be sponsors?

A Jake and -- Jake Amato, Bob Creely, Lenny Levenson, I think Chip Forestal, Louis Marcotte. That's the ones off the top of my head that I can recall right now.

Q And you called them because you knew they were people likely to give him money?

A Well, when -- they were the ones that came

in the office that I knew well.

Q And based on their contributing to these other costs, you knew if you called them, you had a pretty good chance of them being a sponsor?

A Yes.

Q You mentioned that Louis Marcotte was one of the people you called. What was the judge's relationship with the Marcottes?

A They were bondsmen that would come into the office to have bonds set.

Q And they came into the office frequently?

A Yes.

Q Would you say they were in the office at one time or another every week?

A Probably. It depended on the business and how -- you know, what was the need.

Q When they would come to the office, you would tell the judge they were there. Would he basically have them sent right in?

A No, sometimes they had to wait. It was dependent on how busy he was.

Q But he would always see them?

A Not always. I mean, there were times when he had to turn them away if he had to go into court and they would just have to wait, come back another

time.

Q Would you say most of the time when they came, he would see them?

A Yes.

Q Did the judge also socialize with the Marcottes?

A Yes.

Q Go out to lunch with them?

A Yes.

Q Would you also say that was frequently in occasion?

A Yes.

Q And would you also go to lunch with the Marcottes?

A Yes.

Q Sometimes with the judge, sometimes without the judge?

A Yes.

Q Did you and the judge, either separately or together, also go on trips with the Marcottes?

A Yes.

Q And some of the trips that you went on, Ms. Danos, were to places like Las Vegas?

A Yes.

Q Did you go to Las Vegas multiple times

with the Marcottes?

A I did.

Q Do you recall whether some of these were while he was on the state bench and some were while he was on the federal bench?

A Both.

Q When you would go on these trips to Vegas, who paid?

A The Marcottes.

Q Was there one trip where you used your credit card to pay for your travel expenses and then were reimbursed by the Marcottes?

A Yes.

Q And when you were reimbursed by the Marcottes, did Lori or Louis Marcotte give you the money for the trip?

A I don't recall which one it was.

Q Did they come by and give you cash or a check for it?

A They reimbursed me. I don't remember if it was cash or a check. That's a long time ago.

Q Do you recall them ever giving you a check?

A For other things, for, you know, like raffle tickets that the kids had or hole

sponsorships for St. Clement of Rome Church, which the judge was president of the men's association, and every year there was an annual golf tournament, and I would get hole sponsors for the holes of golf.

Q But for the trips, they usually paid for it directly; right?

A Yes.

Q Any reason to think that they didn't pay you in cash when they reimbursed you for the trip?

A No, there's no reason. I'm just not sure.

Q Were there times when you paid -- or wrote checks for the judge's credit card bill?

A Yes.

Q Do you recall in particular writing a check for a credit card -- a fleet credit card of Mrs. Porteous?

A Yes.

Q About how much was that check that you wrote?

A I think it was 1000, $1000.

Q Do you know how it came about that you wrote this check for Mrs. Porteous's credit card?

A I was just asked if I'd go ahead and write it.

Q Asked by Judge Porteous?

A Yes.

Q Were you aware he was about to file bankruptcy?

A No.

Q How soon before the bankruptcy did you become aware that he was filing bankruptcy?

A It was like right at the time when it hit the newspaper.

Q So he didn't tell you in advance?

A I knew nothing about it.

Q Periodically, the judge would have to fill out federal judicial disclosure forms. How did that work?

A It was something that had to be done annually, and I prepared part of it, he prepared part.

Q And the part you prepared, would that be if you knew he went on a trip somewhere, that you would include it and the rest of the information you would get from him?

A Yes, the part that I filled out was just the main part insofar as his name, address and everything. And then the parts with the seminars that he attended or the conventions, and the dates, that's the parts I filled out.

Q But other trips and other information, credit card debts, that's information you get from him?

A Yes, sir.

Q Do you recall on the judicial disclosure form there is a section or liabilities, debts?

A Yes.

Q In that section where you list credit card debts, do you recall also there's a column where you have to list the code for the amount of the debt?

A Yes.

Q And the code might be a letter J if the debt is 15,000 or less?

A Yes.

Q And the code might be a different letter if it's 15,000 to 50,000, et cetera?

A Yes.

Q Did the judge supply you with the codes that went with each credit card?

A Yes.

Q And he would handwrite that and you would type it up?

A Yes, he'd fill out that portion and I'd just copy it.

Q And if the judge wrote a code J, 15,000 or

less, for a credit card, but, in fact, the debt was for greater than that code, would you have any way of knowing that?

A No, I'd just copy what he gave me.

Q If the judge gave you only two credit cards and, in fact, there were debts on five credit cards, would you have any way of knowing that?

A I'd just put exactly what was given to me.

MR. SCHIFF: I have no further questions, Madam Chair.

CHAIRMAN MC CASKILL: Cross-examination?

CROSS-EXAMINATION

BY MR. SCHWARTZ:

Q Ms. Danos, good morning.

A Good morning.

Q Let me just go through some of the issues that you went through in your direct testimony.

How well do you know the Porteous family?

A Very well.

Q And do you know the children as well?

A Yes.

Q How do you -- are they like your children? How do you treat them?

A Yeah, like my kids.

Q And did you know Mrs. Porteous while she

was alive?

A Very well.

Q While you were working in Judge Porteous's office, did you carry on some other activities, some other businesses?

A Yes, I did.

Q What were those?

A For a while I did outside sales for a travel agency, and then I had a company where I -- I booked entertainment, bands.

Q And did that bring significant income to you?

A Not overly so, no.

Q What would you estimate on an annual basis?

A For this year, okay, I'd say I'm about at 30,000.

Q For this year so far?

A For this year so far.

Q Okay. And you did that in addition to your duties in the -- in the judge's office?

A Yes, I did.

Q Was there any concern about interference with your duties in the office?

A No.

Q You cleared that with the judge?

A Yes.

Q You were asked about paying some of the judge's bills.

A Yes.

Q How did that process start?

A Well, it didn't happen right away. I mean, I was with him for a few years and he didn't have his checkbook and it had to be paid, so I went ahead and I paid it for him.

Q And did you -- did that become more common? Did you start paying many of his bills?

A As time went on, yes.

Q Why were you paying them?

A Well, if he'd ask me to, I would. And then as time went on, I just went ahead and took it upon myself and paid them for him and just would tell him how much he owed me.

Q And you would tell him how much to reimburse you for?

A Yes.

Q Did he always reimburse you for that?

A Yes, always.

Q And did he do so quickly?

A Yes.

Q Was there ever a time in which you weren't reimbursed?

A No. The only thing would have been -- if it would have been something minor that I even would have forgotten to ask him about, you know, like postage or the linen account for the office, which was a minimal amount. And that would have been my fault, because I would have forgotten to ask him about it.

Q Did you also pay bills for other people?

A Yes.

Q Who?

A My sons.

Q Tell us a little bit about them. How old were they then and what kind of transactions did you carry on for them?

A Then they didn't have a checkbook, a checking account at that time. And all their car notes went through me, their car insurance, their student loans, their cell phone bills, anything that they had to pay came to the house, and I'd pay it and they would reimburse me.

Q They had just graduated from college; is that correct?

A I didn't say.

Q And they would pay you out of their income and then --

A Yes.

Q Very good. And reimburse you for -- for your checks that you had written?

A Yes.

Q Thank you.

Did there come a time when you paid a marker for Judge Porteous?

A Yes.

Q Tell us about that.

A Are you talking about Beau Rivage?

Q Yes, yes.

A I was going to Beau Rivage, and he knew that, so he just asked me if I would mind paying it, which there's no problem, I was going there anyway.

Q Do you recall, did he give you a check endorsed over to Beau Rivage? How was it done?

A I think I wrote mine, if I'm not mistaken.

Q But you were on your way over there anyway, he didn't ask you to make a special trip?

A Oh, no. I was going over there.

Q Had that happened any other time?

A I may have done one or two for Casino Magic in Bay St. Louis, but it was because I was

going there.

Q And he knew you were going there and asked you to do a favor for him?

A Yes.

Q Did you go to the law offices of Amato & Creely very often?

A Debby and I were friends, so Debby and I would go to lunch, and sometimes --

Q Who is Debby?

A Debby Mull, is Jake Amato's secretary.

Q How often do you think you were over at that office?

A I mean, not very often. Lots of times I didn't even go in, I'd just pick her up.

Q And did you also have some legal work being done in that office for you?

A Yes, an attorney by the name of Gary Rafael handled something for me for my aunt and uncle.

Q While you were over in that office, did you ever pick up cash?

A No.

Q Did you ever pick up envelopes that you thought contained cash?

A No.

Q When you were over there, did you ever act like a bill collector?

A No.

Q So if somebody said you were over there acting like a bill collector, frequently picking up cash, that would be incorrect?

A That's not true.

Q The question was raised with regard to an envelope that you picked up from Debby, I think you were on the street and she brought the envelope to you?

A Yes.

Q Do you recall when that was?

A It would have been -- I went before the grand jury, I think that was in '06, and it was -- 2006. And it was within a five-year period of that time. I don't remember exactly what year.

Q So no earlier than the year 2000 or 2001?

A Right.

Q Did it ever occur to you that there might be cash in that envelope?

A Didn't even enter my mind.

Q And that's because you didn't think of it or it just didn't feel like cash?

A Like I said, it didn't enter my mind that

it would be that.

Q And what did you do with that envelope when you got it?

A I brought it back to the office and sat it on his desk.

Q Was the judge there at the time?

A I don't think he was there. I think he was at lunch at the time.

Q Did you have any role in dealing with requests that came to the judge regarding adjusting bail?

A In state court?

Q Yes.

A Yes.

Q What was your role?

A If there was a bond that needed to be set, I'd call the jail and see if they had any priors, and I'd let him know what they told me.

Q You'd let who know?

A The judge.

Q Why would you do that?

A Because he had to set the bond.

Q But did he ask you to check on priors?

A Well, routinely, that's what I would do. If someone came in, no matter who it was, we always

had to call and check and see if they had any priors. He needed that information before he could even determine what he was going to do.

Q Did the judge ever express to you any concerns about the truthfulness of bail bondsmen?

A He always said don't ever believe a bail bondsman. They all lie. Don't take their word for it. Always call the jail and check and see. Get it straight from the jail. Don't believe any bondsman that ever comes in.

Q Was that true about the Marcottes as well?

A Oh, I always checked. I never, ever took their word for what -- and not just the Marcottes. Anybody that came in relative to a bond. That was something he insisted on.

Q Did the Marcottes have any special access to the judge's office?

A No more than anybody else.

Q It was kind of an open door policy?

A Had an open door policy. Anybody that was in the building could come in and get a cup of coffee. You know, it was open door to anybody.

Q Now, your desk was outside the judge's chambers; correct?

A Right in -- right outside of his.

Q And if somebody wanted to come in and see the judge, what was your role?

A They had to go through me. That was my job, to tell him who was there to see him.

Q And did you have instructions not to let certain people in, or could you -- did you influence who would come and not come into the judge's chambers?

A No, I didn't have any influence on that. My job was to let him know who was there to see him.

Q And he would see most people if he was free?

A If he was free, yes.

Q That was true of the Marcottes?

A That was true of anybody.

Q And the Marcottes didn't receive any special treatment in that regard?

A Not as far as I'm concerned.

Q But you saw the Marcottes fairly frequently; right?

A Yes.

Q Why is that?

A Lori and I were friends.

Q Tell us about that. How do you know you were friends?

A Well, we did some outside-of-the-office things together, went to a concert, and I went to Vegas with them. You know, she and I sometimes -- just she and I would go to lunch.

Q Did she ever come and talk to you in the office about life and personal problems?

A Oh, gosh. Yes, she'd just sit there and I think just wanted somebody to listen to her problems.

Q Did that happen fairly frequently?

A Yes.

Q Did you see the Marcottes or representatives of that company frequently because they were a fairly substantial bail bondsman in the Gretna area?

A They were like the major ones in that area. They didn't have very many besides them.

Q Do you have a sense of how -- how much of the business they had?

A In my opinion, Louis Marcotte had a monopoly on that area.

Q Now, it's been testified to that you took a trip to Las Vegas with Lori Marcotte?

A Yes.

Q Did you have any concerns about that the

first time it happened?

A The first time I was asked, I asked the judge if it was okay if I'd go, and he said that what I did with my vacation time was my business.

Q And how did it come about that you were invited? Did Lori --

A Lori just came into the office and asked me if I wanted to go.

Q And did you express any concern?

A She just told me that her brother allowed her to take a guest whenever they went for their conventions.

Q So this trip that you went to was a convention?

A Yes.

Q And had you -- did you go some additional times throughout the years?

A I went several times.

Q With the Marcottes?

A Yes.

Q Did it -- did it occur over time that you began to play a role in planning the conventions?

A Yes, I used to make their flight arrangements for them.

Q And did you take any role while the

convention was going on arranging dinners or anything of that sort?

A If they went out to dinner, they always took me with them, unless it was something they were doing with the heads of the convention. I wouldn't go to that.

Q Did you occasionally have lunch with the Marcottes?

A Yes.

Q In Gretna?

A Yes.

Q About how frequently?

A A few times a month.

Q Two times a few?

A A few times.

Q A few times a month.

A Uh-huh.

Q And was the judge sometimes in those lunches as well?

A Yes.

Q During those lunches, did you ever talk about or did you overhear the judge and the Marcottes talking about individual bails, bail bonds?

A Not so much individual bails. They talked

to him several times about stuff that they were trying to get passed through the legislature, bills that, you know, they were trying to get passed. They would want his opinion on it.

Q On legislative --

A Legislative things.

Q Okay. But did they, for example, ever bring bail worksheets to lunch and ask you to go back after lunch and do something with them?

A I don't recall that.

Q Did they ever talk about specific bail applications?

A I mean, they may have, but I don't recall them ever bringing any paperwork or anything.

Q But in your presence at lunch, you never saw that?

A No, not really.

Q After the judge became a federal judge, went to the federal bench, did he continue to socialize with the Marcottes?

A At the beginning he may have gone to lunch with them a few times, but that gradually stopped.

Q Over what period of time did it stop?

A We were there a short time when that ceased. I mean, once in a great while maybe, but

like eventually, that just stopped altogether.

Q You say "once in a great while." Is that once a month, once every six months? What are you conceiving of?

A Maybe once every couple of months. It really didn't happen frequently at all once we got into the federal court.

MR. SCHWARTZ: Thank you, Ms. Danos. Thank you.

CHAIRMAN MC CASKILL: Redirect?

REDIRECT EXAMINATION

BY MR. SCHIFF:

Q Ms. Danos, the judge at times asked you to, when you were at casinos, pay markers that he had at those casinos?

A Yes.

Q So he had debts at the casino that he wanted you to write a check for?

A Yes.

Q And this was while you were his federal secretary?

A Yes, it happened while we were on federal bench as well, uh-huh.

Q And on the -- opposing counsel asked if you were ever sent to pick up cash from Mr. Amato or

Mr. Creely. And I think you said no; is that right?

A No, uh-huh.

Q You don't know what was in the envelope, do you?

A I have no idea.

Q So if the judge sent you to pick up an envelope with cash, you may have done exactly that, if cash was in that envelope; right?

A If it was in it, but I have no idea whether it was in it.

Q At the same time when you picked up the envelope, you didn't want to know what was in the envelope, did you?

A No.

Q And you testified that you and Lori Marcotte were friends. Part of the relationship was friendship; right?

A Pardon me?

Q Part of the relationship was friendship?

A Yes.

Q And part of it was business; right?

A Yes.

Q At some point, Lori invited you to go to Las Vegas, and you asked the judge whether it was okay if you went?

A Right.

Q Did you also ask the judge if it was okay if the Marcottes paid for your trip to Las Vegas?

A No, I don't think I asked him that.

Q And you didn't need to ask that because they had already been paying for the judge's trips; right?

A Well, I went on trips with them before he did.

Q And then Marcottes had always paid for those?

A Yes.

Q So there was no reason for you to have to ask again or at all whether it was okay if they paid for the trips?

A Right.

Q You understood that was okay?

A Right.

Q Now, after Judge Porteous was appointed to the federal bench, you continued to go on at least some trips, you've testified, to Vegas at the Marcottes' expense; right?

A I think I went on two.

Q And you continued to have some lunches with the Marcottes; correct?

A Yes.

Q But eventually, that started tapering off; right?

A Right.

Q Is it fair to say that while the friendship with Lori Marcotte may have continued, the business relationship, now that the judge was on the federal court and couldn't set bonds anymore, was coming to an end?

A Yes.

MR. SCHIFF: No further questions, Madam Chair.

CHAIRMAN MC CASKILL: Any other questions by counsel?

MR. TURLEY: Could we just have one second, Madam Chair?

No further questions from the defense.

CHAIRMAN MC CASKILL: Any questions by the panel?

SENATOR SHAHEEN: Madam Chair?

EXAMINATION

BY SENATOR SHAHEEN:

Q I understood you to say that the judge told you to always call over at the jail when the Marcottes came in to set a bail bond?

A Any bondsman.

Q And I'm not clear -- my understanding was that the judge actually set the amount of the bail bonds. So why would you call the jail to find out about that?

A To get the information for him to see if they had any priors.

SENATOR SHAHEEN: Okay. Thank you.

CHAIRMAN MC CASKILL: Any other questions by the panel?

SENATOR WHITEHOUSE: Yes.

CHAIRMAN MC CASKILL: Senator Whitehouse?

EXAMINATION

BY SENATOR WHITEHOUSE:

Q Let me take you back to the visit where you drove over to Amato & Creely to pick up the envelope.

A Okay.

Q You were at that time a federal employee?

A Yes.

Q And Judge Porteous was at that time a federal judge?

A Yes, sir.

Q Did he have any legal business that you were aware of with Amato & Creely at the time? Did

they represent him in any matter?

A Not that I recall.

Q Would you know that -- were you enough involved in the judge's life that you would know if Amato & Creely were representing him in a legal matter?

A I would think I would, but I didn't -- I didn't know about the bankruptcy, so there's a possibility I wouldn't have known.

Q But you would have expected to have known --

A Yes.

Q -- if there was a legal client relationship between Judge Porteous and Amato & Creely?

A I would expect to, yes.

Q And at the time you were not aware of any such relationship?

A No.

Q So you went over to, at the judge's request, pick up an envelope from Amato & Creely?

A Yes.

Q And when you picked up the envelope, was it Debby Mull who came down?

A Yes.

Q And you knew her?

A Yes.

Q You were friends with her?

A Yes.

Q And you asked her, what's in the envelope?

A Yes, sir.

Q And she rolled her eyes?

A She just kind of rolled her eyes back, so I figured it was something that her boss didn't want me to know.

Q And you said, never mind, I don't want to know?

A Right.

Q Did you have any thought at the time as to whether --

A I thought maybe it was something for her boss that was personal that they didn't want me to know about.

Q All right.

A So I didn't press it.

SENATOR WHITEHOUSE: Thank you very much.

CHAIRMAN MC CASKILL: Any other questions by Senators?

Thank you, ma'am, you are released.

THE WITNESS: Thank you.

(Witness excused.)

CHAIRMAN MC CASKILL: Next witness by the House.

MR. SCHIFF: The House calls Bobby Hamil.

Whereupon,

BOBBY PHILIP HAMIL, JR.

was called as a witness and, having first been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. DAMELIN:

Q Good morning, Mr. Hamil.

A Good morning.

Q My name is Harold Damelin, I'm special impeachment counsel.

Could you please state for the record your full name.

A Bobby Philip Hamil, Jr.

Q Where do you currently reside, sir?

A Currently reside in Fayetteville, Georgia.

Q Could you briefly state your educational background.

A Yes, sir. I graduated from the University of Alabama undergraduate school, Birmingham School of Law law school and went -- grew up in Alabama, so my primary and secondary education was in Alabama

also.

Q Are you currently a member of the Alabama bar?

A Yes, I am.

Q And what is your current occupation, sir?

A I'm currently the chief of police at Clayton State University in Morrow, Georgia.

Q How long have you been in that position?

A 2-1/2 years.

Q Prior to that, were you employed by the FBI?

A Yes, I was.

Q During what period of time?

A From 1983 to 2008.

Q Okay. Did you retire from the FBI?

A Yes, sir, I did.

Q While with the FBI in the period of 1994, did you have occasion to participate in the background investigation or background check of Judge Thomas Porteous?

A Yes, I did.

Q Were you the lead agent in that assignment?

A No, I was not.

Q What was your role?

A My role was initially to interview the candidate, Judge Porteous, and then I was also assigned several other interviews throughout the investigation.

Q But did you report to a lead agent who assembled the --

A Yes.

Q -- entire work product?

A Yes, sir.

Q Now, could you just take a minute and explain to the committee how background investigations are conducted and how they are different, if they are, from a criminal investigation.

A The distinction from a criminal investigation, these are administrative investigations or administrative inquiries as they are called.

And the -- the guidance that comes from headquarters, they send out the information to the respective field offices where the background information -- background will be conducted and assigned -- the leads are then assigned to various personnel in the office to gather the information, report it back up through the chain to FBI

headquarters for review and any further guidance or additional leads that may be necessary.

Q Now, is there a standard or a general format that the FBI follows or the agents follow in conducting a background investigation?

A As far as questioning?

Q Yes, sir.

A There is a general format that we follow. It doesn't mean we can't also allow for additional input. But if you're talking about the acronyms, it's CARLABFAD that's generally used. It covers traits of the candidate. Would you like for me to explain each of those?

Q Yes, would you explain that please?

A They gave it an acronym so we would make sure that we cover all of the essential questions when we conduct interviews, whether it's a reference, whether it's an associate or a neighborhood.

And the C stands for character. You're asking about is there anything that you know of in the candidate's background that would adversely influence his character.

The A is associates, do you know of anything in the background that would show that

associates would be -- would adversely impact his ability to perform the job.

The R is responsible, is the person responsible in the position that he currently holds and would you expect him to be responsible if he's appointed to the position being considered.

The L is loyalty to the United States. And the second A is ability, based on your knowledge, is he able to do the job.

And then the B is bias or prejudice, any known biases or prejudices that might adversely impact this appointment, and then the last -- the FAD, F is financial responsibility, do you know of any issues that might impact the financial responsibility of the candidate, and the last A and D are alcohol and drugs, any known abuse of alcohol, any known abuse of illegal drugs or abuse of prescription drugs. So it's abuse of alcohol, abuse of prescription drugs, use of illegal drugs, and that covers the basic background questions.

Q And then is there another terminology referred to as compromise or coercion, compromise and coercion, questions that are part of the background investigation?

A Yes, that's generally the last question

which you will see in most of the interviews, do you know -- do you know of anything in the candidate's background that might subject him or her to coercion, compromise, undue influence or negatively impact their reputation or character.

Q Now, was that a question that is also asked of the candidate when he or she is interviewed?

A Yes, it is.

Q Now, prior to starting the commencement of a background investigation, and using this example of Judge Porteous, what would you do to prepare for an initial interview with Judge Porteous?

A You would review the SF 86, standard form 86, that is the application filled out by all candidates, goes from everywhere they have lived, places they have been to school or the places they have worked, lists references and associates.

You review that, as well as the set of instructions that will come from FBI headquarters for specific questioning of the candidate, him or herself.

Q Now, one other just general background question. When you do the interviews in connection with a background investigation, is there a

timeframe within which you are required to prepare the FBI 302 or interview memorandum?

A Yes, there's always a strict time -- timeline. The background investigation will come out with an established bureau deadline within which the entire report must be submitted.

Q Now, Mr. Hamil, you had indicated that you're retired from the FBI, three years ago. And this -- this particular investigation was conducted in 1994.

Let me ask you whether you have an independent recollection of what you did during the course of the background investigation regarding Judge Porteous.

A No, I do not.

Q Prior to testifying today, have you had an opportunity to review the background investigation file to refresh your recollection with respect to those aspects of the investigation that you participated in?

A Yes, I have.

Q And based on that review, can you tell me how many times during the course of the background investigation of Judge Porteous did you interview him and/or speak with him in connection with his

background investigation?

A Three times.

Q How many were in person?

A Two.

Q And was there a telephone conversation also?

A Yes.

Q Why don't we start to go through those. Let me first ask that you take a look at or put up on the screen exhibit -- what we'll refer to as Exhibit 69(i). That is a five-page --

MR. TURLEY: Chairman Hatch, the Defense would like to know if this 302 is being used for impeachment or to refresh the memory of the witness. He is being shown the 302. We have been under rather strict rules as to when 302s could be used. I just was wondering if they're impeaching the witness or refreshing his memory.

MR. DAMELIN: Senator, this is going to involve statements by Judge Porteous himself, which Mr. Hamil will testify to as to the accuracy of the statement of Judge Porteous and will admit -- we would move to admit the 302 for -- to establish a statement made by Judge Porteous in connection with the background investigation.

VICE CHAIRMAN HATCH: We will permit that.

MR. DAMELIN: Excuse me?

VICE CHAIRMAN HATCH: We will permit that.

MR. DAMELIN: Thank you, sir.

BY MR. DAMELIN:

Q First of all, taking a look at this 302, you have reviewed this before you've taken the witness stand today, have you not?

A Yes, I have.

Q Okay. Now, in connection with this 302, were you one of two agents that were involved in the interview of Judge Porteous that took place on July 6 and July 8, 1994?

A Yes, sir.

Q Who was the other agent that participated in the interview with you?

A Cheyenne Tackett.

Q Does this represent your first interview of Judge Porteous?

A Yes, it does.

Q Can you briefly describe the procedure that you followed, including during the interview, with respect to who interviewed Judge Porteous and who might have taken notes? How was that done?

A When two persons are involved in an

interview such as this, one generally would ask the questions and the other would take the notes.

At the end of the interview, we would get together to make sure that we're -- we're totally in agreement with all of the content of the interview and then we would have it transcribed, review again.

If we have any corrections that are made, and if not, we initial it and it becomes the official document.

Q Does this document that's before you, Exhibit 69(a), reflect a combined work product of you and Agent Tackett and to the best of your recollection accurately reflect what took place during the course of that interview?

A Yes, it does.

Q I want to direct your attention to page 3 of this interview, the first paragraph which we'll put up on the board.

Could you please read that paragraph?

A "Porteous said he is not concealing any activity or conduct that could be used to influence, pressure, coerce or compromise him in any way or that would impact negatively on the candidate's character, reputation, judgment or discretion."

Q Was this based on the procedures --

MR. TURLEY: I'm sorry, Mr. Damelin, if I could make another objection.

Madam Chair, the defense position on this, you know we've gone back and forth on the 302s. My understanding -- and I want to be corrected if I'm wrong -- is that his testimony can come in, not the document itself.

What I don't understand is why the witness is not being asked whether he recalls the statement, and instead they're going straight to the 302 and having him read the 302. That seems to be different from the normal course of things.

The witness should first be asked if he remembers a statement, they can use the 302 to refresh it. But we would object, and this has been the rule so far with both sides, of the 302 coming in as evidence.

CHAIRMAN MC CASKILL: Well, I believe that the Vice Chairman admitted this 302 into evidence. Am I correct?

MR. TURLEY: I thought Mr. Damelin said he was going to move it into evidence. We would have objected to that.

MR. SCHIFF: Madam Chairman, may I?

CHAIRMAN MC CASKILL: I think you did

object and the Vice Chair made a ruling.

VICE CHAIRMAN HATCH: I allowed him to pursue this line of inquiry.

MR. TURLEY: We understood he's pursuing the testimony.

MR. SCHIFF: If I could be --

CHAIRMAN MC CASKILL: Let me just take a moment.

MR. TURLEY: Of course.

CHAIRMAN MC CASKILL: This 302 -- let me just say for the record that while we are trying to be very fair to both sides, there should be no misunderstanding that this is not a civil trial and this is not a criminal trial.

And the Senators, each Senator, will have the ability to judge the evidence, each Senator will have the ability to reject or accept any type of evidence that this record develops.

This is a -- this is a different animal than a typical trial.

It is the ruling of this committee that the 302 of the interview of the judge, with the FBI agent on the stand who can be cross-examined about every word that's in that document, is appropriate for this committee to consider.

And on that basis, this 302 will be admitted into the record.

(HP Exhibit 69(i) received.)

MR. SCHIFF: Madam Chair, if I can just add on this, there are three 302s that this witness will testify, he's already said he does not have an independent recollection because of the time that has taken place.

We're not offering the judge's statements in these 302s for the truth of the matter. In fact, we don't think they're true. So because we're not offering them for the truth, they're not hearsay. And we will be asking the Chair at the conclusion of the testimony to admit all three of the 302s.

MR. TURLEY: Can we be heard, Madam Chair?

We're now talking about three 302s. We're not objecting on hearsay grounds. We had been told that 302s would not come in, and they are now trying to move in three 302s.

And we've been structuring our case to deal with evidence based on the ruling earlier that 302s wouldn't come in. I understand this one has come in, but now they're saying we're going to move three 302s in.

CHAIRMAN MC CASKILL: We will ask the

House to offer each 302 they would like to be part of the record individually, and we will make the ruling individually on each 302.

The 302 that delineates the interview with Judge Porteous we believe is important for the Senate to have an opportunity to review. And on that basis, this 302 will come in. And we'll consider each 302 on its individual merit, if either side wants to offer a 302.

And I understand that we can -- I mean, whether it's being offered for the truth of it or whether it's hearsay, those Rules of Evidence are not -- do not strictly guide this committee.

What guides this committee is an effort to make the record as complete and full as possible, because we are here representing the entire Senate. We are here trying to develop a very complete record so individual members of the Senate can make an independent judgment as to whether or not to convict Judge Porteous in these impeachment proceedings.

So I just -- for both sides, you should take that into account that this is not someplace where the Rules of Evidence that we learn in law school are going to be strictly applied. It's going to be more a test, is this something that we believe

the Senate at large should have an opportunity to review.

Thank you both.

MR. SCHIFF: Thank you, Madam Chair.

CHAIRMAN MC CASKILL: Would you identify the specific label on this particular 302?

MR. DAMELIN: Yes, this document is labeled as Exhibit 69(i).

I will be giving you on the other documents, Madam Chair, a specific reference. This one is a stand-alone 69(i).

CHAIRMAN MC CASKILL: Thank you. We just have to keep track of the documents, what's there and what isn't.

MR. DAMELIN: The following documents will also have some subnumbers, which I will also make reference, and we can't find them, we'll go back and double-check.

BY MR. DAMELIN:

Q Going back to the statement that you just read, based on the procedures that you followed as a standard practice, does that statement accurately reflect what Judge Porteous said to you during the course of the interview?

A Yes, it does.

Q Now, I want to also turn your attention, if I could, to page 5 of the same 302 and direct your attention to the first sentence of the first -- second paragraph, which states that Judge Porteous "provided the supplement to his SF-86 with attachments 1 and 2 to the interviewing agents."

Let me show you Exhibit 69(b) at PORT297. If we could put that up on the screen.

Based on your review of the file, Mr. Hamil, is that the document that Judge Porteous gave you that is referred to in your 302?

A Yes, it is.

Q Had you, do you know, had a copy of that prior to the interview of Judge Porteous?

A No, sir, it was provided at the time of the interview.

Q Okay. And with respect to that document, I want to direct your attention to the second page, which is PORT298, question 10S, and ask you to read the question and the answer to that document.

A Okay. "Is there anything in your personal life that could be used by someone to coerce or blackmail you? Is there anything in your life that could cause an embarrassment to you or to the president if publicly known? If so, please provide

full details."

The answer, "No."

Q Okay. And was that document signed and dated on -- at the time that Judge Porteous gave that to you?

A It was previously signed and dated prior to giving it to us.

Q What's the date on that document?

A April 27, 1994.

MR. DAMELIN: I believe -- and if it's not correct, I will move both of these documents into -- into evidence or ask that they be moved into evidence. Are they -- have you already ruled, Madam Chair, that they are? This is the 302 and the attached supplement to the SF-86, which is referenced in the 302.

CHAIRMAN MC CASKILL: We -- the ruling was that the 302 and any attached supplements provided by Judge Porteous will be admitted into the record.

MR. DAMELIN: That document is --

MR. TURLEY: Madam Chair, just to clarify one thing, obviously, we have a standing objection. But the -- we're just introducing these pages, because 69(b) is about 300 pages long. So I just want to make sure we're just introducing these

pages.

CHAIRMAN MC CASKILL: 297, 298. Correct?

MR. DAMELIN: Yes, 297, 298. Actually, 299, 300 and 301 were attachments to the supplement, so they should come in as a -- as a full document.

CHAIRMAN MC CASKILL: Let's make sure that, if you will check with this -- are you good, in terms of identifying for the record what it is that we've admitted? Okay.

This is really important, because the most important task of this committee, so all of you know, is preparing a record for the full Senate. So that's why we have to be very careful about these exhibits, and they're numbered in ways that are very hard to follow. So the most important person, in terms of making sure you have the right exhibit numbers once we have admitted an exhibit, is this nice young man sitting down here with his laptop who is keeping track of every exhibit so that we are sure we are accurate in terms of this record.

So if you would follow up with him and make sure that we have exact numbers on the record.

MR. DAMELIN: If there's a question.

CHAIRMAN MC CASKILL: Just so the record is clear, from the ruling of the committee, is that

Judge Porteous's 302 and all relevant attachments provided by Judge Porteous come into the record.

(Exhibit 69(b), Pages 297 through 301 received.)

BY MR. DAMELIN:

Q Mr. Hamil, before we leave that document, let me go back to page 3 of that document and direct your attention to a paragraph -- the fifth paragraph down on page 3, which states that Judge Porteous said that he has not abused alcohol, and goes on, "during his entire adult life."

Would that have been a question you would have asked him in connection with his initial interview?

A Yes, it would.

Q Okay. And would that accurately reflect what his answer would have been during the course of that interview?

A Yes, it would.

Q Did there come a time, Mr. Hamil, when you had occasion to interview Judge Porteous a second time?

A Yes, sir.

Q What caused you to re-interview Judge Porteous a second time?

A A teletype was received by our office from FBI headquarters, requesting that he be re-interviewed, along with several other people, in response to some information that had been reported about the investigation.

Q Let me ask that Exhibit 69(b) be shown on the screen. And if I could direct your attention to that document, Mr. Hamil, is that -- is that the document that made reference to the fact that you were to re-interview judge --

CHAIRMAN MC CASKILL: If you would pause for a moment, Counselor, the document is no longer on the screen.

THE WITNESS: That was not the document.

MR. DAMELIN: Judge, 69(b), PORT478. I apologize for the miscommunication.

BY MR. DAMELIN:

Q Is that the document, Mr. Hamil, that caused you to re-interview Judge Porteous, along with certain other people?

A Yes, sir, it is.

Q And I direct your attention to page 3 of that document and ask you to read that first paragraph.

A "Judge Porteous should also be

re-interviewed to provide him an opportunity to address the general allegations."

Q And what were those -- if you recall, based on your review of the file, what were those general allegations?

A The general allegations that there were some alleged payoff in exchange for reduction of bonds in two cases, I believe, was on the previous page.

Q Now, prior to re-interviewing Judge Porteous a second time, did he contact you before you had an opportunity to contact him?

A Yes, sir.

Q Can you explain what happened?

A Well, in response to this teletype, you know, I was assigned the responsibility of interviewing these -- these persons, a couple -- two of them were re-interviews, one Judge Porteous and the other was Louis Marcotte. I had not conducted the previous interview, but nonetheless, he was assigned -- the assignment was to re-interview him.

And I had -- and the conduct of these -- these interviews, Judge Porteous contacted me by telephone before I could reach out to him and schedule an official appointment to interview him on

all of the allegations.

Q Let me direct your attention to Exhibit 69(b), PORT491. Does that document reflect the conversation you had with Judge Porteous when he called you?

A Yes, it does.

Q Okay. Does this document -- was this document prepared by you?

A Yes, it was.

Q Was it prepared by you shortly after you had the conversation with Judge Porteous?

A Yes, sir.

Q Does it accurately reflect the conversation you had with Judge Porteous?

A Yes, sir.

Q Can you just describe what -- reviewing that document, can you briefly describe what Judge Porteous was calling you about specifically?

A All right. Jolene Acy, the civil court clerk, had already been interviewed, she was one of the persons we were directed to interview in the teletype about the allegations of inappropriate bond matters, she had already been interviewed and Judge Porteous was apparently out of the office and called in for messages.

In doing so, he was advised that she had been interviewed by us earlier, and according to the 302 she was noticeably unnerved. He had been advised of the nature of the interview and he provided some initial comments about the allegations in this telephone interview.

Q Did you fully discuss the allegations with Judge Porteous during that phone call?

A No, sir.

Q Now, based on your experience as an FBI agent, did you find the call from Judge Porteous in any way unusual?

A It's out of the ordinary for a candidate to reach out to us unless it was something like, I left out something in my application.

MR. DAMELIN: Madam Chair, we would ask that Exhibit 69(b), PORT491, the memo reflecting the telephone call from Judge Porteous with Agent Hamil, be admitted into evidence.

MR. TURLEY: Same objection, Madam Chair.

CHAIRMAN MC CASKILL: Overruled. The objection will be received -- I mean the exhibit will be received.

(HP Exhibit 69(b) received.)

BY MR. DAMELIN:

Q Now, Agent Hamil, let me show you Exhibit 69(b), PORTA492, which is a three-page FBI 302 prepared by -- an FBI 302. Can you review that document?

Does this 302 reflect your second in-person interview with Judge Porteous?

A Yes, it does.

Q Okay. The first interview with Judge Porteous that we talked about earlier was done by you and Agent Tackett. Based on your review of this memo, did you do this one alone?

A Yes, sir.

Q Okay. And what procedure, being alone, would you have followed in prepare -- in doing this interview?

A Oh, I would have conducted the interview as well as taking notes simultaneously.

Q And based on your standard procedure and the way you operated, does this memo accurately reflect the questions asked and the answers given by Judge Porteous during that interview?

A Yes, it does.

Q Okay. And what was the date that that interview took place?

A August 18, 1994.

Q Now, according to this 302, did you discuss the specific allegations that you were looking into with Judge Porteous?

A Yes, sir.

Q Let me direct -- and with respect to those, how many allegations were you looking into as a follow-up, one or two?

A Two.

Q With respect to the first allegation, did you and Judge Porteous have a discussion about that, based on your review of the memo?

A Yes, we did.

Q Okay. And let me direct your attention to the page 1, last line carrying over to page 2, where it states that "Furthermore, Judge Porteous categorically denied that he was paid a sum of $10,000, or for that matter, any sum in exchange for an agreement to reduce the bond for Keith Kline."

Does that accurately reflect what Judge Porteous had told you in connection with that investigation -- in connection with that allegation?

A Yes, it does.

Q And then there was a separate investigation, was there not, involving a separate issue with respect to a Miss Ireland? Is that

correct?

A Yes, sir.

Q And in connection with that allegation, did you have an occasion to discuss that with Judge Porteous?

A Yes, I did.

Q And did Judge Porteous -- in connection with that allegation, reading the last two lines of that particular paragraph on page 2, did Judge Porteous again -- "Porteous again categorically denied that he had been given $1500 or any amount of money to reduce the bond for Tracy Ireland."

Does that accurately reflect a statement made by Judge Porteous?

A Yes, it does.

Q Then also, Agent Hamil, in reviewing this -- in reviewing this memo, did you ask Judge Porteous again that question in connection with any potential compromise or coercion?

A Yes, I did.

Q Okay. And did he, in fact, respond to that question based on your review of that memo?

A Yes, he did.

Q Let me direct your attention to the last paragraph on page 2, carrying over to page 3. Could

you please read that?

A Okay. The last paragraph begins as follows: "Lastly, Judge Porteous denied that he had ever signed any bail bonds in blank and stated that he was unaware of anything in his background that might be the basis of attempted influence, pressure, coercion or compromise and/or would impact negatively on his character, reputation, judgment or discretion."

Q And does that accurately reflect a statement made by Judge Porteous in connection with that interview?

A Yes, it does.

MR. DAMELIN: Okay. We would ask that this exhibit also be moved into evidence. This is Porteous Exhibit 69(b), A492.

CHAIRMAN MC CASKILL: I think we have to have the page number, because it's 69(b) is a large --

MR. DAMELIN: I believe it was PORTA 492, 3 and 4. No A, excuse me. PORT492 through 494.

CHAIRMAN MC CASKILL: 492, 493 and 494.

MR. DAMELIN: Yes.

MR. TURLEY: Same objection, Madam Chair.

CHAIRMAN MC CASKILL: Overruled. They

will be admitted.

(Exhibit 69(b), Pages PORT492, PORT493 and PORT 494, received.)

MR. DAMELIN: May I ask a moment, please?

BY MR. DAMELIN:

Q Mr. Hamil, in reviewing your memos and looking to see back the discussions you had with Judge Porteous, was there ever a time where he made any reference whatsoever that he had received cash from the firm of Amato & Creely or Mr. Creely or Mr. Amato?

A No, sir.

Q Okay. If he had, would you have included that in your 302 interview of Judge Porteous either in the first or second interview?

A Yes, I would have.

Q Okay. And also with respect to the interviews you had with Judge Porteous, did he ever make reference to the fact that he had sent curatorships to Mr. Creely and his law firm and requested and received cash back in return for those curatorships?

A No, sir.

Q If he had made such statements to you, would you have included those in your 302?

A Yes.

Q Did Judge Porteous ever make reference to the fact that he had received numerous lunches, home repairs and car repairs from bail bondsmen appearing before him or asking him to set bonds?

A No.

Q If he had made such a statement, would those have been included in your 302s?

A Yes.

Q Did he tell you at any point in time that he had expunged the convictions of Jeff Duhon at the request of Louis Marcotte?

A No.

Q If he had told you that, would that have been included in your 302?

A Yes.

Q Did he tell you in any conversation with him that he had changed or granted a motion to change or amend the sentence of an individual by the name of Aubrey Wallace?

A No.

Q If he had told you that, would that have been included in your 302?

A Yes.

Q And did he tell you that he planned to set

aside the conviction of Aubrey Wallace after he had been confirmed or if he was confirmed by the Senate?

A No.

Q If he had told you that, would that have been included in your 302?

A Yes.

MR. DAMELIN: With that, I have no further questions at this time.

CHAIRMAN MC CASKILL: Let's take a 10-minute break at this point, and we will come back at 10:40. And we will then go until 1:00.

(Recess.)

(Closed session follows.)

OPEN SESSION CONTINUED

CHAIRMAN MC CASKILL: We are ready for the cross-examination of Mr. Hamil.

CROSS-EXAMINATION

BY MR. MEITL:

Q Good morning, Mr. Hamil. My name is P.J. Meitl. We've met before.

A Yes, good morning.

Q How long were you an FBI agent?

A Approximately 25 years.

Q Over the course of your career, how many individuals did you interview as part of an FBI background check?

A I would say a hundred would probably be a conservative estimate, ranging from neighborhoods to candidates.

Q So could be more than a hundred?

A Could be.

Q When you did these interviews, I think you previously testified to this but I just want to make sure I'm clear, were you provided by the FBI a list of questions you were supposed to ask each of the interviewees?

A Not a specific list of questions, but they previously referenced the CARLABFAD. When we're

interviewing, you know, employment references or associates or social acquaintances, we generally follow that standard format for most all interviews.

Q So you were trained to follow a format?

A Yes, sir.

Q All right. Now, do you have a specific recollection of your interviews of Judge Porteous in 1994?

A No, I do not.

Q Would it be fair to say that your memory of those interviews is fuzzy?

A Yes, sir.

Q Do you have any memory of those interviews?

A You know, I remember the name. And looking back at the report, I remember some of the -- you know, the last names of some of the people that were interviewed. But I can't recall the contextual situation of any of the interviews, no.

Q Okay. So you can't visualize the interview?

A No, sir. I've tried.

Q So you're relying upon the interview summaries that were provided to you for your

testimony today?

A Yes, I am.

Q Okay. Now, in relation to those interview summaries -- and they're referred to as 302s, correct?

A Yes, they are. Well, some are inserts. The 302s are the ones that have the names at the bottom.

Q I see.

A A lot of the interviews, as you notice, have just initials at the top, and those are called -- candidates were required to be transcribed to a 302.

Q All right. Now, when you're interviewing a candidate or an interviewee, are those individuals under oath?

A No.

Q And are they asked to review the 302 or the interview summary before it's submitted?

A No.

Q Are they even given a copy of it?

A No.

Q And you didn't ask Judge Porteous to look at any of this information before it was submitted, did you?

A No, I did not.

Q Did you make an audiotape of the interview?

A No. That's against bureau policy at that time.

Q There was no videotape of the interview?

A No, sir.

Q Why was there no audiotape or videotape of the candidate?

A Bureau policy did not allow for audiotapes or videotapes at that time for interviews.

Q All right. Now, in relation to those interviews, first, you referenced some of the things that you might include or might not include in these interview summaries. Is it true that if you learned that Judge Porteous had lunch with other attorneys in his legal community, that you would have necessarily included that in your interview summary?

A Not necessarily, unless there was some connection with one of the -- one of the questions that I asked.

Q Okay. And is it true that if you found out that he had lunch with a bail bondsman, you necessarily would have included that?

A No, sir.

Q In fact, you previously testified about Louis Marcotte and interviews with him; correct?

A Yes.

Q And, in fact, in one of those interviews, you were even told that Louis Marcotte even told the FBI that he had lunch with Judge Porteous quite often; isn't that correct?

A I don't recall. But if it's in -- I interviewed him in the follow-up interview. I was not involved in the initial interview with him.

Q All right. Well, why don't we pull up that document and see if it helps refresh your recollection.

A Sure.

Q It's in 69(b), and it's PORT471, which I believe is page 250 of the .pdf, if that's of assistance to putting it up.

Now, in the first paragraph, the first full paragraph there, there's a line, and it will get blown up for you here, it said, "Marcotte said he sometimes goes to lunch with the candidate and attorneys in the area since Marcotte's office is across the street from the courthouse."

Do you see that?

A Right. But those are not my initials at

the top of that communication.

Q But you do see that that's in the FBI materials?

A Yes, I see that's in there.

Q So the FBI was aware of it?

A I can't attest to the FBI being aware of it, because I did not conduct that interview.

Q Well, this is an FBI form; correct?

A It's an FBI form, right.

Q So at least someone in the background check was aware that Louis Marcotte had made that statement?

A This interview was conducted by a colleague, yeah, because I recognize the initials at the top.

Q And then above this, if we can pull out there a little bit, there's the date of this interview. And it -- I believe it says August 1, 1994; is that correct? Do you see that?

A Yes, sir, I see it.

Q Okay. And you did an interview of Judge Porteous after this, on August 18; isn't that right?

A Yes, I did.

Q And you didn't ask him during that interview whether he had lunch with Louis Marcotte?

A No, because I was not necessarily aware of this interview. We -- we conduct these interviews independently and submit them to the coordinator, the case agent.

Q Sure. Now, based on your experience in the FBI, you're a 25-year member, would you have, had you read that, necessarily asked Judge Porteous about that? Was that an alarming statement to you?

A Could you pull it up again, let me see?

Q Sure. It says, "Marcotte said he sometimes goes to lunch with the candidate" --

A No.

Q -- "and attorneys in the area."

A Not necessarily.

Q All right. Now, would one of the questions that you often asked or was in this training that you received on what kind of questions to ask be whether the interviewee knew of anything in the candidate's background that could be used to influence, pressure, coerce, compromise a candidate or whether there was anything in the candidate's background that would negatively impact the candidate's character, reputation, judgment or discretion?

A That's correct.

Q And that was a compound question, and I didn't mean to make it so. But I believe that's how it's asked; isn't that right?

A That's how it's asked, yes, sir.

Q Okay. So there's quite a number of things to that question, but that's how you would put it to an interviewee?

A Yes.

Q And that was part of the script or the training that you received?

A Part of the instructions that come from headquarters.

Q And would you always ask this question?

A Should.

Q Would it surprise you that if this question and answers to this question appear in over 60 interviews in Judge Porteous's FBI background check?

A Would you repeat the question?

Q Well, in Judge Porteous's background check -- and I could show you all of the pages -- but there was interviews of dozens of witnesses.

A Right.

Q And I've gone through and counted them up, and this question and answers to it came up in over

60. Would that surprise you?

A No, not at all.

Q And would it surprise you that if not one of the individuals interviewed by the FBI and asked this question noted anything affirmatively in response to that question?

A No.

Q In your experience, in all the interviews you've ever conducted where this question was asked, how often would an individual respond with an affirmative response to that question?

A In my recollection, none.

Q That was over 25 years, over hundreds of interviews?

A That's correct.

Q Can you specifically recall any instance ever where an interviewee or an interview that you performed, one of the interviewees noted something that they thought could be used to influence, pressure, coerce or compromise a candidate?

A No, I can't recall any.

Q Now, would one of the other questions that you might ask be whether the interviewee knew of anything about the candidate that was embarrassing or would embarrass the President?

A No, we did not ask that question.

Q Okay. And again, it's a compound question, but I'm putting it to you because I believe that's how you put it to your interviewees; isn't that right?

A Yes, but we did not ask that question that you just posed.

Q Well, would you ask that to candidates?

A No.

Q That would only be on the SF-86?

A Yes, sir.

Q So it's on the form, the SF-86; correct?

A Yes, it is.

Q And any candidate would have to fill out that form; right?

A Yes, sir.

Q And you, in your experience at the FBI, would you review SF-86s in preparation for interviews?

A Yes, we review them before we interview.

Q How often, in your experience, would an individual respond with an affirmative response to that question?

A To my recollection, none.

Q Can you specifically recall any instance

in any interview that you performed or SF-86 that you reviewed where someone noted something that would be embarrassing to them or the President?

A No, I can't recall any.

Q Now, as an FBI agent, you were trained in investigating people and talked to a lot of people over all those years. Did that make sense? Doesn't everyone have something embarrassing in their past?

A We didn't draft the question. We just -- we just asked the interviews. We have to follow the instructions that come from FBI headquarters, not to create our own questions.

Q I see. So when you got a response of no to that question or you read a response, you didn't dig deeper and say, are you sure there's nothing embarrassing?

A No, we did not.

Q And that's because you were just told to do that by the FBI?

A We're told to ask the questions and submit the results to headquarters. If any additional follow-up is required, they will advise us accordingly.

Q Okay. Now, do you recall the dates on which you interviewed Judge Porteous?

A I can look at the forms.

Q Please do.

A First interview was July 6 and 8, 1994. The second was the telephonic contact on August 17, 1994, followed the next day, August 18, 1994, by -- of an interview in his office.

Q All right. Now, do you know how many times the FBI interviewed Louis Marcotte in relation to Judge Porteous's background?

A In reading the file, it's two.

Q Do you know the dates on those?

A I only know the date that I interviewed him, which was the re-interview on August 17, 1994. I don't know the date of the initial interview.

Q Okay. Now, we previously had a document up there, and we can pull it back up, but that was the first interview, I believe, of Louis Marcotte, it was PORT471 in 69(b), page 250 of the .pdf. We were talking about that date. Maybe we can just blow it up for you and show it to you again.

A Uh-huh.

Q Do you see the date there?

A August 1, 1994.

Q Now, during your second interview with Judge Porteous -- well, prior to your second

interview with Judge Porteous, you discussed a little bit of this with Mr. Damelin, but were you made aware of allegations that Judge Porteous had improperly set bonds?

A Yes.

Q And were you also made aware of allegations that Judge Porteous had received cash in exchange for bonds he had set?

A Yes.

Q And were you also aware that there were allegations that Judge Porteous had signed bonds in blank?

A Yes.

Q And did the FBI do any investigation of these allegations?

A The only investigation was the request for the interviews of specific people that came out in the teletype. And those interviews were conducted, the questions were asked, the results submitted to the FBI. And no further tasking came from headquarters.

Q I see. So the FBI went and interviewed additional people, talked to people that might be witnesses to this alleged conduct, and then made a determination not to take it any further?

A Apparently.

Q Are you aware whether Judge Porteous was ever charged with any crime or raised on any --

A I'm unaware of any.

Q Now, during the FBI's background check of Judge Porteous, did you or the FBI become aware that Louis Marcotte had known the judge for approximately 10 years?

A I don't -- I don't recall a recollection of their relationship.

Q On that same document that's up on the screen, in that first paragraph, it's going to say Louis Marcotte advised that he has known the candidate for approximately 10 years.

Do you see that?

A Yes, I see it.

Q So based on your experience, was the FBI made aware of that at least on August 1, 1994?

A Again, I can only speak from documents that I drafted. This was not drafted by me.

Q I'm not asking for your personal observation. I'm asking based on your experience, was the FBI made aware of it by looking at this document?

A Based on my experience, the FBI should

have been made aware of it, yes.

Q They were aware of it because it was in this document; right?

A This should -- this should and was -- have been included in the report that went to FBI headquarters for review, yes.

Q This was actually an FBI document?

A Yes.

Q That was drafted by FBI agents?

A Right.

Q During the FBI's background check of Judge Porteous, was the FBI aware that Louis Marcotte sometimes went to lunch with Judge Porteous?

A Well, I'm not personally aware that the bureau was --

Q FBI.

A But based on -- if it was included in this document, this document was included in the report that went to headquarters, then they would have been made aware.

Q Okay. And are you aware whether the FBI was aware that Judge Porteous worked with Louis and Lori Marcotte in writing bonds prior to Judge Porteous's confirmation?

A No, I'm not aware. I was not aware at

that time.

Q Okay. We're going to pull up another document in the same exhibit. It's PORT526, which was page 305 of the .pdf.

In this document --

MR. SCHIFF: Madam Chair, I don't want to make an objection, but this is a 302 not prepared by this witness that concerns an interview he wasn't present for. And I think the relevance of what he knows about an interview he wasn't present for is of fairly marginal character.

MR. MEITL: Madam Chair, I think what we're trying to do here is, I believe the chair had earlier stated they're just trying to gather facts on this. You have facts about what Judge Porteous was aware based on his interviews. We're just trying to complete the record here. There's a couple of additional questions that are coming out of these 302s.

This witness had 25 years of experience in the FBI. He can state not what necessarily he observed but based on his experience, what the FBI was aware of.

CHAIRMAN MC CASKILL: I think, Counselor, what you're trying to do is bootstrap here, and I

think if you have something in this document that you want to impeach this witness with, or if you have something in this document that --

MR. MEITL: It's to refresh his recollection whether the FBI was aware of this.

CHAIRMAN MC CASKILL: Then you need to ask those foundational questions as to whether or not a report prepared by someone else in an interview that he didn't conduct is going to refresh his recollection on anything.

Now, if you establish a foundation, this report is going to refresh his recollection that then allows him to testify to something, then I think it's fine.

But I don't think that -- I think the objection should be sustained on that basis.

BY MR. MEITL:

Q Mr. Hamil, prior to your second interview with Judge Porteous, what did you do to prepare for that interview?

A Reviewed the information from the confidential source.

Q Okay. Now, on this document, I believe -- how did the FBI designate confidential informants in their interview summaries? Would they be given a

moniker or --

A Given T symbols.

Q T-something?

A T-1, T-2, et cetera.

Q Now, are you aware whether the FBI -- were you ever made aware that Judge Porteous worked with Louis and Lori Marcotte in writing bonds?

A No, I was not aware of that.

Q All right. I'm going to use PORT526. This page, Mr. Hamil, refers to a T-6. Now, is that the type of anonymous source or confidential informant?

A Yes.

Q All right. Now, let me find the page here. All right. Now, let me ask you another question before we move on, Mr. Hamil.

Was the FBI aware that Louis -- that there had been allegations that Louis Marcotte had given kickbacks to Judge Porteous?

A If they received this T symbol -- this T-6 302, they would have been made aware of the allegations.

Q All right.

A And since a teletype came out asking us to interview a number of people as a result of this, I

would presume that it -- they had read this 302 before.

Q All right. And were you aware that there had been allegations that Judge Porteous had made kickbacks to Louis Marcotte?

A Only after reading the 302.

Q All right. Now, during the FBI's background check of Judge Porteous, were you made aware that there were allegations that Judge Porteous had transferred a case from another division to his division to help certain individuals?

A No, sir.

Q All right. I'm going to show you page 526 and see if that -- same page, see if that refreshes your recollection.

A Okay.

Q There is the third full paragraph there, it says, and I think it means number, but it says "no T-6 advised that he/she had also heard that Porteous had transferred a case from another division to his, Porteous's, to help."

Do you see that?

A Yes.

Q Does that refresh your recollection

whether you knew that at the time of your second interview of Judge Porteous?

A Yes, this is embedded in the same 302, yes. Looking at that -- all the information in that 302 would have been brought to my attention before conducting the interview.

Q So the FBI was aware of this prior to Judge Porteous's confirmation?

A I think it's safe to say they -- they would have been.

Q Okay. Now, during the FBI's background check of Judge Porteous, did the FBI send a separate background note to the Department of Justice on August 19, 1994, notifying the department of these allegations, including the kickback allegations?

A What was the date?

Q The date of the memo or document, I guess it was called a background note --

A Right.

Q -- was August 19, 1994?

A I recall seeing that in the file.

Q Okay. And why would you send that to the Department of Justice?

A Well, the process is that the field conducts investigation, we send our results to FBI

headquarters. FBI headquarters then reports both positive and negative to -- information to the Department of Justice.

Q And do you know why the Department of Justice needs that information?

A The initial -- initial background investigation comes from the Department of Justice to the FBI, so it just -- everything reports right back up the chain.

Q So it was just part of the process --

A Part of the process.

Q -- that you would give this back to the Department of Justice?

A I mean, that's my opinion, because I did not send it to the Department of Justice. But that's the logical course of the conduct and reporting of the background investigation.

Q You are aware that this note was sent to the Department of Justice?

A It's in the file, I saw it, yes.

Q Why don't we just reference -- put that up on the screen. It's PORT524, which is also part of 69(b), and that's page 303 of the .pdf, if that's of assistance. I don't believe that's the one. It should be page 303 of the .pdf. We're having a

little trouble with the .pdf, Madam Chair, but we would like to move the document Bates labeled PORT524, which is not a 302, this is a background note from the FBI to the Department of Justice with these allegations, into evidence.

MR. SCHIFF: Madam Chair, I need to take a look at the document and the purpose for which it's being introduced. Is this a document that this witness reviewed or was present for the interview?

CHAIRMAN MC CASKILL: Are you objecting?

MR. SCHIFF: Yes.

CHAIRMAN MC CASKILL: Sustained.

MR. MEITL: I'm sorry? It's not being admitted into evidence? All right. Those are all the questions we have right now, your Honor.

MR. SCHIFF: Madam Chair, if I could just have a moment.

MR. TURLEY: I'm sorry, Madam Chair, we just needed an explanation of why this non-302 is not admitted.

CHAIRMAN MC CASKILL: It was not prepared by him. He testified that he reviewed it and he was aware of it. I think the information that you wanted as part of the record is part of the record, and that is that there was an allegation that caused

the FBI to go out and do another interview, and that clearly is in the FBI file. It's part of the record, the testimony you elicited from this witness. But the document itself was not prepared by this witness, the witness that prepared the document is not here to be cross-examined or examined by any parties, and it is completely -- you know, it is definitely hearsay.

So for what purpose would you offer the document?

MR. TURLEY: Well, there's been a great deal of hearsay brought into the record.

CHAIRMAN MC CASKILL: My question is, for what purpose are you offering the document?

MR. TURLEY: The witness just explained that he does -- he was aware of the content, and we thought that the committee itself, in having a complete record that you referred to earlier, would want the document itself.

There's --

CHAIRMAN MC CASKILL: I think what's relevant, Counselor, is that this witness has testified that he was aware of this document. So what you want in the record is in the record, that an allegation was made and the FBI knew about it.

But we're not going to go down the path of admitting every 302 that either side thinks might be helpful to --

MR. TURLEY: This isn't a 302, Madam Chair. That's what our concern is, is that this is the first non-302 --

CHAIRMAN MC CASKILL: If you want to bring it up again later -- I want to move on with witnesses now. If you want to bring it up later for further discussion, I'm happy to consider it, the committee is happy to consider it. But for now the objection is sustained and that piece of evidence will not be part of the record.

MR. TURLEY: Thank you, Madam Chair.

REDIRECT EXAMINATION

BY MR. DAMELIN:

Q Mr. Hamil, with respect to Mr. Meitl's question regarding whether the witness was under oath in connection with the interview, these were interviews being conducted by a federal agent in connection with an inquiry, an official inquiry, so they would be subject, based on your experience, would they not, to the penalties of 1001 for making a known false statement?

A That's -- that's highly possible, sir,

yes.

Q Excuse me?

A Yes, that's possible.

Q Okay. Now, based on your experience as an agent, would a -- in connection with the question of whether somebody is subject to coercion, blackmail, exposure, would an individual participating in a kickback scheme that could be exposed at any point in time be subject to those kind of pressures, blackmail and things of that nature?

A In my opinion, yes.

Q Would an individual who set aside a conviction at the request of a bail bondsman for whom he had been taking favors, would that individual, in your opinion, be subject to potential blackmail or exposure at a subsequent point in time?

A Again, yes.

Q And when Mr. Meitl was going through the issue of background checks, and I just want to clarify something, you had said, I think, in response to some of his questions, people that you had interviewed over the years had not offered up adverse information in connection with background checks.

Are you talking more about the candidate,

or are you talking about individuals that you went out and interviewed in connection with the background checks?

A Primarily, the candidate. But for the most part, when asked that direct question, you would rarely get a positive response.

Q But in connection with even this case, you had people who were coming forward, were you not, with adverse information about Judge Porteous?

A None of my interviews resulted in adverse --

Q Right. But you had seen as an example the person that precipitated the follow-up interview?

A Right, right. The T symbol source?

Q Yes.

A Yes. No, it's not uncommon for -- for people to bring adverse information. But I was talking about the specific question, when asked, rarely comes back with -- results in a negative -- or a positive response. It's just about always no.

Q Right. The specific question. But -- but in the real world, you go out and you start to spread out from the people that you interview in connection with the FS-86 -- the SF-86, the fact is people will provide, on occasion, adverse

information, not necessarily in response to that particular question?

A Yes.

Q But the interview will reveal --

A That's true.

Q -- adverse information?

A Sure.

Q Okay. And also based on your review of the file, is there anything in the file that states that Judge Porteous received cash for curatorships that he sent to the Creely & Amato law firm?

A I don't recall seeing anything about that.

Q Okay. And is there anything in the file, the background file, that states that Judge Porteous received things of value from the Marcottes in connection with the setting of bonds?

A I don't recall seeing anything to reflect that either.

MR. DAMELIN: I have no further questions.

CHAIRMAN MC CASKILL: Any further questions?

MR. TURLEY: Not from the defense, Madam Chair.

CHAIRMAN MC CASKILL: Any questions from the panel?

This witness is excused. The House should call its next witness.

(Witness excused.)

MR. SCHIFF: Madam Chair, the House calls DeWayne Horner.

CHAIRMAN MC CASKILL: While we're waiting for that witness to arrive, the House has 11 hours and 10 minutes remaining in its case, and Judge Porteous's team has 12 hours and 57 minutes remaining.

MR. MEITL: Madam Chair, just to correct the record, I had mistakenly said 527 for the document we were discussing. It was 530.

CHAIRMAN MC CASKILL: 530.

MR. MEITL: Yes.

Whereupon,

DE WAYNE G. HORNER

was called as a witness and, having first been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. DUBESTER:

Q Sir, in a nice loud clear voice, introduce yourself to the Senate panel.

A I'm Special Agent DeWayne G. Horner, FBI agent in New Orleans.

Q Can you spell the first name, indicating whether the W is capitalized or not.

A It's D-e-W-a-y-n-e.

Q How long have you been an FBI agent?

A It will be 15 years in November.

Q Where did you say you were assigned?

A In New Orleans.

Q I'm going to ask you a little bit about your background with the FBI, but before I do that, let me just ask some other questions. First, where did you grow up?

A I grew up in North Dakota.

Q Did you go to college?

A I did.

Q Where did you go?

A At the University of North Dakota.

Q Did you do anything as far as your education after you graduated at UND?

A I went to law school at UND, took the bar and practiced law.

Q How long did you practice law?

A About 3-1/2 years.

Q Did you go to the FBI directly from law school?

A No. I practiced law for about 3-1/2 years

and then I was hired by the bureau.

Q And roughly when was it that you started with the FBI?

A November of '95.

Q And have you been in New Orleans the entire time?

A Yes.

Q And just briefly describe what you've done in the New Orleans field office.

A When I first arrived in New Orleans, I was assigned to a bomb crime squad for about six months and then I was moved over to public corruption. So I've been working public corruption for almost 15 years.

Q Now, my questions today are going to involve solely financial matters involving Judge Porteous. Were you involved in the FBI's investigation of Judge Porteous relating to matters arising from his bankruptcy in 2001?

A I was.

Q And as part of that investigation, were any financial or casino records obtained?

A We obtained a number of financial, credit card and casino records.

Q And are you familiar with those records?

A I am familiar with the records.

Q Have you looked through them?

A I have looked through them.

Q And did you look through them in connection with the DOJ investigation, the Fifth Circuit proceedings and, once again, in preparation of your testimony today?

A I have.

Q Now, I'm going to show you a series of charts, documents and forms to try to synthesize some of the records from disparate sources into one place for the members of the panel here.

A Okay.

Q Have you reviewed those charts and the underlying records in connection with your testimony today?

A I have.

Q That's both the face of the charts and the underlying records?

A That's correct.

Q And you came here with your own binders. Does that include a lot of those underlying records?

A It does.

Q And you studied those?

A I've studied them.

Q Just down the hallway were you looking at them?

A Yes, I was.

Q Okay. And are you familiar with the specific financial activities of Judge Porteous surrounding his bankruptcy?

A I am.

Q Now, in addition, as part of the documents that you're familiar with, are you familiar with the financial disclosure reports that Judge Porteous filed with the executive office of the courts in the years immediately preceding his bankruptcy?

A Yes, I am.

Q And were those obtained and have you looked at those?

A Yes.

Q And are you aware that they are the subject of some charts that you're going to see today?

A I am aware of that.

MR. DUBESTER: Okay. I'd like to -- Madam Chair, some of the issues that you've talked about, about document numbers and page numbers, are also associated with these charts. I believe what we're going to do is make an introduction of all our

documentary evidence at one point instead of trying to go page by page as we show things today. The documents, of course, have been stipulated to as authentic. I don't believe that will create an obstacle to going forward and, in fact, it might help us go forward efficiently.

CHAIRMAN MC CASKILL: Keep in mind, if the documents have not been entered into evidence, they can only be utilized for proper purposes.

MR. DUBESTER: We understand that.

CHAIRMAN MC CASKILL: I don't want to lecture you about what would be the proper purposes to use documents if they have not been admitted into evidence.

What I would really suggest going forward is if you all know what documents you're going to be offering into evidence during the direct of any witness, that you check with the other side so that we can -- we could really expedite this, in terms of moving evidence into the record, so we can at least highlight when we have differences of opinion and get to those issues and get rulings on those issues.

So I -- if there is an objection, I'm not going to let you carte blanche let the witness start reading from the objection or anything like that,

unless they have been admitted into evidence. Because, you know, he's got to have an opportunity to object.

Yes, Mr. Turley?

MR. TURLEY: Madam Chair, I thank you for that concern and that statement. One of the concerns that we have is to make sure that there was a dispute about judicial financial disclosure forms that we believe are not relevant, they're not part of the case.

I'm going to assume that that's not in these groups of documents. But we do object to just throwing the documents in without allowing us a chance to at least look at them.

MR. SCHIFF: Madam Chair, the financial disclosures have already been the subject of testimony from Rhonda Danos. They're highly relevant to the judge's intent. There is a pattern here that we are establishing of the judge deliberately not disclosing facts, concealing them, misstating them and, in particular here, the judicial disclosure forms corroborate his intent to hide those same debts in his bankruptcy proceeding.

The fact that the judge is aware, for example, that he has five credit card debts in

excess of 25,000 each and only discloses some of them in his judicial disclosure forms is also pertinent to his hiding debts in the bankruptcy, so it's highly pertinent to his state of mind.

MR. TURLEY: Madam Chair, may we be heard on that point since they explained their position?

As we stated earlier with the Staff, there is no allegation in the articles of impeachment that he lied on these disclosure forms. These are many years before these events, and we raise serious objections to their relevancy.

This is part of our problem of sort of mission creep, where they're bringing in a whole bunch of collateral allegations and material and saying let's throw it in here. They're not directly related to the bankruptcy, they're not directly related to these articles.

And the result is if they're allowed to keep on doing this, they just run us around with every possible document. They're not relevant. They're not connected to the articles.

MR. SCHIFF: Madam Chair, if I could be heard, counsel is incorrect. These documents are not old documents. These are federal judicial disclosure forms, while he's on the federal bench,

both preceding and during the course of the bankruptcy. They couldn't be more contemporaneous in terms of his state of mind about hiding debts.

CHAIRMAN MC CASKILL: I'm assuming that when -- are you offering those documents right now? Are you asking me for a ruling right now?

MR. SCHIFF: At some point during the course of the testimony, we will be offering them in evidence.

CHAIRMAN MC CASKILL: If these are documents -- let me just say, if these are documents that were prepared by the judge and signed by the judge concerning his financial situation while he was a federal judge, I certainly believe they're relevant.

MR. TURLEY: Some of these are for -- these are periods, as was just acknowledged, before the period of bankruptcy. It is -- it doesn't have a connection to the bankruptcy.

CHAIRMAN MC CASKILL: If they are documents -- representations made by the judge while he was a federal judge, I think they're relevant.

MR. SCHIFF: Thank you, Madam Chair.

MR. DUBESTER: Thank you, Madam Chair.

BY MR. DUBESTER:

Q I'd like to first show you, Agent Horner, just what a typical -- or what one of the forms looks like. And I'm going to choose the one for -- so if I could call on the screen Exhibit 103(a), which is SC 0227. Is this the front page of a financial disclosure report in this case for calendar year 1997 for Judge Porteous?

A Yes, it is.

Q And frankly, have you seen this document before?

MR. TURLEY: I'm sorry to interrupt, but we'll have a standing objection. This is from 1998 and we have a standing objection to the relevancy. This is long before the bankruptcy.

CHAIRMAN MC CASKILL: That objection is overruled.

BY MR. DUBESTER:

Q Okay. Is there a blank on this form, going now to page 2, SC 0228, block 6, for where liabilities are to be listed?

A Yes.

Q Okay. And on this particular form, is there any liability listed?

A No.

Q In fact, is there a box checked on this

form?

A The box representing "none" is checked.

Q And then finally, on this form, is there a place at the conclusion of the form where the judge signs?

A Yes.

Q That would be on SC page 230; is that correct?

A That's correct.

Q Is there a certification above the signature -- just read out loud the middle paragraph of the three paragraphs of the certification.

A It says, "I certify that all information given above, including information pertaining to my spouse and minor and dependent children, if any, is accurate, true and complete to the best of my knowledge and belief and that any information not reported was withheld because it was" -- I can't -- make it smaller.

Q "Because it met applicable statutory provisions permitting nondisclosure"?

A That's correct.

Q And accompanying the forms, are you aware if the candidates or applicants -- sorry, the judges have to get a -- some instructions? Is there a

judicial -- is there instructions which go along with that?

A Yes.

Q Okay. I'd like to show Exhibit 103(b). Is that first -- is that the cover of the pamphlet which would go with the instructions?

A That's correct.

Q And that's the first page of 103(b). And within the instruction book, is there a page which describes the -- how the liabilities are to be reported?

A There is.

Q Okay. And is that in front of you, and it's under title VI, liabilities, which corresponds to block VI of the form; correct?

A That's correct.

Q Now, what I'd like to do now is -- before we go through the different reports, and we'll be able to do it very quickly with this background, I'd like to just go over what liabilities are supposed to be reported. With that, I have chart 34, which is a copy of that same page with some text highlighted. So if we can go to chart 34, I think it will facilitate looking at that.

Are there two parts of this section which

relate to liabilities or how liabilities should be reported which are sort of bracketed in the box there?

A Yes.

Q Okay. And the first one describes which universe of liabilities are to be reported and at the top which liabilities should be reported?

A Any -- any liability the judge has to any creditor except for family members which at any time during the year exceeded $10,000.

Q Okay. So -- and also liabilities of the spouse too; correct?

A That's correct.

Q Okay. So we -- the first criteria is that it's the liabilities which exceed -- of in this case the judge and the spouse which exceeded $10,000; is that correct?

A Yes.

Q Okay. That at any point in the year exceeded $10,000; correct?

A That's correct.

Q Okay. And at what -- in terms of what number is to be reported, going to the bottom, what is the number that should be reported or reflected on the form?

A He's supposed to break out the liabilities in -- in categories of either 15,000 or less, then 15,001 to 50,000, and so on.

Q Okay. But at the very bottom, it says to report the value of that liability as of the year end; correct?

A That's correct.

Q Okay. So if it's -- okay. So now with that understanding, let's go just through the years, and we should be able to do this quickly.

I'd like to go to chart 30 now. Okay. Chart 30. Let's just go through the three boxes of text, which are reflected here. First of all, what are those three boxes of text?

A Well, the first box is where he would have stated whether he had any liabilities, and he said he had none because he checked the box "none."

Q Let's be clear. Was this for calendar year 1996?

A Right, 1996.

Q And he would have filed it roughly in May of '97; correct?

A It's due by May of '97.

Q Have you looked at his credit card records that you obtained?

A Yes.

Q Was there a credit card that should have been reported?

A He had a Citibank credit card, which had a balance in excess of 14,000.

Q And that was at year-end '96; correct?

A That was year-end '96.

Q As you see at the bottom, this was signed under the same sort of legend you just read; correct?

A That's correct, by Judge Porteous.

Q Okay. I'd like to now go to chart 31.

I'm sorry, I think we need some IT help. There we go?

On chart 31, does this have the same categories of information?

A It does.

Q Okay. And what was -- that's the box -- this is the form that we just showed the originals of to the committee; is that correct?

A That's correct.

Q And what did Judge Porteous indicate as far as his creditors were concerned?

A Well, for year 1997, he reported no credit card debt.

Q Okay. And have you found credit cards which, at least in your reading of the instructions, should have been reported for that year?

A Yes.

Q And just go through those credit cards and explain why you think they should have been reported.

A First, he had an MBNA credit card, which had a balance in excess of, I believe it's, $10,000. Then he had another MBNA credit card which --

Q Will you look more carefully? I believe -- see if that's 18,000.

A Is that an 8? 18,000. It's hard to read.

Q Okay. And then next?

A He had another MBNA credit card which had a balance in excess of 15,000, there you go, and then he had a Citibank card, which in November of '97 had a balance in excess of 16,000, but at the end of the year had a balance of $424. But since it, you know, hit $10,000 during the year, he was obligated to report it.

And then he had a Travelers credit card which had a balance in December of 11,400, and then the next statement reflected a balance of about 9300.

Q Actually, would that have been a November balance due in December of 11,000 and then --

A Right. And then a December balance due in January.

Q Let's move on to chart 32. Is this the same information for calendar year 1998 which he filed in 1999?

A Yes.

Q And under this -- what did he report as far as his liabilities in '98?

A In 1998, he reported that he had one MBNA credit card with a balance of $15,000 or less, and then he reported one Citibank card with a balance of $15,000 or less.

Q Actually, in terms of the balance -- the balance could have been as low as zero if as December it was zero, so long as it had been above 10,000 at one point in the year; correct?

A Right.

Q So those code Js really mean anywhere from zero to 15,000?

A At -- right.

Q Okay. And have you -- in fact, did he have at year-end '98, did he have debt, credit card debt, that was in excess of those codes?

A He had three credit cards. He had an MBNA credit card balance of in excess of 16,000. He had another MBNA credit card with a balance in excess of 17,000, and then he had a Travelers card that had a balance of $10,545.

Q And did he also sign that form?

A Yes.

Q And also, those two -- first two you read, each one of those was in excess of 15,000, so that would have been a different letter code as well?

A Right.

Q Okay. Now I want to go to calendar year 1999, which he filed May of 2000. And is this -- first of all, just to get the committee back to where we are in his life, 1999 is the year that he got money from -- asked for money from -- at least if the testimony is to be credited, the issue on the boat occurred, the issue -- the matters in Las Vegas occurred --

MR. TURLEY: Objection. Counsel is giving testimony here that's not coming from the witness.

MR. DUBESTER: I'll strike that and move on.

CHAIRMAN MC CASKILL: Rephrase your question and ask it -- yes, just strike it and start

over.

MR. DUBESTER: Thank you. That's what I'll do.

BY MR. DUBESTER:

Q On the top again, what credit cards did he report and what codes did he use?

A He reported, again, one MBNA credit card with a balance of J, $15,000 or less, and one Citibank card with the same letter code, J.

Q And, in fact, what do the credit card balances at year-end 1999 actually reveal?

A He had a Citibank card balance in excess of 22,000, an MBNA card with a balance in excess of 24,000, a Travelers card balance in excess of 15,000, another MBNA card with a balance in excess of 25,000 and another Citibank card with a balance in excess of 20,000.

Q And if we add those up, is that over $100,000 in credit card debt at that point?

A Yes.

Q And he reported two cards -- by the way, each of those cards should have been at code K; correct?

A Yes.

Q And he reported two cards at code J?

A Code J.

Q Which was zero to 15,000?

A That's correct. And he signed the form.

Q Now I'd like to move on to the discussion of the events surrounding his -- the financial activities surrounding his filing for bankruptcy.

First I'd like to ask you, are you generally aware from your own study of the records and looking at them of a series of financial acts that Judge Porteous took in roughly the 30 days before he filed for bankruptcy?

A Yes.

Q And just to get that day firm, what was the date that he filed for bankruptcy?

A March 28, 2001.

Q And what I'm going to do here, I'd like to show you chart 15 and ask if -- first of all, ask if you had a chance to review this chart.

A Yes, I have.

Q And there's a series of activities here. I'm going to go briefly through them and then we're going to go through the records which relate to each of these.

A Okay.

Q So first on February 27, from your review

of the records, what happened?

A Judge Porteous gambled at the Grand Casino and left owing $2000.

Q Okay. And on March 2, 2000, what happened?

A Judge Porteous gambled at the Treasure Chest Casino, he borrowed on a marker and left owing 1500.

Q Okay. So on March 2, he owes $3500 to two different casinos?

A He's got a $2000 outstanding marker -- or two $1000 markers at Grand Casino and 1500 at Treasure Chest.

Q Okay. On March 20, what do the records show Judge Porteous did?

A He obtained a P.O. Box.

Q And on March 23, what did Judge Porteous do?

A He filed an income tax return where he requested a refund in excess of 4000.

Q The 4000 here is an approximation?

A Right.

Q In fact, it's over 4100; correct?

A Right.

Q And on March 23, 2001, what did Judge

Porteous do?

A He had his secretary, Rhonda Danos, pay off a Fleet credit card.

Q Now, he still owes $3500 at that time to the two casinos; correct?

A That's correct.

Q Okay. And on March 27, what does Judge Porteous do regarding the Treasure Chest?

A He goes to the Treasure Chest casino and he pays off the three markers with $1500 in cash.

Q Did the FBI ever figure out where the cash came from?

A No.

Q Okay. Now, is there something he did March 27 of 2001 which appears to relate to the $2000 outstanding at the Grand Casino?

A Yes, he deposited $2000 into his Bank One account, 1960 of which was cash and a $40 check that was written off a Fidelity account.

Q Why is there a belief that that had something to do with the $2000 that he would have owed to Grand Casino at that time?

A Because those markers from Grand Casino would have been deposited or were going to be deposited and run through his account, so his

account was short and he needed the 2000 to cover the markers.

Q In addition, that amount was exactly $2000; correct?

A Right, the markers were 2000, so he deposited the 2000 to cover the markers.

Q And the 2000 that he deposited include a $40 check from another account to make it exactly 2000?

A That's correct.

Q And so there's another $1960 cash there, you don't know where that came from, do you?

A No.

Q So in the day before bankruptcy, Judge Porteous used -- had at least, sorry, approximately $3500 in cash on him that he used in the ways you've just described; correct?

A That's correct.

Q Okay. March 28, you've already indicated that Judge Porteous filed for bankruptcy; is that correct?

A That's correct.

Q And we'll hear more about this. Was there anything unusual about his bankruptcy forms?

A He filed it in a false name, G.T. Ortous,

with a P.O. Box listed as the address.

Q And on -- whatever happened to that outstanding $2000 he owed Grand Casino?

A On April 4 and 5, the $2000 marker cleared his checking account.

Q Okay. Now, the records of these various transactions, they come from all different places, casino records, bank statements, bank accounts from his various bank accounts; is that correct?

A That's correct.

Q Okay. I'd like to now just cover these in turn. I'd like to go to chart 6.

Is it fair to say, Agent Horner, you've looked at a lot of different casino records which are in a lot of different formats?

A Yes.

Q Okay. Sorry, chart 6 is described as undisclosed creditor, Grand Casino, Gulfport. Would you just take the committee through the various images which are on that chart.

A Well, first of all, he gambled --

MR. O'CONNOR: Madam Chair, we have an objection with regard to this demonstrative. It's misleading in that it selectively excerpts pieces of information from the underlying document.

MR. DUBESTER: I believe that would be a fair subject for cross. There's nothing inflammatory about this. The agent has described his -- what he's able to do with this.

MR. O'CONNOR: I think by selectively cutting out the portions that they want to ask about, they are omitting a key piece of information to which the House has specifically stipulated in the agreed stipulations of fact, specifically numbers 198 and 199, which specifically address these markers and the fact that they were not outstanding during the period of time during which the bankruptcy was filed.

CHAIRMAN MC CASKILL: I think you have every opportunity to prepare a demonstrative exhibit that highlights stipulation number, what was it?

MR. O'CONNOR: The stipulations are 198 and 199. Madam Chair, we would request that the House use the underlying document as opposed to the demonstrative, which is misleading.

MR. SCHIFF: Madam Chair, if I may, we provided all these demonstratives to counsel. They have had them. They have raised no objection with us to them.

CHAIRMAN MC CASKILL: I understand the

point you're making, and I think it's important you made the point. If you want to prepare a demonstrative to show the stipulations that you think correct the impression that this exhibit leaves, I think that if there's nothing on this that's inaccurate, I would not keep it from the record, simply because it may make things go more quickly.

You are certainly welcome to highlight the stipulations that you referenced that you think present another view of this set of facts.

Is there anything factually incorrect on the demonstrative?

MR. O'CONNOR: No, Madam Chair, we'll go ahead and right it on cross.

CHAIRMAN MC CASKILL: Then I would overrule your objection.

BY MR. DUBESTER:

Q I think the last question was, go through the three different graphic images which are part of this chart.

A First of all, on February 27, 2001, Judge Porteous went to the Grand Casino Gulfport and drew a couple markers or borrowed against a couple markers. He played and he left owing the casino

$2000.

Q And just to be -- just to help the committee here, there is a legend which appears to say credit marker, then there's marker numbers, one of them at the bottom is MK 131402, it's for $1000. And the reason the one above it is $2000 is because that's the balance at that time; correct?

A That's correct.

Q And then on March 27, there was a deposit?

A Right.

Q And is that the $2000 cash deposit that you've previously described?

A Well, it's a deposit for $1960 in cash, and then you can see under the deposit slip is the check that he wrote from the Fidelity account for the remaining $40 to reach the 2000.

Q And, by the way, there is a little bit more to the story with Grand Casino, and we're going to get to it further in our questions. Is that correct?

A That's correct.

Q Okay. For our purposes, let's leave it as we are now, and then we'll get to a wrinkle with it later.

Was Grand Casino ever made whole and/or

was that debt outstanding until those markers actually cleared Judge Porteous's bank account? Maybe one of those asked for a positive and one a negative.

A Right.

Q When did those markers actually clear Judge Porteous's account?

A On April 5 and 6 of 2001.

Q Now, on the bankruptcy forms, is there a place where unsecured creditors are supposed to be listed by the debtor?

A Yes.

Q Is that actually several pages of, in Judge Porteous's case, several pages of creditors?

A Yes.

Q Okay. I'm not going to -- if I -- and were those filed on April 9?

A Yes.

Q And were they -- were those schedules of creditors supposed to be those which were outstanding on March 28?

A Yes.

Q Okay. I'd like to show you Exhibit 127, House Porteous Exhibit 127. Is this -- is this the cover page to the Chapter 13 schedules and plan?

A Yes.

Q And at some point, we're going to be introducing the entire document, but I'd like to now, for demonstrative purposes, bring your attention to schedule F. And is this the layout of schedule F?

A That's where he would have listed creditors holding unsecured claims.

Q And he had several pages of this, so it doesn't really lend itself to be including in the chart; correct?

A Right.

Q At any point in these pages is Grand Casino Gulfport listed as a creditor to whom Judge Porteous owed $2000 on March 28, the day he filed?

A No.

Q Okay. Now I want to go to chart 2, and we're going to return to Grand Casino shortly. On chart 2, which is coming up, you've previously described that Judge Porteous took out markers at -- took out debt at the Treasure Chest Casino in the form of markers on March 3 of 2001; is that correct?

A March 2.

Q Okay. And can you just describe the Treasure Chest records and indicate how they're

listed, how they're laid off, and the reference to the date that three of them were repaid and how they were repaid?

A On March 2, he left Treasure Chest Casino with three outstanding $500 markers, so he owed them 1500. And then on March 27 of 2001, Judge Porteous went to the Treasure Chest Casino with $1500 in cash and paid off the three markers.

Q Okay. Now, thereafter on April 9, 2001, when Judge Porteous filed his schedules and forms, is there a place on those schedules where payments to unsecured creditors made within 90 days were to be listed?

A Yes.

Q I'm sorry, if I may, the Senate's indulgence for one second. I believe we have that page from the schedule, so I wanted to get that in front of -- in front of you.

Okay. Agent Horner, in front of you do you see the place on the schedules where -- which call for the disclosure of payments to unsecured creditors within 90 days?

A I do.

Q Okay. And can you just read what's supposed to be reported in that box?

A It says, "list all payments on loans, installment purchases of goods or services and other debts aggregating more than $600 to any creditor made within 90 days immediately preceding the commencement of this case."

Q And what was the answer on Judge Porteous's form?

A Judge Porteous listed "normal installments."

Q He didn't list the repayment to Treasure Chest the day before he filed bankruptcy?

A No, he didn't.

Q And the phrase -- the phrase "normal installments" was used; is that correct?

A That's correct.

Q And what was -- what is your understanding of what that phrase meant?

A That would be like your mortgage payment, car payment, your normal monthly bills.

Q Okay. I'd like to go now to chart 4 -- sorry, chart 7. Okay. Now, on March 20, you've indicated that Judge Porteous went and applied for and obtained a post office box?

A That is correct.

Q Is the application for that post office

box depicted on the chart 7 in front of you?

A Yes.

Q And that's in the upper right-hand corner?

A That's correct.

Q And ultimately on March 28, when Judge Porteous filed, did he use his real name?

A No. He used a false name, G.T. Ortous.

Q And the name he -- his address, was that his real -- was that an address which goes to any street that you know?

A No.

Q What address was used on the petition?

A The P.O. Box 1723, Harvey, Louisiana.

Q And there were two places on that petition that he had to file -- had to sign. Was it signed in two different places?

A Yes.

Q And one of them was it over the initials G.T. Ortous, debtor?

A Yes, he signed over the false name.

Q And in the other place, in the other location where it says "signatures of debtors," is that over the legend that the document is filed under penalty of perjury that the information provided in the petition is true and correct?

A Yes.

Q Okay. I'd like to go now to chart 3. You indicated, I think, that on March 20 now, just eight days before filing, Judge Porteous filed a tax refund, for a tax refund; is that correct?

A That's correct.

Q And are the pertinent copies of his tax return depicted in front of you on this chart?

A Yes.

Q And the schedule from his bankruptcy schedules isn't well set forth here. I'd like to go back to Exhibit 197 -- sorry, 127. And it would be at SC0096 if we can blow up box 17, is there a place on the bankruptcy schedules which specifically asked the debtor to disclose if he has a tax refund pending?

A Yes. Question 17 of schedule B asks for other liquidated debts on the debtor, and it specifically asks for tax refunds.

Q Okay. And what does that form indicate the answer to that was?

A He said none.

Q The box is checked which says none?

A Right, the box is checked representing none.

Q Okay. I'd like to go now to chart 1.

You previously indicated on March 23 now, five days before bankruptcy, Ms. Danos paid off or wrote a check on his behalf; is that correct?

A That's correct.

Q And is that depicted on chart 1?

A Yes.

Q At the top, do you see the credit card -- reference from the credit card as to when the check was due?

A Yes, it reflects that the payment is due April 15, 2001.

Q Of what amount?

A $1088.41.

Q Below that, is that a copy of the check that has been obtained?

A That's a copy of Ms. Danos's check she wrote.

Q What's the name of the creditor, by the way?

A Fleet Credit Card Company.

Q Okay. Now, we previously saw this in connection with the Treasure Chest markers. In the place on the bankruptcy forms where it says have you made any payments to any unsecured creditors within

90 days, is this Fleet payment listed?

A No.

Q Let me ask you this. Is the way that this Fleet credit card payment was handled in the five days before bankruptcy consistent with how that credit card had been handled in the prior months?

A No.

Q I'd like to now show you chart 14. And can you just describe what this chart reflects and just walk the members through this chart?

A Well, it shows that Judge Porteous's January Fleet statement had a due date of February 15, 2001, and he made a payment February 1, 2001 in the amount of $100.

Q Okay. That's actually -- let's just be clear here. Whose credit card was this?

A This was Carmella's.

Q That was his wife?

A That was his wife.

Q How much was paid on the balance of $1144 on the January statement?

A $100.

Q From what account was that payment written?

A From the Bank One account.

Q The Bank One account meaning Judge Porteous's personal account?

A Yes.

Q Okay. On the February statement, tell the members how that credit card payment was handled.

A Well, the due date was March 19, 2001, and Judge Porteous made a payment of March 1 -- on March 1, 2001 in the amount of $315.

Q And what was the -- out of how much of the amount?

A It was $1251 balance.

Q Again, which account did that come from?

A The Bank One account.

Q So in both those prior months, there were small amounts on big balances out of Judge Porteous's personal account; is that correct?

A That's correct.

Q And both of those payments occurred two or three weeks after the statement was logically received?

A That's correct.

Q Didn't seem to be a rush to pay it off or anything?

A No.

Q Okay. Let's see how the March -- how the

Fleet statement was handled. First of all, what was the date of the statement?

A March 15, 2001.

Q And what was the date of Ms. Danos's check?

A March 23, 2001.

Q How long before that check was due was it written?

A Well, approximately three weeks.

Q Okay. And was that a partial payment or was it paid in full?

A It was paid in full.

Q Was it paid out of Judge Porteous's checking account?

A No.

Q What account was it paid out of?

A Rhonda Danos.

Q Okay. I'd like now -- I'd like to now go to chart 5. We've previously discussed that on the day before filing for bankruptcy, Judge Porteous deposited $2000 into his personal account. Do you see that referenced on this screen for chart 5?

A Yes.

Q You've previously described it but just do it again. What is the source of that $2000?

A $1960 is cash, and a $40 check out of his Fidelity account.

Q On the bankruptcy forms and schedules, is there a place where an individual is supposed to disclose their checking account balances?

A Yes.

Q And on the -- just so it's clear, on March 27, Judge Porteous put $2000 into that account; correct?

A That's correct.

Q And what did Judge Porteous disclose as his checking account balance on that account on the day he filed?

A $100.

Q Now, did Judge Porteous also have another account in addition to that Bank One checking account?

A Yes.

Q And what was that other account?

A It was a Fidelity money market account.

Q Have you reviewed the records of that account?

A Yes.

Q And among the purposes, what, among others, was a purpose for which that account was

used?

A He would -- he'd write checks out of the account for various expenses. He would have his federal travel expense checks would be deposited into that account occasionally. He'd, you know, pay his insurance, like State Farm insurance, out of the account. I mean, it's just used generally for, you know, some bills.

He would also make gambling payments out of the account, and he would deposit cash into the account.

Q I'd like to show you chart 16. Okay. And what's the title of chart 16?

A "Judge Porteous's use of the Fidelity account prebankruptcy to pay gaming debts."

Q And does this chart indicate six different checks from 1998 to November of 2000 drawn on that account to establishments that you know to be gambling establishments?

A Yes.

Q Is Beau Rivage a gambling establishment?

A Yes.

Q Boomtown?

A Yes.

Q And Casino Magic, I take it?

A Right. Treasure Chest.

Q And the amounts speak for themselves. But there are -- at least three of them are -- well, one of them is over 1600, another is 2000 and another is 2500; correct?

A That's correct.

Q In addition, now going to chart 4, in or around the month of March 2001, did Judge Porteous use that Fidelity account?

A Yes.

Q And does chart 4 depict some of the checks drawn on that account in March?

A Yes.

Q You've previously mentioned one check in particular that was written on March 27; is that correct?

A That's correct.

Q What was that check?

A That was the $40 check he wrote to get the $2000 balance to deposit into his account.

Q Now, going back now to the checking accounts or the accounts that Judge Porteous had to disclose, can you indicate whether the Fidelity account is or is not listed?

A It's not listed.

Q Okay. So any creditor or trustee or anybody who looked at this would not know that there was a Fidelity account that Judge Porteous had?

A That's correct.

Q Okay. Now, on that statement of financial affairs we saw, is there a question, and I'm going now to chart 8, which specifically refers to gambling losses?

A Yes.

Q Showing you now chart 8, I'd ask you to read the text box and indicate how that box is answered.

A Question 8 of the statement of financial affairs asks for Judge Porteous to "list all losses from fire, theft or other casualty or gambling within one year immediately preceding the commencement of this case or since the commencement of the case. Married debtors filing under chapter 12 or Chapter 13 must include losses by either or both spouses, whether or not a joint petition is filed. Unless the spouses are separated and a joint petition is not filed."

Q Okay. And what box is checked there?

A Judge Porteous checked "none."

Q In connection with your 5th Circuit

testimony, did you actually try to go through Judge Porteous's gambling records?

A Yes.

Q Is there a phrase which is called being a rated player?

A Yes.

Q What does it mean to be a rated player?

A That's a player who will come into a casino and the casino will rate his play, meaning they will keep track of how much he bets, how much he wins, how much he loses, stuff like that.

Q Just why would a player want to be a rated player?

A Well, they earn comps when they're playing at the casino based upon how much they play, and also for tax purposes.

Q Okay. And would all of Judge Porteous's casino records reflect all the times he gambled, or would that only reflect the times that he indicated to them he wanted to be rated for his play?

A It would only reflect times he wanted to be rated by the casino. Some casinos he could go into, they would not know who he is, he could gamble and be rated. Other casinos they know who he is and he could play and be rated without even knowing it.

Q Did you prepare a chart or table in which you tried to go through and indicate the wins and losses from the casinos for which you had records?

A Yes.

Q And I'd like to show you House Exhibit 337. And this is the same as SC Exhibit 00030.

Is this the chart that you prepared?

A Yes.

Q And did you prepare it based on your own review of Judge Porteous's casino records?

A Yes.

Q And is it truthful and accurate to the best of your knowledge?

A To the best of my knowledge.

Q And did you testify about this chart in the 5th Circuit as well?

A I did.

MR. DUBESTER: I would move this document into evidence.

MR. O'CONNOR: We have no objection, so long as the record notes that as the witness testified, this chart only reflects those gaming losses and winnings that were reflected where Judge Porteous was a rated player and where his actual play was being recorded.

CHAIRMAN MC CASKILL: The exhibit will be received.

(House Exhibit 337 received.)

BY MR. DUBESTER:

Q Agent Horner, on the records you have, indicate, and I think on the very first page -- there's a summary and it indicates from the records you had, what were his winnings and what were his losses?

A Well, Judge Porteous had gross gaming losses of $12,895.35, and he had winnings of $5,312.15.

Q So at least on these records, there were losses for the year; is that correct?

A That's correct.

Q And in addition, were you present during the 5th Circuit testimony?

A Yes.

Q And did Judge Porteous -- was Judge Porteous asked about his winnings and losses at the casino?

A He was.

Q I'd like to now publish and read to the members of the panel an excerpt from House Porteous Exhibit 10. And I'd like to start -- this is Judge

Porteous's 5th Circuit testimony. And I'm on page 98 and 99 of the transcript. And I'd like to read out loud starting on line 21. It's after an introductory colloquy concerning the box relating to losses that we just looked at. Starting at line 21, the question, "it asks you to list all losses for fire, theft, other casualty, gambling, within one year immediately preceding the commencement of this case, meaning your case, or since the commencement of this case. And I believe we read this before about married debtors filing under Chapter 12 and Chapter 13, and you list none; correct?

Judge Porteous, "That's what's listed, correct.

"Question: Judge Porteous, do you recall that in the -- that your gambling losses exceeded $12,700 during the preceding year?

"Answer: I was not aware of it at the time, but now I see your documentation and that -- that's what it reflects.

"Question: So you -- you don't dispute that?

"Answer: I don't dispute that.

"Question: Therefore, the answer no was incorrect; correct?

"Answer: Apparently, yes.

"Question: Even though this was signed under oath, under penalty of perjury; correct?

"Answer: Right."

Did I read that correctly?

A Yes.

Q And actually, were you present when Judge Porteous testified to that?

A Yes.

Q Okay. So as of the date that Judge Porteous filed his schedules, there was no reference to the casino debts, gambling, the cash that he had just had or the tax return that he was about to receive; is that correct?

A That's correct.

Q And all of those were matters which were called for on the forms; is that correct?

A Yes.

Q I indicated before that there was a wrinkle with the Grand Casino records, and I'd like to just ask you if you can explain what happened in the month between him taking out the records -- sorry, between him incurring the debt at that casino on February 27 and him repaying on April 4 and 5 pursuant to that first chart that we saw.

A What happened was Judge Porteous had the two outstanding markers at Grand Casino, and Grand Casino deposited the markers into his account, and they were returned to judge -- the markers were returned to Grand Casino because they had the wrong account number on them. Judge Porteous's bank had merged with another bank, and the routing number and account number was wrong. So they were kicked back to the casino.

And then the casino had made contact with Judge Porteous, or he called the casino, they got it worked out. They redeposited the markers, and they cleared the account.

Q Okay. Now, Agent Horner, let's just assume that Judge Porteous had some reason to believe that the markers had cleared his account. Between February 27 and the day he filed.

If that were the case, should that debt have been reported as having been repaid, with debt repaid to an unsecured creditor within 90 days?

A Right.

Q It wasn't reported there either, was it?

A It was not reported there either.

Q And in addition, on March 27, the day before filing bankruptcy, Judge Porteous put $2000

into his Bank One account?

A Yes.

Q And if the Senate accepts the inference, that would suggest that on March 27, Judge Porteous well knew that those markers were outstanding; is that correct?

A That's correct.

Q Now -- so now he's filed for bankruptcy and he's taken the acts that we've described. Let me move on now to some conduct immediately following his filing for bankruptcy.

On April 6 -- I'd like to go to chart 11. On April 6, and by the way, that would be between the time he actually filed for bankruptcy and the time he filed those schedules we saw, did Judge Porteous do anything else regarding either gambling or obtaining credit at casinos?

A On April 6, 2001, Judge Porteous went to the Beau Rivage casino in Mississippi and had his credit limit increased to $4000.

Q And we don't have the casino record in front of you, partly because it's complex and partly for space reasons. But are you aware of whether or not when he left the casino, he owed it?

A Yeah, when he -- he left the casino, he

owed $1000.

Q And how did he repay that $1000 debt to the Beau Rivage?

A On April 24, 2001, Judge Porteous withdrew $1000 from his IRA account, and then he took that withdrawal check and endorsed it to Rhonda Danos.

Q And then at the bottom, you see that Rhonda Danos wrote a check to the Beau Rivage for $1000?

A Right. On April 30 she wrote a check out of her personal account to Beau Rivage.

Q Okay. Now, going back to this issue about casinos being included as unsecured debt, in the course of your investigation, did you have occasion to talk to representatives of casinos?

A Yes.

Q Did you talk to them about their credit policies?

A Yes.

Q What would have been the consequences to an individual, such as Judge Porteous, in terms of obtaining credit from a casino if he ever failed to pay a casino debt in full?

A They would have -- they would not have given him credit anymore.

Q Would it have been a big deal to a casino if a casino debt was listed on a bankruptcy petition?

A Yes.

Q What would -- would that justify --

MR. TURLEY: I'm going to object. The witness is now testifying as to what the views of casinos are in terms of particular facts. I'm not aware that he's an expert in that area or qualified to give that testimony.

CHAIRMAN MC CASKILL: Sustained.

BY MR. DUBESTER:

Q I'd like to now go to House Exhibit 149. On April 30 -- just let me start that question over.

What is House Exhibit 149 in front of you?

A This is a Harrah's casino credit application.

Q When is it dated?

A April 30, 2001.

Q Who signed it?

A Judge Porteous.

Q There's some information on the bottom left-hand corner of this, it says -- reports income excess of 100,000, there's a hole punch, presumably by size it suggests house or residence, of 250,000,

indebtedness, zero. You don't know who filled that out or under what circumstance; correct?

A No.

Q But --

A But Judge Porteous signed it.

Q Okay. Okay. Are you aware that in May of 2001, there was a meeting of creditors?

A Yes.

Q And ultimately a bankruptcy order was issued on June 28, 2001?

A That's correct.

Q I'd like to go to chart 9. Did the order require that the debtor not incur additional debt during the term of this plan except upon written approval of the trustee?

A Yes.

Q Was that issued June 28?

A Yes.

Q And did Judge Porteous incur debt?

A Yes.

Q Notwithstanding that order?

A That's correct.

Q And what else is depicted on this chart 9?

A On August 13, 2001, Judge Porteous applied for a Capital One Visa card.

Q And you've reviewed the records. Did he receive it?

A Yes.

Q Did he use it?

A Yes.

Q And the very first time that he used it, was it at Lucy's restaurant on September 17?

A Yes.

Q Now, I say "he used it." Was that card used?

A It was used.

Q And where is Lucy's?

A Lucy's is a restaurant/bar that's about two blocks from the federal courthouse.

Q Okay. Now, did Judge Porteous continue to take out debt at casinos?

A Yes.

Q And did you do a chart or table that ended up getting typed up reflecting the taking out of debt at casinos over the next year while he was under the supervision of the bankruptcy court?

A Yes.

Q I'd like to refer to -- show you what is table 7, and that's how this will be called. And this is a table which is included in the House

report which accompanied the articles of impeachment.

Okay. What is table 7, Agent Horner?

A That's a table which shows Judge Porteous's gaming markers -- or gambling markers July 2001 through July 2002.

Q And the bottom line here is how many -- how many times did he incur debt in the form of markers?

A 42.

Q And what was the total amount of markers that he took out that is reflected on this chart?

A 33,400.

Q Now, some of these -- some of the times that he took out debt he repaid it the same day; is that correct?

A That's correct.

Q Okay. Were there times that he took out debt that he didn't repay it the same day?

A Yes.

Q Okay. And that's reflected on the chart; correct?

A And in particular, there's one October 17 and 18 of 2001, Judge Porteous went to the Treasure Chest, he left owing -- he left owing $5900. And

then he repaid it on November 9 with an $1800 check and, I think, $2600 in cash.

Q Okay. Now I'd like to -- we've previously discussed that he didn't disclose to the -- his Fidelity account. Is that an account that he continued to use while he was in bankruptcy?

A Yes.

Q I'd like to now turn to chart 18. And can you tell the members of the panel here what's depicted in chart 18?

A This is how Judge Porteous used the undisclosed Fidelity account when he was in bankruptcy to pay casino debts.

Q Okay. There's three -- three transaction items at the top of this chart. What do those depict?

A That was the Treasure Chest trip, where Judge Porteous owed $4400. And what he did was he withdrew $1760 from his IRA, and he deposited that IRA into his Fidelity account. And then he wrote a check out of the undisclosed Fidelity account for 1800 to Treasure Chest, and then paid the remaining amount in cash.

Q Okay. And then in the summer of 2002, did -- what's the item which is reflected on the

bottom of that chart?

A That's a check that Judge Porteous wrote to the Grand Casino for $1300.

Q And, again, off of what account?

A Off the Fidelity account.

Q Okay. Now, there was reference in Mr. Turley's opening statement to the fact that some creditors got more than they were supposed to get, or some words to that effect, in bankruptcy.

Understanding you don't know exactly what Mr. Turley was referring to, can you explain what you think he's referring to and what the import of -- your analysis of what the creditors got reveals?

MR. TURLEY: Objection, Madam Chair. He's asking the witness now to explain what I was thinking of in an opening statement, and then proceeding to ask him for what sounds again much like an expert testimony, but both objections are filed.

CHAIRMAN MC CASKILL: Sustained.

BY MR. DUBESTER:

Q Did any creditors -- tell the members of the panel how Judge Porteous's payments to his trustee in the Chapter 13 were distributed to the creditors.

A The creditors in Judge Porteous's case, when the case was first filed, he had a number of creditors listed on the -- on the schedule.

And in order for the creditors to collect or to be included in the payment plan, they had to file a claim.

And in Judge Porteous's case, there was a few creditors that didn't file a claim. And as a result of that, the creditors that did file a claim, the payments to those creditors were increased. Not because there was more money but just because there was less creditors, so there's more money for each creditor to split.

Q Now, let me ask you this. Judge Porteous reported his take-home pay as of May of 2000; correct?

A That's correct.

Q It was under what he was actually taking home in May of 2001; is that correct?

A That's correct.

Q And starting in August of 2001, did anything significant happen to Judge Porteous's take-home pay?

A In August of 2001, Judge Porteous had reached the Social Security cap.

Q So what would happen?

A They would quit taking Social Security out of his paycheck.

Q And his salary would go up 800, a thousand bucks, something like that?

A That's correct.

Q Same thing happen in 2002 in or about August?

A That's correct.

Q Same thing happen in about 2003 in or about August?

A That's correct.

Q Did Judge Porteous every August, to make these creditors get more than they maybe had to get, say I want to pay $1000 more a month every month to make sure these creditors get every penny they deserve?

A No.

Q Did he pay extra starting August of 2001, August 2002, August 2003 in order to make sure the creditors were whole?

A No.

Q So that was several thousand dollars more every month for -- during those periods of time; is that correct?

A That's correct.

MR. DUBESTER: Senate's indulgence.

BY MR. DUBESTER:

Q I'd like to go finally to chart 18. I'm going to have to handle one chart the old-fashioned way by showing the witness a document and catching up -- getting the document into evidence and having the witness explain it that way.

MR. TURLEY: Is the defense allowed to know what this document is?

CHAIRMAN MC CASKILL: Please stop and show the judge's team the document as you go to the witness stand.

MR. TURLEY: Thank you very much.

BY MR. DUBESTER:

Q I'm sorry we don't have the screen for this. Obviously this would be easier to see than to hear, but we'll go ahead.

Agent Horner, we've talked about the undisclosed Fidelity account; is that correct?

A That's correct.

Q And you've indicated the various types of deposit items that went into that account; is that correct?

A I have.

Q Going to -- by May of 2002, what was the account balance in that account?

A $8760.37.

Q What was his account balance in his checking account?

A $1120.91.

Q Okay. So the -- there was far more in the Fidelity account than the checking account; correct?

A That's correct.

Q And in July of -- sorry, in the next month in 2002, does the same pattern hold?

A That's correct. The balance in the Fidelity account, over $7800, and the balance in the Bank One account as of June 24 was about $857.

Q Okay. Agent Horner, if one were to look at Judge Porteous's bankruptcy petition and bankruptcy filings, is there any reference at any point anywhere to any gambling activity whatsoever by Judge Porteous?

A No.

Q I believe we found -- there we go, it's on the screen. Quickly, Agent Horner, since you described the document, what does this depict, chart 18?

A Judge Porteous's use of the undisclosed

Fidelity account to accumulate cash outside of the disclosed Bank One checking account.

Q So in the undisclosed account, cash was accumulating and the balance in this disclosed account was still kept at a low level; correct?

A That's correct.

MR. DUBESTER: That concludes the questioning. I would like to move in the financial disclosure forms for Judge Porteous for the years that have been displayed to the panel. For calendar year 1996, that would be House --

CHAIRMAN MC CASKILL: I'm going to interrupt you, Counselor. I think this is going to be more efficient to have the exhibit numbers as opposed to describing the documents. And since your case is not closed, I would like to move on to the next witness. And if you would present the list of documents by exhibit numbers that you would like to come into the record, and if, Mr. Turley, you would indicate whether or not -- to us whether or not you object to any of those, then we will deal with those.

MR. DUBESTER: Very well. Fine, thank you very much.

CHAIRMAN MC CASKILL: So we can move on to

cross-examination.

MR. TURLEY: We shall do so. Thank you, Madam Chair.

CHAIRMAN MC CASKILL: Cross-examination for Judge Porteous's team.

MR. SCHIFF: Madam Chair, just a housekeeping matter. The votes will be around 2:00. There are at least five votes. First is a 15-minute vote. The rest are all five-minute votes. Reasonably, the first 15-minute vote won't probably close for 25 minutes, if we're lucky, they will close at 25 minutes. But if you assume 30, the next five-minute votes will go fairly quickly. So that would be 50 minutes, best case. Walking to and from, I think we're talking about an hour.

CHAIRMAN MC CASKILL: Okay. Well, let's see how far we can get with this witness. We may -- we may prevail upon you to take your expert out of order.

CROSS-EXAMINATION

BY MR. O'CONNOR:

Q Good afternoon, Mr. Horner. My name is Dan O'Connor and I'm one of the attorneys representing Judge Porteous in this case.

A Good afternoon.

Q We have not spoken before; correct?

A No, we haven't.

Q As you testified earlier today, you're a lawyer?

A That's correct.

Q Have you ever practiced bankruptcy law?

A No.

Q Do you have any particular expertise in bankruptcy law?

A No.

Q What is the extent of your expertise with regard to bankruptcy?

A None. I'm not a bankruptcy lawyer and never practiced bankruptcy law.

Q Okay. Thank you. With regard to the Porteous investigation, I'd just like to establish a few background facts quickly. Mr. Dubester touched on some of this but he didn't really paint the full picture. When did you first become involved in the government's investigation into Judge Porteous?

A It was either late 2001 or sometime in 2002, something like that.

Q And what was your role in that investigation?

A I was the case agent.

Q And as your testimony so far seems to indicate, you were investigating the bankruptcy case that Judge Porteous and his late wife Carmella filed in 2001; is that correct?

A Yes, that's correct.

Q That was a Chapter 13 bankruptcy case?

A That's correct.

Q Can you briefly explain what a Chapter 13 bankruptcy case is and if it's different from other types of bankruptcy cases?

A Chapter 13 is a wage earner's bankruptcy, which is based upon a stream of income that the debtors will have during the bankruptcy period. A Chapter 7 is a liquidation bankruptcy, where they liquidate all the assets of the debtors to pay off the creditors. A Chapter 11, I think, is a business reorganization, and a Chapter 13 is a family farm reorganization, I think.

Q I think that's "Chapter 12, "is the last one?

A Chapter 12 is the family farm.

Q So really the basic distinctions for individuals is a Chapter 7 versus 13 where 13 is a repayment plan where you pay over a period of time, and Chapter 7 is a liquidation plan where you turn

over your assets and then ultimately whatever debts remain are discharged; is that correct?

A That's correct.

Q Other than with regard to Judge Porteous, have you ever been called upon as an FBI agent to investigate the conduct of a debtor in connection with a Chapter 13 bankruptcy case?

A I don't know about ever, because I don't know if I can say that bankruptcy issues have never been involved in some of my cases. But I think -- I think Judge Porteous is probably the only case that I've had where bankruptcy was a central -- you know, one of the central issues in the case.

Q So you're not a bankruptcy expert and this is the only case you've worked on where bankruptcy issues played a central role?

A Yes, that's accurate.

Q Would you describe the government's investigation of Judge Porteous as thorough?

A Yeah.

Q And after conducting a thorough, multiyear investigation of Judge Porteous, the Justice Department specifically declined to pursue any criminal charges against Judge Porteous; is that correct?

A That's correct.

Q I'd like to show you a document that the House has marked as Exhibit 4. Do you recognize this document?

A Yes.

Q Is this a May 18, 2007 letter from Department of Justice?

A Yes, to Judge Jones.

Q And this letter specifically states that the Department of Justice would not be pursuing any criminal charges against Judge Porteous; correct?

A That's correct.

Q I'd like to draw your attention to the second paragraph on the first page. That paragraph states "the Department of Justice and the FBI specifically investigated Judge Porteous in connection with a number of criminal allegations, including bribery, Honest Services fraud, false statements and bankruptcy fraud."

Is that correct?

A That's correct.

Q And notwithstanding those wide-ranging allegations and the Department of Justice and the FBI's thorough investigation, the first line of the third paragraph states, "the department has

determined that it will not seek criminal charges against Judge Porteous."

Is that correct?

A That's correct.

Q And do you see that among the reasons the Department of Justice lists for its decision not to prosecute Judge Porteous are, "concerns about the materiality of some of Judge Porteous's statements" and the "specific difficulties of proving mens rea, an intent to deceive beyond a reasonable doubt," and "the need to provide consistency in charging decisions concerning bankruptcy and criminal contempt matters"?

A That's what it says.

MR. O'CONNOR: At this time, your Honor, Defense would like to move House Exhibit 4 into the record.

MR. SCHIFF: Madam Chair, we have no objection.

CHAIRMAN MC CASKILL: It will be received.

(House Exhibit 4 received.)

MR. O'CONNOR: Thank you.

BY MR. O'CONNOR:

Q Mr. Horner, are you aware that Judge Porteous signed a series of tolling agreements

extending the applicable statutes of limitations for a number of criminal violations for which he was then under investigation?

A I'm aware that some tolling agreements were signed. I'm not sure how many. But yes, I'm aware that some were signed.

Q And Judge Porteous signed those tolling agreements?

A Yes, he did.

Q And those tolling agreements --

MR. SCHIFF: Madam Chair, if I could, again, this is something that I hope we'll have an opportunity to argue prior to your 2:00 vote, in terms of how much you'll allow the defense to get into prosecutorial decisionmaking.

But as we are now starting to tread on that ground, we do object that the department's decision is not relevant to whether this judge should be impeached. The standards are different. The evidence is different. In fact, I think the letter counsel is referring to refers the case for potential impeachment.

And I don't know if, Madam Chair, we need to broach this now or how far counsel intends to go. But to question this witness about why the DOJ made

its decision will intrude on that.

The final thing I would say is we have an interest in the sense that we don't think it's the same standard, same evidence or same rule to be applied in terms of prosecution versus impeachment.

The department has its own separate interest, however, in not having the internal deliberations in any investigation of the judge, the Department of Justice will have to know in the future if the decisionmaking can come out during impeachment, that they can't discuss it internally without knowing that one day it will become public.

And I don't feel like I'm in a position, frankly, to speak for the department on that very important institutional interest. But if you're going to want to hear from the department on that, then we need to make arrangement for that as well.

MR. TURLEY: Madam Chair, if you can -- if the defense could speak to this overall issue, these documents were turned over to the defense. Mr. Schiff is correct, he's not representing the Department of Justice. Department of Justice has been aware of these documents in the case.

The House just introduced years of financial disclosure forms before the bankruptcy

period because of their connection to Judge Porteous. We have an agent describing an investigation. These are documents signed by Judge Porteous.

I think it would be rather strange to introduce financial disclosure forms in prior years but not actual tolling statements signed by the judge.

CHAIRMAN MC CASKILL: Well, we've had a couple of -- we've had a talking objection that reaches far beyond the question that was asked.

I believe the question that was asked is a proper question as to whether or not this witness was aware of tolling statutes. You're going to have an opportunity to cross-examine, and I think that, you know, we are talking about different standards. We're talking about different kinds of procedures.

And this is not a typical jury that's sitting up here. These are people that are going to be able to weigh the various information that comes in front of this committee and the records that develop and decide which part of that information is relevant to their personal decisions in regards to a conviction or not -- or an acquittal on the impeachment.

So I think the question is -- I would overrule the objection to this question and would urge the parties to make it a little simpler, to try to limit their objections to the questions being asked.

And if you have a matter that is larger than the questions being asked, to bring it to the attention of the committee separate and distinct from the time that questioning is occurring.

MR. TURLEY: Thank you, Madam Chair.

MR. SCHIFF: Thank you, Madam Chair. May I ask one last question, though, in terms of the -- I think you mentioned we're going to have a 2:00 vote on the department witnesses.

Will the chair want to hear from the department on their institutional interests and their internal deliberations?

CHAIRMAN MC CASKILL: Well, there has been a motion to subpoena a member of -- someone who works at the Justice Department. And that motion will be voted on by the committee. And we will vote on that motion at 2:00.

MR. SCHIFF: There will be argument on that motion, Madam Chair?

MR. TURLEY: Madam Chair, if the defense

can also just point out, the Department of Justice is fully aware of these documents and has not presented anything thus far. I'm surprised at this point Mr. Schiff, after giving a speaking objection, is saying that they want to be heard.

I'm not aware of that, in terms of this material being turned over. But I can't imagine why my client signing tolling agreements in these documents would be kept out. I mean, I can't imagine how that reveals something secret about prosecutorial discretion. He signed tolling agreements. He's not a prosecutor --

MR. SCHIFF: Madam Chair, I'm not objecting to the tolling agreements. What I am asking, if the Senate committee intends to make a ruling on -- at 2:00 on whether certain witnesses can be called, will the committee want to be -- hear argument on that motion, and in particular, we're obviously available to make argument on that.

But will the chair want to hear argument from the department, in which case --

CHAIRMAN MC CASKILL: We don't intend to hear any further oral arguments on this motion.

MR. SCHIFF: Thank you, Madam Chair.

MR. TURLEY: Thank you, Madam Chair.

CHAIRMAN MC CASKILL: And the letter that the Justice Department sent to the committee is now part of the record.

MR. O'CONNOR: Thank you, Madam Chair.

BY MR. O'CONNOR:

Q Mr. Horner, let's go back just briefly and make sure we're back on the same page.

A Okay.

Q So Judge Porteous signed a series of tolling agreements; is that correct?

A I know he signed some tolling agreements, but I don't know how many.

Q Okay. And with regard to the tolling agreements, are you aware that those tolling agreements tolled the statute of limitations for a number of crimes, including bankruptcy fraud, bribery, criminal contempt, false statements and honest services mail and wire fraud?

A I don't know that, but if you're reading them, then I would assume that's true.

Q Let me show you one and see if that helps. I'd like to introduce Porteous Exhibit 1003. Have you seen this document before?

A No.

Q If you'll take a look at it, is this a

tolling agreement that was signed by Judge Porteous in April 2006?

A Well, it's signed by Judge Porteous in April of 2006, but I haven't had a chance to read to see what it is.

Q Okay. I'll represent to you this is a tolling agreement signed April 2006 by Judge Porteous that tolls the statute of limitations for a number of criminal crimes, including bankruptcy fraud.

A Okay.

Q I'd like to introduce Porteous Exhibit 1004. Have you seen this document before?

A No.

Q We can go to the second page. Does this appear to be a tolling agreement signed by Judge Porteous June 22, 2006?

A You know, again, it's signed by Judge Porteous, but I haven't read it, so I'll assume it's a tolling agreement.

Q All right. I'd like to show you one more and see if you've seen this one. I'd like to introduce Porteous Exhibit 1005. Does this appear to be a tolling agreement signed by Judge Porteous in October 2006?

A Yes, with the same assumption.

MR. O'CONNOR: Madam Chair, at this time, the Defense would like to move Porteous Exhibits 1003, 1004 and 1005 into the record.

MR. SCHIFF: No objection, Madam Chair.

CHAIRMAN MC CASKILL: Will be received.

(Porteous Exhibits 1003, 1004 and 1005 received.)

BY MR. O'CONNOR:

Q Mr. Horner, who requested that Judge Porteous sign these tolling agreements?

A Well, I was not a part of this process, so I don't know if, you know, the department requested it or if Judge Porteous's attorneys requested it. I really don't know.

Q In your experience, do defense attorneys typically request to sign agreements to extend statute of limitations?

A Well, I have had a case where defense attorneys have signed tolling agreements to extend statutes of limitations in cases, yes.

Q Do you have any reason to believe that's what happened in this case?

A I have -- I really don't know what happened.

Q Okay.

A Okay.

Q During direct examination, the House asked you about a number of different allegations in connection with the Porteous' bankruptcy case. I'd like to return to those. First, the House's questions are entirely premised on the fact that a marker is a debt. Would you agree with that statement?

A Okay. Repeat that question.

Q So the House's statements asked to go through various portions of the bankruptcy statements that Judge Porteous filed. And in connection with those questions, House counsel asked you whether certain prepetition payments to creditors were made or certain unsecured creditors were not listed on bankruptcy statements.

In order for that to have been the case, a marker must be a debt. Is that true?

A Well, that's a lot there. But generally, yeah, that's true.

Q Now, you've testified that in connection with your investigation of Judge Porteous, you investigated casino records and casino markers; correct?

A Yes.

Q And in connection with that investigation, did you speak with Vincent Schwartz, the comptroller of the Treasure Chest Casino in Kenner, Louisiana?

A Yes, I did.

Q Do you recall when you spoke with him?

A Oh, boy. No.

Q Would it have been June 2003?

A I'm assuming you're reading from the 302, so --

Q Let me see if I can refresh your recollection. I'd like to pull up a 302 report. Have you seen this document before?

A Yes.

Q Who prepared this document?

A I would assume that I did.

Q Why do you say that?

A Well, because I remember interviewing Mr. Schwartz, but I mean, I haven't seen this 302 in probably six years.

Q I'd like to direct your attention to the third paragraph, which begins "Porteous usually used markers when he played at the Treasure Chest Casino."

Do you see that paragraph? If you would,

I'd like you to read out loud the second sentence in that paragraph which begins "Schwartz explained."

(Witness reviewed the document.)

A Okay.

Q Would you mind reading that out loud?

A "Porteous usually used markers when he played at the Treasure Chest. Schwartz explained a marker is a temporary check from Porteous's checking account. If Porteous does not repay the marker, the Treasure Chest will negotiate the marker. Porteous has 30 days to repay any marker."

Q Thank you. And so from this statement, Mr. Schwartz was explaining to you that a marker is a check; is that correct?

A Yes.

Q And so according to the Treasure Chest Casino, markers are treated as checks?

A Well, it's a check that's used to pay a debt owed to the casino.

Q But the marker is a check?

A Yeah, the marker is a check and they use it to pay the credit that's owed.

Q And the advantage of treating a marker as a check is that the marker can then be directly deposited in a bank account; is that correct?

A Yeah, that's correct.

Q And is there a term for that, when that process occurs, when a marker --

A A casino -- they usually say they drop the marker.

Q They drop the marker, means they negotiate the marker?

A Right.

Q And they effectively submit it to the bank and in return are paid just like a check is normally honored by a bank?

A That's correct.

Q Also, are you aware that a number of the judges in the 5th Circuit who considered whether to discipline Judge Porteous specifically addressed whether markers constitute checks and not debt?

A No.

Q I'd like to show you a document that's been marked by the House as Exhibit 6(b). Do you recognize this document?

A No.

Q I'd like to go ahead to page 39 of House Exhibit 6(b).

A Is this the dissenting opinion from the 5th Circuit?

Q Yes, it is.

A Okay.

Q And this is page 39 of House Exhibit 6(b). In the middle of the page do you see the sentence that states, "under Louisiana law, markers are considered checks as defined by Louisiana statute"?

A Yes.

MR. O'CONNOR: Madam Chair, at this time, the Defense would like to move House Exhibit 6(b) into the record.

MR. SCHIFF: No objection, Madam Chair.

CHAIRMAN MC CASKILL: Will be received.

(House Exhibit 6(b) received.)

BY MR. O'CONNOR:

Q Mr. Horner, with regard to the calculation of gambling losses, House counsel introduced a chart and asked you to discuss it. Do you recall that?

A Yes.

Q And you testified that you had calculated gambling losses in the year preceding the Porteous' bankruptcy as approximately $12,000; is that right?

A That's correct.

Q And you also said that you calculated in that same period of time that Judge Porteous had winnings of at least $5312.15; is that correct?

A That's correct.

Q Now, those figures are based on your review of casino records, including marker transactions; is that right?

A That's correct.

Q So the figures that are in that chart are only as good as the records that you were able to receive from those casinos; is that correct?

A That's correct.

Q And you've testified before that casino records are, quote, very confusing; is that right?

A Yes, they can be.

Q You'd agree generally casino records are tough to discern exactly what's happening in them?

A Yeah, they can be. They have a bunch of abbreviations and things like that. So yeah, they can be hard to read at times.

Q You've also testified that casino records contain certain nuisances; is that right?

A Yeah.

Q Now, the figures that were on that chart with regard to the calculation of gambling losses versus winnings, those figures do not include cash transactions; is that correct?

A That's correct.

Q That's as a result of the fact that the only information you had on that chart was reflected in rated play; is that correct?

A That's correct.

Q And you also testified earlier that while Judge Porteous was a rated player, he wasn't well known at the casinos that you went to in order to collect documents and information, and often would gamble without being recognized and wouldn't have, quote, rated play; is that right?

A Well, he was fairly well known at Treasure Chest, because he played there a lot. But, you know, a lot of the other casinos like Beau Rivage, casinos on the Gulf Coast, he was not a known player, so he could have went in there, played and not have been rated. So that would have not been recorded or reflected in the records.

Q So the wins or losses that came out of that play would not be recorded in the records and wouldn't be recorded in your chart; is that correct?

A That's correct. The only thing I had to go on was what was in the records.

Q So just as an example, if Judge Porteous had gone into a casino, let's say the Beau Rivage, one where he was not particularly well known, and he

had $200 in cash in his pocket when he started and he left with $1000, he would have winnings that there was no way that you would have known about and would not have been reflected in that chart; is that correct?

A That's correct.

Q So ultimately, is it possible that in the year preceding Judge Porteous's bankruptcy, he, in fact, had net gambling winnings because he had significant winnings that were not recorded in the information you were able to collect?

A Well, I mean, that's possible. But he didn't report any gaming winnings on his tax return.

Q But it's possible?

A It's possible.

Q Mr. Horner, there was a series of testimony when Mr. Dubester was asking you questions with regard to a Fidelity Homestead money market account; is that correct?

A That's correct.

Q Do you know the balance of that account on March 28, 2001, the day that Judge Porteous filed his bankruptcy?

A I think it was like $200 or something like that.

Q It was about $200.

A On March 28. I think that's what he reported, or that's what we -- when we did an analysis, I think it was about $200.

Q And, in fact, for the committee's benefit, I can cite the committee to stipulation 230, where the parties were able to agree to the actual balance in that account. And it is effectively $283.42.

A That sounds familiar.

Q Mr. Horner, you've testified earlier there was a series of documents that were presented to you and you said Judge Porteous signed these documents; is that correct?

A That's correct.

Q So you're familiar with his signature; is that correct?

A Yes.

Q You can recognize it?

A Generally I can recognize it.

Q I'd like to show you a document that's been marked by the Porteous defense team as Porteous 1100(b). While this pulls up, this is the original petition Judge Porteous filed on March 28, 2001.

I'd like to go to the second page. Do you see the signature there?

A Yes.

Q Is that Judge Porteous's customary signature?

A I would say no.

Q Why would you say that?

A Because usually you can read -- you can kind of read Gabriel, and usually the B is a little more pronounced. This signature is a little shorter than when he signs Gabriel Thomas or Gabriel T. Porteous. This is a little shorter, and you really can't read Gabriel. I mean, you really can't read anything on it.

So I would say no, it's not a typical signature of his.

CHAIRMAN MC CASKILL: I think you may mean P, not B.

THE WITNESS: P, that's correct, yes.

BY MR. O'CONNOR:

Q I'd like to move on to -- there was a chart Mr. Dubester showed you about markers for a period of time in 2002. Do you recall that?

A Okay. Repeat that.

Q There was a chart Mr. Dubester showed you that listed a number of markers from 2002. Do you recall that chart?

A Yes.

Q And I just want to make clear for the record that the majority of the markers that were listed on that chart were redeemed the very same day that they were executed; is that correct?

A Can you show me the chart again?

Q You know, I don't have it. House counsel is the one putting that up.

You may be able to answer the question just generally. I think you testified before when we went through the chart certain markers were taken out and there was discussion as to how many of those were redeemed on the same day.

A Okay.

Q And is it your understanding that the majority of them were, in fact, redeemed on the same day?

A I wish I could see the chart to know. But, I mean, a lot of time -- I mean, sometime he would redeem markers on the same day that he played, so --

Q Frequently he would do that?

A Yeah. I mean, occasionally. I mean, he gambled a lot, so sometimes he'd repay the markers the same day, a lot of times he'd walk out owing the

casino some money. So it's really kind of hard to say.

SENATOR RISCH: Madam Chairman, would this be a good time to break? We have a meeting we're late for already.

CHAIRMAN MC CASKILL: I am hopeful we can finish this cross. We're scheduled to go until 1:00.

How much more do you have, Counselor?

MR. O'CONNOR: I can be brief. Is it just a few minutes to 1:00?

CHAIRMAN MC CASKILL: It is.

MR. O'CONNOR: May be a few minutes more than 1:00.

CHAIRMAN MC CASKILL: We will adjourn until 2:00.

(Whereupon, at 12:59 p.m., the proceedings were recessed, to be reconvened at 2:00 p.m. this same day.)

AFTERNOON SESSION (2:08 p.m.)

Whereupon,

DE WAYNE G. HORNER

resumed the stand and, having been previously duly sworn, was examined and testified further as follows:

CHAIRMAN MC CASKILL: We will begin by continuing the cross-examination of this witness.

MR. O'CONNOR: Thank you, Madam Chair.

CROSS-EXAMINATION (Continued)

BY MR. O'CONNOR:

Q Mr. Horner, I just have a few quick questions for you. Did you have occasion to meet with the Chapter 13 trustee, Mr. S.J. Beaulieu, who administered the Porteouses's bankruptcy case?

A Yes.

Q When did you meet with him?

A A number of years ago.

Q Would it have been January 2004? Does that sound right?

A I mean, that's probably correct.

Q Who else attended that meeting?

A There was some public integrity folks and another agent. I can't remember who it was. But do you have the 302? If you have --

Q I do. I can show it to you if that would help.

A Yes.

Q If we can go ahead and turn on the projector and pull up what's been marked Porteous Exhibit 1106.

Do you recognize that document?

A Yes.

Q And is that the 302 of your January 2004 meeting with S.J. Beaulieu?

A Yes.

Q Can you tell from that who else attended the meeting?

A Another agent, Pat Boer, a financial analyst, Jerry Fink, and then public integrity attorneys Noah Bookbinder and Dan Petalas.

Q A number of people from the Department of Justice as well as the FBI?

A Yes.

Q What did you discuss in your meeting with Mr. Beaulieu?

A Oh, boy. I mean, I'd have to review the 302. It's been six years since I've seen it.

Q Maybe we can step back. Do you recall where the meeting occurred?

A I think it was at his office.

Q How long did it last?

A Oh, boy.

Q Roughly, was it an hour, two hours, a whole day?

A I'm sure it was more than an hour, and probably around two hours or something like that.

Q Okay. Well, in that meeting, did you describe in detail the various allegations of errors and omissions and misconduct in connection with the Porteous's bankruptcy case that you were investigating?

A What I did was we asked him questions about certain things that Judge Porteous did in his bankruptcy. We didn't describe them as, you know, the terms that you used, okay, because, you know, we weren't going to reach -- I mean, we weren't going to tell him those types of conclusionary -- or interview him with those conclusionary words.

So we just asked him, you know, about the things that Judge Porteous did, and he answered the questions. I mean, we didn't reach the conclusions about, you know, the words that you described in your question.

Q So do you recall now what specific issues

you raised with Mr. Beaulieu?

A Well, I'm sure it was, you know, the amount in the Bank One account, probably the omitted Fidelity account, the false name and probably -- probably, you know, most of the things that I testified about, I'm sure that we asked him about.

Q So effectively everything that the House has asked you about today would have been the issues you would have discussed with Mr. Beaulieu back in 2004?

A I mean, in essence, yes, we'd have talked to him about those.

Q When you met with Mr. Beaulieu, the Porteous' bankruptcy case was still pending, it was still open; is that right?

A That's correct.

Q Now, are you aware that following your meeting with Mr. Beaulieu, he had one of the attorneys that worked for him send you a letter, advising you that he did not take -- intend to take any action in connection with the Porteouses' bankruptcy case as a result of the allegations that you brought to him?

A Okay. You're going to have to repeat that.

Q Sure. Well, do you recall receiving a letter from Mr. Beaulieu following your meeting?

A I recall receiving a letter, but I'm -- I can't remember if it was from Mr. Beaulieu or not.

Q Well, let me go ahead and show you what's been marked as Porteous 1108. Do you recognize this letter? Is that letter addressed to you, Mr. Horner?

A Yes. It's been a long time since I read it.

Q Does that appear to be a letter from one of the attorneys who represented Mr. Beaulieu to you?

A If you can go to the next page. Yes. Yes, it does.

MR. O'CONNOR: Madam Chair, we would like to move Porteous 1108 into the record.

MR. DUBESTER: We object. It's a hearsay document from a third person that Agent Horner happened to receive.

MR. O'CONNOR: It's a letter from Mr. Beaulieu to Mr. Horner. He just testified he received it and recalls it and it specifically discusses the meeting --

CHAIRMAN MC CASKILL: For what purpose is

it being offered?

MR. O'CONNOR: It goes to the fact that the meeting occurred.

CHAIRMAN MC CASKILL: Is it being offered for the truth of what's contained in the letter? Are you impeaching the witness with it? Are you refreshing his recollection?

I think you have the right to certainly use the letter to refresh his recollection about what he learned about this incident. But if you're offering it for the truth of the matters asserted in there, it's a little more problematic.

MR. O'CONNOR: We certainly are using it to refresh his recollection. Mr. Horner testified he recalled receiving the letter but he doesn't recall the contents of it. So yes, we're of course using it for that.

CHAIRMAN MC CASKILL: Why don't you establish a foundation about what's in the letter that you think is relevant, and then we'll offer it again.

BY MR. O'CONNOR:

Q Mr. Horner, this is a letter that you received from an attorney representing Mr. Beaulieu; is that correct?

A That's correct.

Q And this letter describes Mr. Beaulieu's position with regard to the issues you discussed with him when you met with him in 2004; is that correct?

A I'd have to read the letter first.

Q Go ahead and please take a quick read.

CHAIRMAN MC CASKILL: Counsel, is the author of the letter going to be a witness?

MR. O'CONNOR: At this point we believe the author of the letter likely will not be a witness because it was a staff attorney who represented Mr. Beaulieu. But Mr. Beaulieu will be appearing as a witness in this case.

CHAIRMAN MC CASKILL: Who is the letter from?

MR. O'CONNOR: The last name of the attorney who wrote the letter is Mr. Adue, Michael F. Adue.

CHAIRMAN MC CASKILL: From Mr. Beaulieu's law office?

MR. O'CONNOR: Yes.

CHAIRMAN MC CASKILL: I'm going to allow the letter to come in. You're going to have an opportunity to cross-examine the lawyer that this

lawyer worked for, and we're not going by strict hearsay rules in this trial, obviously, on both sides. So I will allow the letter.

(Porteous Exhibit 1108 received.)

MR. O'CONNOR: I appreciate that, Madam Chair.

BY MR. O'CONNOR:

Q Mr. Horner, do you recall that the Department of Justice responded with a letter to Mr. Beaulieu following receipt of this letter?

A I don't recall that.

Q Let me show you what's been marked as Porteous 1109. Would you please take a look at that and tell me if you recognize it?

(Witness reviewed the document.)

A I'm not sure that I've ever received that letter.

Q Mr. Horner, can I direct your attention down to the cc line on the bottom left?

A Okay.

Q Does it say special agent DeWayne Horner, FBI, cc?

A Okay, then I did receive it.

Q Okay. And this letter discusses the Department of Justice, obviously they were aware of

the fact that these conversations had happened and that Mr. Beaulieu had his attorney send a letter to the Department of Justice reciting what his position was with regard to the allegations that you had discussed in your earlier meeting; is that correct?

A Right. I think what Mr. Beaulieu was asking us to provide him was in the interview, as a result of the questions that we were asking him, Mr. Beaulieu, you know, surmised that there were some problems with the bankruptcy, but he wanted us to provide him with evidence that he could use.

And I think the position of the Department of Justice was that, you know, if you learned something through the questions that we ask you, you know, you have to take your own steps, that we can't provide you with evidence and documents and things like that, you have to ask in your own questions, get your own records and take your own course of action.

I think this is what the issue was.

Q And ultimately, Department of Justice sent back the letter, saying that they wouldn't be providing any additional information to Mr. --

A Right. They said, you know, we can't give you any of our evidence. You know, if you think

that he had additional money in his Bank One account or, you know, the bankruptcy was filed under a false name, you know, you have to investigate that yourself, you're the trustee.

MR. O'CONNOR: Okay. Madam Chair, I would like to move this document into the record, this is Porteous Exhibit 1109.

MR. DUBESTER: No objection.

CHAIRMAN MC CASKILL: No objection, it will be received.

(Porteous Exhibit 1109 received.)

BY MR. O'CONNOR:

Q Just have a couple quick questions here at the end, Mr. Horner. With regard to the financial disclosure statements, first, are you familiar with the articles of impeachment against Judge Porteous?

A Yes.

Q And those articles do not allege improprieties in connection with the financial disclosure forms that Judge Porteous filed while a federal judge; is that correct?

A That's correct.

Q There was some testimony earlier with regard to filing proofs of claim. Is it fairly common for creditors to fail to file a proof of

claim in a bankruptcy case?

A You know, as far as I know, I think it is pretty common, where creditors don't file claims for whatever reason, maybe if they don't, you know, feel that there's enough fight over, whatever, they probably won't file a claim.

Q Thank you. With regard to the FICA effect, Mr. Dubester testified that the FICA effect could be as much as a few thousand dollars a month. That's not correct, is it? The FICA effect might be more like a few hundred dollars a month?

A If I remember right, I think in Judge Porteous's case, his monthly salary increased about $800 a month.

Q So certainly not thousands of dollars a month?

A No, not thousands.

Q And the trustee was free to move to amend the plan to attempt to get additional income into the Chapter 13 repayment plan at any time; is that correct?

A That's correct.

Q And he didn't do that?

A No, he did not.

Q The last question I have for you is with

regard to the Beau Rivage markers. Do you know whether the redemption of the Beau Rivage markers in April of 2001, using exempt assets from Judge Porteous's IRA account, is improper under bankruptcy law?

A Okay. Rephrase that question.

Q Sure. You testified earlier that there were some markers at the Beau Rivage that Judge Porteous redeemed in April 2001 using some money from his IRA account?

A That's correct.

Q Do you know whether the redemption of those markers using funds from his IRA account is improper under bankruptcy law?

A I don't know that. I don't know one way or the other.

MR. O'CONNOR: Thank you, Mr. Horner.

We have no further questions at this time.

REDIRECT EXAMINATION

BY MR. DUBESTER:

Q Okay. Agent Horner. Putting aside the lawfulness of what funds were used to repay the markers, as far as that -- as far as Judge Porteous's repayment of his debt to the Beau Rivage by running a check -- by running an IRA check

through Ms. Danos's account, would it be true that if anybody looked at any of Judge Porteous's Fidelity account or his Bank One account, no one would ever see that he had taken out credit within just a few days of filing for bankruptcy?

MR. TURLEY: I'm sorry, was that a question? Because it seemed like he was -- counsel again was testifying.

CHAIRMAN MC CASKILL: What's your objection?

MR. TURLEY: That's testimony. He's not asking a question.

CHAIRMAN MC CASKILL: Rephrase the question.

BY MR. DUBESTER:

Q As to the repayment of the markers at the Beau Rivage, did that go through either Judge Porteous's personal Bank One checking account or his Fidelity account?

A No.

Q Okay. Now, you have been used as a sounding board probably by both counsel a little bit to have documents presented in front of you. The defense counsel has asked you about some very specific documents. I'd like to just show you some

other portions of those same documents.

First, I'd like -- you were asked about a definition of a marker which shows up in the dissent of the 5th Circuit opinion.

I'd like to show you the majority opinion on this very topic and ask you to identify what is stated in that document.

Showing you now what is marked as House Porteous Exhibit 5, which is the majority opinion in the 5th Circuit opinion regarding Judge Porteous.

Do you see that in front of you?

A I do.

MR. DUBESTER: We move the -- we move that House Exhibit 5 into evidence.

MR. TURLEY: No objection.

(House Exhibit 5 received.)

BY MR. DUBESTER:

Q I'd like to draw your attention to page 18 of that opinion, and going into page 19 in the section which starts "impermissible debt" and ask you to start reading where it isn't highlighted, "B_impermissible debt."

A It says, "Porteous was explicitly warned by the Chapter 13 trustee, S.J. Beaulieu, his own attorney and Judge Greendyke that he could not incur

debt while in bankruptcy. Examples of incurring debt would include credit cards, including credit cards not disclosed to the trustee, and taking out gambling markers. A gambling marker is a form of credit."

Q Okay. And there's a reference to a footnote 10. I'd just ask you to read footnote 10 out loud.

A Footnote 10. "A gambling marker is a form of credit extended by a gambling establishment, such as a casino, that enables a customer to borrow money from the casino. The marker acts as the customer's check or draft, to be drawn upon the customer's account at a financial institution, should the customer not repay his or her debt to the casino.

"The marker authorizes the casino to present to the bank for negotiation and draw upon the customer's bank account any unpaid balance after a fixed period of time.

"Porteous testified that this definition of a marker was accurate."

Q And then there's a cite to his 5th Circuit testimony; is that correct?

A That's correct.

Q Okay. So now let's go to that 5th Circuit

testimony. I'd like to show you a portion of Exhibit 10, Judge Porteous's 5th Circuit testimony, starting on page 64, line 13, and ask -- I'll read it to you, and ask if I'm accurately reading it.

Before I do that, were you present at that hearing?

A Yes.

Q Did you hear the examination of Judge Porteous at that hearing?

A Yes.

Q Okay. Starting at line 13, Judge Porteous is asked the following:

"Question: Would it be fair to state that 'a marker is a form of credit extended by a gambling establishment, such as a casino, that enables the customer to borrow from the casino? The marker acts as the customer's check or draft to be drawn upon the customer's account at a financial institution, should the customer not repay his or her debt to the casino, the marker authorizes the casino to present it to the financial institution or bank for negotiation and draw upon the customer's bank account any unpaid balance after a fixed period of time.' Is that accurate?

"Answer: I believe that's correct and

probably was contained in the complaint or -- or the second complaint. There's a definition contained.

"Question: And you have no quarrel with this definition?

"Answer: No, sir."

Did I accurately read the transcript?

A Yes.

Q And were you there or was that the testimony which was given?

A Yes.

Q And according to that testimony, had Judge Porteous been given that definition even in advance of the 5th Circuit hearing?

A Yes.

Q Okay. Now, you've also been read by Judge Porteous's lawyers a portion of the Department of Justice's complaint letter to the 5th Circuit. Do you recall being asked about that document in your cross-examination?

A Yes.

Q And you were read a paragraph -- this document is in evidence. You were -- recall being read the second paragraph on the cover page?

A Yes.

Q I'd like to start by reading other

materials from that letter, starting at the very bottom of that first page with the words "the department."

Just read along as I read. "The department also gave careful consideration, as it must, to the availability of alternative remedies for Judge Porteous's history of misconduct while on the bench, including impeachment and judicial sanctions administered pursuant to 28 USC sections 351 to 64.

"Despite the department's decision not to charge Judge Porteous with violations of federal criminal law, the investigation has uncovered evidence of pervasive misconduct committed by Judge Porteous.

"The department also is aware that Judge Porteous and his medical examiners have concluded that he is mentally and psychologically unfit to serve as a federal judge and that his incompetence is permanent.

"Collectively the evidence indicates that Judge Porteous may have violated federal and state criminal laws, controlling canons of judicial ethics, rules of professional responsibility and conducted himself in a manner antithetical to the

constitutional standard of good behavior required of all federal judges.

"Further, it has come to the department's attention that Judge Porteous is scheduled to return to the federal bench in June 2007, at which time he may seek to preside over matters involving the department. The department accordingly refers this evidence to your Honor for possible disciplinary proceedings and, if warranted, certification of the allegations to Congress for impeachment."

Did I read that correctly?

A Yes.

Q And just one final excerpt, Senators. I'd like to go to page 22 of that document, "Conclusion," and ask if this is what the department also wrote in its letter to Chief Judge Jones.

"Conclusion. As noted earlier, issues of statute of limitations, the materiality of the alleged false statements, the government's twin burdens of proof and unanimity at trial and the availability of alternative remedies persuaded the department that criminal prosecution was not warranted. The results of the FBI's investigation into allegations of misconduct concerning Judge Porteous, however, raise serious doubts about his

suitability for office under the constitutional standard of good behavior on which that service is contingent.

"The instances of Judge Porteous's dishonesty in his own sworn statements and court filings, his decade long course of conduct in soliciting and accepting a stream of payments and gifts from litigants and lawyers with matters before him and his repeated failures to disclose those dealings to interested persons and the Court all render him unfit as an Article III judge.

"Based on the evidence of pervasive misconduct described herein, the department respectively submits this complaint for any further action your Honor may deem warranted."

Did I read that correctly?

A Yes.

MR. DUBESTER: I have no further questions of this witness.

MR. TURLEY: Madam Chair, we just have a very brief recross.

RECROSS-EXAMINATION

BY MR. O'CONNOR:

Q Mr. Horner, I just have one question for you. Isn't it true that reasonable minds, including

federal judges in the 5th Circuit, disagree with regard to whether markers constitute checks or debt?

MR. DUBESTER: I object.

CHAIRMAN MC CASKILL: Basis for your objection?

MR. DUBESTER: This calls for a question that this witness cannot answer.

MR. O'CONNOR: I believe this witness can specifically answer this now that he's seen both the majority and dissenting opinions in connection with Judge Porteous's appearance before the 5th Circuit.

CHAIRMAN MC CASKILL: I think you're asking him to comment on the evidence that's been admitted into the record. Are you establishing him as an expert witness in the area of bankruptcy?

MR. O'CONNOR: I am not.

CHAIRMAN MC CASKILL: Creditor/debtor law?

MR. O'CONNOR: I'm simply asking the witness whether he is aware that there are differing positions among jurists, especially in the 5th Circuit, the issue as to markers --

CHAIRMAN MC CASKILL: I'm going to sustain the objection. You have an expert witness coming on bankruptcy?

MR. O'CONNOR: We do. We'll withdraw the

question.

CHAIRMAN MC CASKILL: You have a great opportunity for cross-examination on that issue with that, Counselor.

MR. O'CONNOR: We'll withdraw the question.

CHAIRMAN MC CASKILL: Thank you.

Any questions of the witness by the panel?

Yes, Senator?

EXAMINATION

BY SENATOR RISCH:

Q Briefly. Mr. Horner, I don't have the document in front of me, but you had testified regarding the box that the judge X'd on the bankruptcy, which said that he hadn't had any losses, I think, from fire or a number of things that ended with gambling.

A Right.

Q Do you recall that testimony?

A Yes.

Q And counsel for the defense got up and went through that it was possible that his net over the year could have been a win as opposed to a loss, since you only looked at the records that they kept.

Is that a fair characterization of the

cross-examination?

A Yes.

Q You know, it seems to me, as I read that, that there's good reasons why that question is asked on the bankruptcy form, and it seems to me that they don't ask about a net gain or loss, it just says have they had losses.

So if he won and he lost, regardless of what the net result is, the answer to that question should have been yes. Is that a fair statement?

A Yes, because I think the specific question asks for gross gaming losses or words to that effect.

SENATOR RISCH: Thank you, Madam Chair.

EXAMINATION

BY SENATOR BARRASSO:

Q Agent Horner, if I could, you testified that Judge Porteous filed his March 28, 2001 bankruptcy under a false name; is that correct?

A That's correct.

Q So I believe that the documents related to that bankruptcy was filed by, was it G.T. Ortous, O-r-t-o-u-s, and C.A. Ortous? Is that correct?

A That's correct.

Q Okay. And is it your understanding that

Judge Porteous signed his bankruptcy filing under penalty of perjury as G.T. Ortous?

A Well, I think, you know, the signature is not his typical signature. So I think he was trying to, you know, sign it in such a fashion that you probably couldn't read Gabriel Porteous.

Q In your view of other Judge Porteous's financial records, did you ever see that name, G.T. Ortous, on any other of those documents?

A No.

SENATOR BARRASSO: Thank you.

Thank you, Madam Chairman.

CHAIRMAN MC CASKILL: Any other questions from the other Senators?

The witness can be excused.

Thank you, sir, for your cooperation.

THE WITNESS: Thank you.

(Witness excused.)

CHAIRMAN MC CASKILL: We are going to now adjourn to our committee room for a closed session for a vote, and then we will come back and hopefully by the time we come back, in about 15 minutes, the Congressmen -- could anybody tell us whether the votes have begun in the House? They have? Okay.

MR. DAMELIN: Madam Chair, I have an

e-mail from Mr. Schiff's assistant and he indicates, just a rough estimate, that they hope to be back between 2:50 and 3:00.

CHAIRMAN MC CASKILL: 2:50 and 3:00. Okay. So that we can give you all time to work on things and consult with witnesses, we will not reconvene in the hearing until 3:00, but the committee needs to come back to the -- I don't want to say chambers, the committee room behind the committee room for a closed session.

(Closed session follows.)

OPEN SESSION CONTINUED

CHAIRMAN MC CASKILL: We will reconvene now, because I can see our colleagues have returned from their votes.

Before we begin the next witness, there are a number of us that probably would have participated in the wreath ceremony they're having on the Capitol steps right now in remembrance of the victims of 9/11. And so if you all would indulge us, because we feel that taking the time to go over there would be disruptive to all of you, so if we would all pause for a moment of silence to give honor to all of the families and the loved ones and friends of those who lost their lives on that day.

(Moment of silence.)

CHAIRMAN MC CASKILL: Thank you very much.

The House may call its next witness.

MR. SCHIFF: A quick issue with the chair before we proceed. The witnesses have been sequestered. Now that Agent Horner has testified, he's not on the defense list, it would be helpful to the House to have the agent remain so we can consult with him, because no one has a longer institutional case than the agent. If that would be appropriate to the chair.

MR. TURLEY: We have no objection.

CHAIRMAN MC CASKILL: That would be fine.

MR. SCHIFF: Thank you, Madam Chair.

CHAIRMAN MC CASKILL: Thank you for asking.

MR. SCHIFF: The House calls Claude Lightfoot.

CHAIRMAN MC CASKILL: The House now has nine hours and 57 minutes remaining in their case, and Judge Porteous has 12 hours and 24 minutes remaining in their case.

Whereupon,

CLAUDE C. LIGHTFOOT, JR.

was called as a witness and, having first been duly sworn, was examined and testified as follows:

CHAIRMAN MC CASKILL: You may sit down, thank you.

THE WITNESS: Thank you.

CHAIRMAN MC CASKILL: Counsel, you may proceed.

MR. GOODLATTE: Thank you, Madam Chairman.

DIRECT EXAMINATION

BY MR. GOODLATTE:

Q Would you please state your full name for the record.

A Claude C. Lightfoot, Jr.

Q Where did you go to school?

A Went to Loyola University undergraduate and University of New Mexico, master's in English. I studied at Tulane toward a PhD in English, then -- I was an English teacher, and I went to law school in mid -- early to mid-'80s.

Q Prior to your becoming an attorney, you taught English?

A Yes, sir, that's correct.

Q And how long have you been in the practice of law?

A Since 1987, I believe.

Q What is your area of practice?

A Since about 1990, it's been almost exclusively bankruptcy.

Q This is in the city of New Orleans?

A Yes, sir.

Q And are you with a firm?

A I had a partner until '95, but I've been on my own since then.

Q Was Judge Porteous a client of yours?

A He was.

Q When did he contact you?

A It would have been the summer of 2000.

Q Why did he retain you?

A Initially, it was to attempt a workout with various credit card creditors, to avoid a bankruptcy to see if we could find a way to borrow money against his house to fund a payment that all of those creditors would accept.

Q And can you explain what you do as a part of that process?

A Well, the way I went about that is --

Q What's that called, first of all?

A A workout outside a bankruptcy. I guess they might have other terms, but it was a proposal to partially pay the debts and to achieve satisfaction of those debts through offering -- offering what the creditors would have gotten, had there been a bankruptcy. So for me to commence on that endeavor, I would solicit and get all of the debt and asset information, just as though I were preparing for the bankruptcy in this case, my analysis would have been had it been a Chapter 7 bankruptcy, I wanted to know exactly what creditors could have expected in a Chapter 7 bankruptcy from the assets that were available.

Q Did you know Judge Porteous before you undertook the representation?

A No, sir.

Q Did you know of his background? Did you know of him?

A I knew that he was a judge, and some maybe 15 years ago I had an appeal that was allotted -- a bankruptcy appeal allotted to Judge Porteous. But the -- I was the appellee. Appellant dismissed the appeal so it never did come to fruition, I never did meet the judge at that time.

Q This was a bankruptcy case?

A This was a bankruptcy case, probably 10 years before, maybe in 1990, early '90s.

Q I think it's already established in the record, Judge Porteous did not become a federal judge until 1994, so it would have been sometime after that?

A Sometime after that.

Q All right. And how did you go about trying to achieve the workout that you just discussed?

A Well, I gave the judge a set of worksheets to gather all of the information on all of the debts and all of the assets. I probably got a check stub at that time and to see what the income was, and then I analyzed the -- I think we next got a fresh

valuation on his home.

The two vehicles that he had were leased, so they didn't really come into play since they were not owned. And I analyzed what would come to creditors if this were a Chapter 7 case. And then I made a -- a letter with a proposal to all of these unsecured credit card creditors, showing them what they would get and asking if they would accept a global settlement where each would receive a pro rata share of money that would have been borrowed against the house.

In other words, it would have been funded by an additional mortgage against the judge's house.

Q What kind of information do you call for in order to accomplish that from the debtor?

A I had to get everything as though I was going to do a bankruptcy case at that moment. Because in order to do the analysis, I had to have everything that existed about assets and debts so that I could complete the analysis to make that proposal.

Q And did Judge Porteous fill out the worksheets?

A He did.

Q And did the worksheets indicate any

indebtedness to any casinos?

A No.

Q If there were debts owed to casinos, should that have appeared on the worksheets?

A I would have expected all debts, regardless of who -- even if it was to someone's mother-in-law, I'm looking for all of the debts, whether it be a gambling debt or any kind of debt.

Q Was the effort of the workout successful?

A It wasn't.

Q Was a decision made to file for bankruptcy?

A Ultimately, when we got no response to the workout offers, that I had been following up, this is a period of some months I had been pursuing by telephone the large packages to each creditor I sent out. And it's very difficult to get anyone on the phone, couldn't get any answers, certainly couldn't get the lion's share of the creditors accepting any proposal at all.

And so ultimately, then, we had to consider the Chapter 13 bankruptcy.

Q And when was this?

A This would have been, I believe it was, March of 2001.

Q And were papers prepared to file for bankruptcy at that time?

A They were.

Q Who provided the information that went on the schedules that had to be filed?

A Went back to the worksheets that I had collected from the judge. And he would update that with various invoices that he would receive from time to time that would bring -- bring the amounts due on the various debts current.

Q Did you ask him if all the information was up to date?

A Well, he -- it was a regular thing where he would -- he would give them -- give me that information. So I didn't even need to ask. I just kept them up to date as we went along.

Q And did you go over these schedules and other documents related to the bankruptcy filing with Judge Porteous?

A I did.

Q And did Judge Porteous tell you at that time that he had debts whereby he owed money to casinos?

A No.

Q And did he ever tell you that he gambled

or had any gambling debts?

A No, sir.

Q The record shows that the original bankruptcy petition was filed on March 28. Did Judge Porteous tell you that he owed $2000 to the Grand Casino Gulfport on that day?

A No.

Q Was that a debt that should have been disclosed to you so it could appear on his bankruptcy schedules?

A I'm trying to collect all debts, so all debts of any nature I would have listed, had I known about them, yes.

Q So your answer is yes?

A Yes. Yes, sir.

Q In your experience, is a marker evidence of credit extended by a gambling establishment, such as a casino, so a customer can borrow from the casino?

A I've had a little experience with markers, because I started this practice before we had gambling in Louisiana. And then after the gambling came, I had occasion to have to look at markers.

And a marker, to me, they look just like a check. And as I had researched it in the past, I

found that it was -- the big fight was whether or not it was a check. But it certainly was a debt in my -- and it is a debt in my opinion. It's a promise to pay.

Q If you had known about the marker, would you have listed it on the bankruptcy schedules?

A Certainly.

Q The attorney for Judge Porteous raised the point with the previous witness that Judge Porteous might have had gambling winnings. If Judge Porteous had gambling winnings, should he have reported this to you?

A It would depend on at what point -- if they were winnings --

Q Prior to the filing of the bankruptcy.

A If they were prior to the bankruptcy and the winnings were in cash or in a bank account, then when I would list that particular asset, that's where I would list those holdings or whatever form they might be in.

Q Let me call up Exhibit Number 125 and ask if you could identify -- can you see that on the screen next to you?

A I can see it.

Q What is that?

A That's the initial petition for Chapter 13 that was filed.

Q And how was this prepared?

A I prepared it, on a computer.

Q And did Judge Porteous review it?

A He did.

Q Now, turning to page 2 of the petition, is that Judge Porteous's signature?

A Yes, sir.

Q Did he sign that under penalty of perjury?

A That's what the language above the signature says.

Q So this is his signature and not yours?

A That's correct.

Q What was the name of the debtor on that original petition?

A G.T. Ortous.

Q And you can see that right there too?

A I do.

Q Is that a false name?

A It is.

Q How did it come about that the petition was filed with a false name?

A I've accepted responsibility for that very stupid idea. The intention was to correct the name,

which was done, after the filing of these initial documents. My concern was at that time the names of all the people who filed bankruptcy used to be published in the news -- the local newspaper at that time.

And I think it was compassion for the judge, wanting to help him avoid embarrassment, frustration with getting absolutely no response from the creditors that I was honestly trying to work out a good workout with, and just plain stupidity, thinking that somehow all of this wouldn't come to light, that I could keep him from having a splash in the newspaper.

So the intent was to avoid embarrassment but to immediately fix it so that all the creditors would be properly notified.

Q Have you ever advised any other client to do that?

A No, sir.

Q And what was Judge Porteous's response to your idea?

A Well, we didn't -- we didn't have a very long discussion about it. I came up with the idea, I told him about it, and it was decided to go in that direction.

Q He agreed to it?

A He agreed to it. I can't say we had much discussion about it, though.

Q Did he say I can't do that?

A No.

Q Did he say I'm a United States District Court judge that hears bankruptcy court appeals and I can't be engaged in committing fraud in a bankruptcy proceeding?

A No.

Q Did he say I'm signing under penalty of perjury or protest in any other way?

A No.

Q Did he understand he was signing under penalty of perjury?

A I think so.

Q Does the penalty of perjury consequences apply only to statements on the bankruptcy form that would have materially affected the outcome of the bankruptcy or to all of the statements on the form?

A Well, the document is signed at various places, and I believe almost all of it is subject to penalty of perjury.

Q Do you know of any statement on the form that's not subject to the penalty of perjury?

A I don't -- I don't think -- there may be some miscellaneous documents that go along with it that might not have that language repeated on the form. But these are official forms, and I think that all the significant parts of it carry --

Q All the schedules, all the listing of assets, that's all signed under penalty of perjury?

A Correct.

Q The form also shows a P.O. Box as the street address, you can see that.

A I do.

Q Whose idea was that?

A That, again, is out of the same effort to avoid embarrassment, was my misguided idea.

Q Did you go out and get the post office box?

A I didn't.

Q Who did?

A I don't know. It was provided to me.

Q Who provided it to you?

A The judge gave me the -- the number.

Q Was the bankruptcy petition amended at some point?

A It was. As soon as -- as soon as the paper had come out and it was immediately amended,

both the petition and then the statement of the schedules and the Chapter 13 plan were also filed all at the same time.

Q Now I'd like to call up Exhibit 126 and ask if you recognize this document.

A I do.

Q What is that?

A That's the amended voluntary petition.

Q And when was it filed?

A It was filed some days later, nine days, eight days, 12 days, I'm not sure.

Q I think you can see the date right there.

A April 9, '01 it was signed. I presume it was filed.

Q So it was filed 12 days after the original petition. Does this amended petition have Judge Porteous's true name and address on it?

A It does.

Q What other documents were filed on April 9?

A The Chapter 13 schedules and the Chapter 13 plan.

Q And they had not previously been filed?

A No, they're not due until 15 days -- they can be filed initially, but they're not due until 15

days after the petition.

Q Let me call up Exhibit 127. Do you recognize these documents?

A I do.

Q And what are they?

A These are the Chapter 13 schedules and plan.

Q And where did you get the information to fill out the bankruptcy schedules and the statement of financial affairs?

A Same place as where I started, with those initial worksheets, and then all of the invoices and materials that I got month by month during that period where I was attempting the workout.

Q Who did you receive that information from?

A From the judge.

Q And he gave the information -- to what extent did you rely on Judge Porteous to give you the information?

A Entirely.

Q Did you review the schedules and statement of financial affairs with him before they were filed?

A We did.

Q Did you go over it with him at length?

A Oh, yes, sir.

Q Explain how you do that.

A Well, at least -- at least at the beginning, just explaining how to fill out worksheets, what happens in Chapter 13, how does it work. I made sure --

Q But once you have the entire --

A Draft after draft --

Q -- petitions and statements and schedules prepared, did you then go over all of that with him?

A Yes, sir.

Q Page by page?

A Yes, sir.

Q And how many times did you review it with him?

A At least two drafts we went through, if not more.

Q Were these bankruptcy schedules signed by Judge Porteous?

A They were.

Q Were they signed under penalty of perjury?

A They are.

Q Did Judge Porteous also sign his statement of financial affairs?

A Yes, sir.

Q Was that signed under penalty of perjury?

A It is.

Q And let's turn to bankruptcy schedule B, question 17. What information does it ask for?

A Other liquidated debts owing to the debtor, including tax refunds.

Q Now I'd ask to call up Exhibit 141. Did Judge Porteous ever tell you that on March 23, 2001, just five days before his original petition was filed, that he filed his year 2000 tax returns and claimed a refund of $4143?

A No, I don't remember him telling me that.

Q Did Judge Porteous ever tell you that on April 13, 2001, just four days after he filed his bankruptcy schedules, that he received the $4143 tax refund and deposited it in his bank account?

A No.

Q Is this information about the tax refund something that should have been disclosed on the bankruptcy schedule?

A If it were liquidated, to me that means if it were filed and you knew exactly what your tax refund was, as opposed to somebody filing in November who doesn't know what their --

Q If he filed the return five days before

you filed --

A The return was filed, the amount was liquidated, it should have been listed.

Q And on the tax return it shows the amount of refund that's due to him, he knows the exact amount. Should he have disclosed that to you?

A Yes.

Q What if after you filed his schedules, you'd found out that he'd filed for a tax refund in a liquidated account? What would you have then done?

A Well, at that time, in Chapter 13 in the Eastern District of Louisiana, the tax refunds were not something normally taken for the duration of a plan -- a plan of repayment like this, by the trustee.

So had I learned that it was liquidated and should have been listed, then I would have amended to list it.

But as far as future years --

Q But that year. That year.

A That year it should have been listed.

Q And let's look at bankruptcy schedule I. What does it contain?

A This is the income.

Q And what is the dollar amount listed for Judge Porteous?

A It's $7531.52.

Q Where did that number come from?

A That came from the check stub I probably got at the beginning of the process.

Q And did Judge Porteous ever give you a more current pay stub?

A No, I don't believe so. This was the one I used.

Q And did he ever tell you that in 2001, prior to the filing of the bankruptcy, his net pay increased to $7705 per month?

A No, I didn't know.

Q Was it relevant for you to know his salary increased in 2001 when he filed for bankruptcy?

A I would have used the most current stub. Frankly, in this case, I didn't think of it because I thought it probably didn't change, it was going to be the same as it had been, you know, some months before.

Q Judge Porteous reviewed page by page all of the petition, statement and schedules with you?

A Yes. Yes.

Q And he could have told you, could he not?

A He could have, yeah.

Q Turning -- let me show you -- let's return to Exhibit 127. Turning to Judge Porteous's statement of financial affairs, what does question 3 ask for?

A Question 3 is about preferences that are -- or potential preferences, I should say. That's payments made on -- to creditors that exceed $600 within 90 days of the bankruptcy filing.

Q And what was the response to question 3?

A Normal installments.

Q And why normal installments?

A Well, during the workout period, the judge had been -- while we were attempting to get the attention of the credit card companies for the workout proposal, the judge had been continuing to service these credit card debts. And we talked about not making any new debt, and we reached a point where we weren't getting any -- any feedback whatsoever, no contact whatsoever from these credit card companies. So it looked like it was going to have to be Chapter 13.

So at a certain point, we said, well, maybe if you just stop paying them, we can get their attention before we have to decide on Chapter 13.

And I really -- other than payments on the two car leases and the two home loans, that's what was intended with normal installments. And those were the normal contractual installments.

Q Did Judge Porteous --

A I was aware of no other payments on the other unsecured debts because we had decided not to pay them.

Q Did Judge Porteous tell you that he gambled at the Treasure Chest Casino on March 2, 2001?

A No, sir.

Q That he left the casino that day owing $1500 and that he paid the casino in full in cash on the day before his original bankruptcy petition was filed?

A No.

Q That date he paid that was March 27, 2001; the petition was filed March 28.

Was that information called for on the schedules you reviewed with him?

A It would have been if it was a repayment of a debt within 90 days more than 600. It should have been on there.

Q If you had known about it, would you have

put that payment to the casino on the schedule?

A I would have.

Q Returning to Exhibit 127, let's look at question 8 on the statement of financial affairs. What information is being requested there?

A This is losses from -- from fires, thefts, casualties or gambling within the one year prior to the case.

Q That's a specific question on the questionnaire and encompasses losses due to gambling?

A It does.

Q What was the response?

A None.

Q Had Judge Porteous told you about any gambling losses?

A I didn't know that Judge Porteous gambled. I don't gamble, and I didn't know that he gambled. So I knew nothing of gambling at any time.

Q Was it important for you to have information about gambling losses?

A If it answered this question and I knew that there was a quantified amount, I would have put that answer on the --

Q And why is it important to have that

information?

A Well, I don't know why that particular question is in there. I guess it prompts many other questions for a trustee to ask in the examination of the case.

Q Would it be important for some creditors to know that information?

A I guess if you were a creditor that was owed a gambling debt, it would be important to know that it was included. But it should have been included as a debt as well.

Q Was there a bankruptcy creditors meeting held in this case?

A There was.

Q When was that?

A It would have been about a month after the filing of the -- of the plan and the schedules, which was April. So I presume it was in May, sometime in May of 2001.

Q And who -- who presided over that?

A There's a standing Chapter 13 trustee, a Mr. S.J. Beaulieu, Jr.

Q And what's the purpose of that meeting?

A Creditors are invited to ask questions. The trustee reviews the schedules and the plan with

the debtor under oath, and it gets to a point where he understands how he will be distributing the moneys paid through him to the creditors under this plan, the Chapter 13 plan.

And ultimately, if the trustee is satisfied, he must make a recommendation to the bankruptcy court at a later hearing about whether the plan should be confirmed.

Q And was Judge Porteous examined under oath at that hearing?

A He was. The debtors are sworn in.

Q Let me call up the transcript of the hearing, which is Exhibit 130. Did the trustee give Judge Porteous any instructions about incurring debt?

A He normally at all the meetings, and you've got to -- this is going back a decade for me, but I have been to many, many thousands of them. And he generally makes a statement, whether it be to each particular debtor or to a group, they are done a number of them at a time, usually six cases are called for a given period of time, is a statement you're not to incur new debts without court authority during the bankruptcy.

Q And let me call up Exhibit 148 and ask if

you recognize this.

A This is the trustee's brochure, which is given to the debtors.

Q He gives that, by your experience, he gives that to every debtor?

A He mails it to the debtors with their note -- at this time the trustee was doing the noticing of the meeting of creditors' hearings. And when he would send out that notice, he would include that pamphlet. And he would always have a stack of pamphlets at his desk when the hearings would transpire in case somebody lost theirs or wanted another one.

So one way or the other, the debtors get that pamphlet.

Q What does paragraph 6 say in that brochure?

A "You may not borrow money or buy anything on credit while on Chapter 13 without permission from the bankruptcy court. This includes the use of credit cards or charge accounts of any kind. If you or a family member you support buys something on credit without court approval, the court could order the goods returned."

Q And what's the purpose of that

requirement?

A Well, when you have a budget and you're on a plan to repay and you start creating more debt, at a certain point, that budget is not going to work anymore. And I think it's to preserve the viability of the plan, and to have the court exercise some control over the finances of the debtor during the time of the plan.

Q Did Judge Porteous ever advise you that during the month after he attended the creditors meeting, he went on several gambling trips and got credit to gamble amounting to $2000?

A No.

Q Who was the bankruptcy judge who presided over Judge Porteous's case?

A Judge Greendyke.

Q And where was he sitting?

A He was in Houston.

Q And why did a judge on the Texas court preside over Judge Porteous's case?

A Well, the 5th Circuit had issued an order recusing the judges in -- I can't forget if it was Texas and -- it wouldn't have been Texas because he was from Texas, but maybe Mississippi and Louisiana. And obviously appeals from bankruptcy courts go to

district courts first, before the 5th Circuit.

Q So all of the bankruptcy judges in the state of Louisiana recused themselves from hearing Judge Porteous's case?

A I don't know if they did it, but I know that the 5th Circuit recused them and assigned the case to Judge Greendyke.

Q Did Judge Greendyke issue a confirmation order in Judge Porteous's case?

A He did.

Q Let me call up Exhibit 133 and ask if you can identify that.

A That's the order.

Q That's Judge Greendyke's --

A This is Judge Greendyke's -- it's the only confirmation order in this case, and it's from Judge Greendyke.

Q Directing your attention to paragraph 4, what does it provide?

A It says that "the debtor shall not incur additional debt during the term of this plan except upon written approval of the trustee. Failure to obtain such approval may cause the claim for such debt to be unallowable and not dischargeable."

Q Did Judge Porteous receive a copy of this

order?

A Yes.

Q Did he appear to understand its requirement?

A I believe so.

Q Let me call up Exhibit 339. Do you recognize this?

A I do. It's a letter from me to the Chapter 13 trustee about refinancing the judge's home.

Q How did that letter come about?

A Well, the -- an opportunity. And this one I'm not as good in my memory on this as the car leases, where you'll be going next.

But there was an opportunity or necessity to refinance one of the mortgages on the judge's home.

Q And so did -- did the judge contact you about this?

A He did. And I went back to the confirmation order, because this is a little different than our normal order. In the Eastern District of Louisiana, we required a motion and a hearing before the court for these things.

And as you can see, Judge Greendyke said

it was upon written approval of the trustee. So it was a little less formal.

So I went back to the confirmation order and looked at that. And I would have asked Judge Porteous for the details on the refinancing, and I would have sent that to the trustee and asked for this written authority to -- to do the refinance. And that's from whence this letter came.

Q Let me call up Exhibit 340 and ask if you recognize that.

A This is the letter that I got about the two car leases, which had, during the time of the Chapter 13 plan, come to their contractual end. So it was necessary to get a new lease car.

Q Who brought that to your attention that you needed --

A Judge Porteous told me about this, and then I went and got the -- got the detail. I'm sure I got the details from him on the new contract. And I would be looking to see that it was budget-neutral, that the price of the cars, the monthly payment was about the same, so the budget would work, and sent that along to the trustee. And then I would have received this letter pursuant to Judge Greendyke's order, the written approval.

Q So Judge Porteous knew in both of these instances that he needed to contact you to get approval for these changed obligations?

A He did.

Q So presumably, he knew to tell you about his gambling losses?

A No. Did you say presumably he didn't tell you about his gambling losses?

Q Well, if he knew that this was the process, if he had other debt, should he have followed that process as well?

A Any creation of debt. Now, I know you could have someone that has to go to the emergency room, I suppose there's some involuntary debt. But anything of a voluntary nature, I would expect to hear about so I could go get court authority for.

Q Did Judge Porteous ever tell you that he gambled on credit from casinos after the confirmation order?

A No.

Q Would it have been a surprise to you that he took 14 gambling trips and signed 42 markers during the year after his confirmation?

A I didn't know about it, so it's a surprise.

Q Never told you anything about any of that?

A No, sir.

Q Would those actions have constituted a violation of the bankruptcy judge's order?

A Well, it would be contrary to the confirmation order, incurring new debt without the trustee's written approval would be a violation.

Q And as spelled out in the order, as spelled out in the brochure from the bankruptcy trustee, as spelled out by what the bankruptcy trustee says at his hearings?

A Yes, sir.

MR. GOODLATTE: Those are all the questions I have, Madam Chairman.

CHAIRMAN MC CASKILL: Is there cross-examination of this witness?

MR. TURLEY: Yes, Madam Chair.

CROSS-EXAMINATION

BY MR. O'CONNOR:

Q Good afternoon, Mr. Lightfoot.

A Good afternoon.

Q My name is Dan O'Connor, and I'm one of the attorneys representing Judge Porteous.

It's nice to finally be able to speak with you.

Now, some of the questions that I had for you actually have already been covered so hopefully it will move a little quicker through this.

You said that the Porteouses retained you as their lawyers in the summer of 2000; is that correct?

A Yes, sir.

Q And when they retained you, you'd never met either Judge Porteous or his wife Carmella before; is that correct?

A No, don't believe so.

Q And when they retained you, you said you'd been practicing bankruptcy law almost exclusively for about 10 years. Is that your testimony?

A That would be about right.

Q And they were looking to get your help with a workout in an attempt to restructure their debt; is that correct?

A Correct.

Q And the reason that they wanted to work out their debt was specifically because they were hoping to avoid filing for bankruptcy; is that right?

A Absolutely.

Q And why was it that the Porteouses wanted

to avoid filing for bankruptcy? Were they hoping to avoid the embarrassment of having to seek bankruptcy protection?

A I think so.

Q And did you know that Judge Porteous's late wife, Carmella, was particularly embarrassed about the possibility of having to seek bankruptcy protection?

A When I met with her, I could tell that she was distraught over the -- over the situation that they were in.

Q And she particularly was very distraught by it?

A Very emotional and, you know, that's sort of typical in the work that I do.

Q Sure. Were you also aware that the Porteouses were very concerned about the embarrassment that would be visited upon their four children if they were to file bankruptcy protection?

A I wasn't told as much, but I'm sure that would have embarrassed them, sure.

Q And did either Judge Porteous or his wife have any familiarity with or knowledge about the bankruptcy practice or bankruptcy law?

A I didn't presume that there would be any

knowledge. Even though -- even though Judge Porteous probably had heard bankruptcy appeals before -- none involving me because the one that I had was dismissed, but I wouldn't presume that somebody that doesn't work in that area every day really has total command over it.

And so I made sure -- and, of course, Mrs. Porteous wouldn't probably know much about it.

And so I made sure that I treated them like I would any other unsophisticated client that came in in that sense.

Q Sure, and I appreciate that. And so just so I'm clear, there's been the allegation that because Judge Porteous was a federal judge, of course he would have extensive knowledge about bankruptcy practice. But it's your understanding that many federal district courts don't, and when you met with Judge Porteous, it wasn't your sense that he, in fact, had a strong command of bankruptcy process; is that correct?

A That's true, particularly with Chapter 13, because many, many lawyers work in high-dollar Chapter 11 cases, and they know next to nothing about Chapter 13 either. And they're bankruptcy lawyers.

Q And so would it be fair to say that they looked to you and relied on your advice with regard to the bankruptcy practice and the bankruptcy procedures in their bankruptcy case?

A In the way I explained how it worked and what we needed to do and how it was to be done, absolutely.

Q So sure, they were relying on you for all of that?

A I think so, sure.

Q Well, in fact, that's why they hired you; right?

A Right.

Q And you were a bankruptcy practitioner with significant experience. You'd been doing this almost exclusively for 10 years at that time; right?

A That's correct.

Q And now you've already testified with regard to the documents that you requested and received from Judge Porteous. I just want to make sure I have the list.

So you said there was a set of worksheets that you gave him and he filled out and gave back to you; is that correct?

A He did.

Q And also did you receive a handwritten list of Judge Porteous's creditors?

A I think at some point early on, he had started out just by making a list, and then the worksheets helped to develop that list and expand and refine that list.

And then the invoices that I would get periodically thereafter would update the worksheets which had expanded off that original list.

Q By "invoices," you're referring to credit card statements?

A The statements that would come every month.

Q The Porteouses would receive the credit card statements and they would forward them on to you so you were aware of the current status of the debt?

A That's the way it work, yes.

Q And you also testified that early on in your relationship with the Porteouses, that you had requested a pay stub from Judge Porteous; is that correct?

A That's correct.

Q And that pay stub was dated May 2000?

A If that's the date on it. I'm sure it was

at the very beginning of the process, when I was starting to work on the workout proposal, because I had to design the whole case, and I got a check stub that was a current check stub from that time.

Q Sure. So that makes sense. They retained you in the summer of 2000 and you asked for a pay stub very quickly thereafter and you received a May 2000 pay stub?

A That's correct.

Q And I'd like to ask you a little bit about the workout period. You said that you spent considerable time reviewing and analyzing the records that you were receiving from the Porteouses, the worksheets, the lists of creditors and the various credit card statements; is that right?

A That's correct.

Q And the purpose for that review was to understand their debts and assets so that you could perform a workout analysis; is that right?

A That's true.

Q And you went ahead and did that. You reviewed all of that material and prepared a workout analysis?

A I basically prepared -- for the purpose of the analysis and trying to go where I was trying to

get to the end result of, I prepared all the information that I got as though it would be a Chapter 7 case, so that I could find out what equity in assets was available to satisfy the creditors' claims in a hypothetical Chapter 7, which is a requirement for Chapter 13 as well, that you pay creditors at least as much as they could have gotten in a Chapter 7 case.

That's one thing that I do on every case, whether I know it's going to be a 13 or a 7, I always want to start out with what would happen if it would be a Chapter 7.

In this case it was to determine how much money would have been available from the assets for payment to creditors in Judge Porteous's case, from which then I was able to base the workout proposal.

Q Sure. And the workout proposal was, in effect, an analogy that if we filed a Chapter 7, this is how the debts would be resolved. And so we can go through that process or alternatively you can give us a call back and maybe we can work out a similar --

A Or we had hoped -- actually, what I proposed was that the judge was willing to go to a lender to obtain the equity out of the house that he

could borrow to fund this pro rata workout proposal with payment to all of the creditors.

Q Sure. I'd like to show you a document, we're going to go ahead and pull it up, it's been marked as Porteous 1101.

If you'll look at it on the screen there, this is a multiple page document. And it is my understanding -- and you can look at the Bates number in the bottom left-hand corner, which has CL 001. It's my understanding that this is a copy of your file which was produced to the Government in response to a grand jury subpoena.

A That's my writing.

Q So that's your writing on the first page?

A Yes.

Q We can go ahead and turn the page a couple -- why don't we go ahead and go forward to page 4. And do you see that document? Is this a copy of the worksheets that you gave to Judge Porteous, he filled out and gave back to you?

A That's the first page, yes.

Q And it's a multiple page document; is that correct?

A Many pages. And it tracks the final product.

Q Excellent. And I will not subject you to having to go through every page. Instead I think we can jump forward to page 28 of the worksheets. And this page is -- it's page 32 of the PDF, and it is Bates labeled in the bottom left-hand corner as CL 0032.

This page, do you see the title "income information" across the top?

A Yes.

Q And I'd like to direct your attention to the upper right-hand corner, there is a question with regard to what is the total -- the monthly total that you receive after all deductions and taxes are taken out of your paychecks.

Do you see that question?

A I do.

Q Do you see the answer? We'll go ahead and call it out for you if we can.

A I think it says 7900, approximately 7900.

Q So we pulled it out. Does that help?

A I can see it.

Q So the disclosure from Judge Porteous to you is that he -- his net monthly take-home was approximately $7900 a month?

A That's what he said on that page. Of

course, I know that I submit the check stub when I file it, so to me the check stub is the best. Sometimes people don't understand to take the taxes out, no matter how clear the question is.

But that was a starting point when he filled out the worksheet.

Q I see. So just let me make sure I understand that, then. So you asked Judge Porteous to fill this out. He filled it out. He said that his take-home was $7900 a month. You looked at that, you compared it to the pay stub and you decided that the pay stub was the more accurate of the two?

A Absolutely. The checks that would be the best -- the best evidence of it.

Q So it was your decision to rely on the pay stub as opposed to the --

A Well, and the trustee expects me to file the schedules with a copy of the check stub. So that's what I used.

Q Sure. So you went ahead and included that in the schedules and relied on the number in the pay stub?

A Correct.

Q And you disregarded this number because

you thought the other was more accurate?

A Correct.

Q And you testified about this before, so we'll go very briefly. But you said that you were working on the workout proposal and talking or attempting to talk with various creditors of the Porteouses. And that spanned for a number of months; correct?

A It did.

Q Summer of 2000, until I think you said it was clear it wasn't going to work by March of 2001?

A If not before. But yeah, for some months, I was, you know, setting aside time to call the 800 numbers on all the credit card statements and say did you get my package, trying to get a response.

Q And you weren't having any success on that endeavor?

A I didn't get anywhere.

Q So ultimately, it became clear that the workout proposal was not going to come to fruition?

A And finally, there were a couple of local lawyers that must have been assigned accounts for collection. And then when I spoke with them, they had not received from their client the package and repackage, you know, all the communications that I

had sent.

So I sent it along to them, and then they -- in the case of one of them, one of the lawyers said the client declined. So it looked like we were getting toward collection activity.

Q And once you already had a lawyer on the other side representing one of the creditors who had taken a look at your package and said, well, hey, my client is not going to go for this, it was clear to you at that point the workout proposal wasn't going to succeed?

A Right. I had many no-responses and one no. I didn't have any yeses.

Q At that point then it became clear that the workout wasn't going to happen?

A That's the way I felt about it.

Q So it became clear, and I think you testified earlier this was about March of 2001, that the workout attempt had failed and you started having discussions with the Porteouses about filing for bankruptcy; is that correct?

A Around then, if not a little earlier, because at some point, when we weren't -- I was putting in time calling, I was getting nowhere, and the judge -- Judge Porteous was concerned about it,

and I was concerned about it. And we figured it might be coming.

And then -- and then it was my next idea, well, maybe if you just stop paying them now, since we're having to now confront the eventual bankruptcy if nothing better comes about, maybe that will get their attention.

And that didn't work either.

Q So you had a discussion with Judge Porteous, and you said well, here's an idea, let's decide to stop paying the creditors. And so you advised him to go ahead and stop, and he did?

A He did, yes.

Q Did that end up precipitating any additional communications from creditors?

A No, it didn't make a difference.

Q I guess it did result in the debts ultimately becoming bigger because the Porteouses had stopped paying off their credit cards the way they had been before; is that right?

A Well, except for the payments that were being made were the minimum payments, probably weren't even keeping up with the interest. So it wasn't really going -- there was not much forward progress.

Q Sure. So it may have been stagnant when they were making the payments, but once they stopped making the appointments, then the debts started increasing because they weren't even keeping pace?

A Sure, sure they would.

Q And I believe you already testified to this earlier today, that you didn't request any additional records from the Porteouses in connection with preparing the actual bankruptcy that was filed in March, because you had already collected all the information at the front end, as well as received a series of credit card statements and invoices along the way; is that right?

A That's -- that's what I was getting. As we went along, I was just getting fresh information by new statements on those debts, showing what the balances were, so that I could keep that updated.

Q Sure. So you didn't feel like you needed to request any additional information?

A Thought I had it all, right.

Q And you didn't ask Judge Porteous for a new pay stub; is that correct?

A No.

Q You previously testified, I think we've already looked at it today, that you filed the

initial petition on behalf the Porteouses on March 28, 2001; is that correct?

A Yes.

Q I think we'd like to go ahead and pull up a copy of that so we can look at it. It's been marked by the Defense as Porteous 1100(b). Is this the original petition that you filed on behalf of the Porteouses?

A That's it.

Q We've already talked about this a little bit but I just want to make sure I'm clear, with regard to the name under which this petition was filed. You testified before this was your idea; correct?

A And the P.O. box.

Q So both the name and the P.O. box were both your idea?

A Correct.

Q And you proposed those ideas to the Porteouses; is that correct?

A I did.

Q And you told them that it would be okay to file the petition under that name and use a P.O. box; is that correct?

A I don't know if I told them it was okay,

but I told them I was concerned about the embarrassment and how this would work, and that it would be corrected before a notice went out to a creditor. And, in fact, all the creditors got a perfectly correct notice, and that part of -- that part of my suggestion went according to the way I intended it for, to do.

Q Sure. And I just want to understand. So you guys are having a conversation with regard to filing the bankruptcy, and the Porteouses were understandably very upset about the prospect of being very embarrassed of having this petition out in the media.

And so you suggested that they could file under a false name and use the P.O. box, and then you would file an amended petition very shortly thereafter and proceed with the bankruptcy. Is that effectively how it worked?

A That's exactly correct.

Q And again, just to go back to what we talked about before, the Porteouses didn't have any particular expertise in bankruptcy and they had hired you because you were a bankruptcy expert and they wanted to rely on your help. So when you had this conversation, is it reasonable to assume that

they relied on your advice?

A I think so.

Q With regard to the actual name, Ortous, is that something that you picked?

A Just made that up.

Q But you were the one that --

A I rue the day. But yes. Could have been John Doe. Could have been anything.

Q That was a decision you made, you just picked it out of the blue?

A (No verbal response.)

Q With regard to the post office box, I think you testified earlier that you told Judge Porteous that he should go get a P.O. box; is that correct?

A Correct.

Q And then I think you said that you don't know who went and ultimately obtained the P.O. box, but later you received a P.O. box address, and so --

A That's correct.

Q And I just want to go back briefly to the issue with regard to the embarrassment. So it was correct that in 2001, the Times-Picayune newspaper was running every week, I think it was on Sundays, a article that listed everyone who had filed for

bankruptcy in the preceding week; is that correct?

A It really wasn't an article, just a listing in very small type of all the -- all the bankruptcies that were filed. And I believe it was only individuals. I don't even know if they included corporations at that time.

They used to also list DWI arrests, things like that, in the paper.

Q Sure.

A And eventually, and certainly after Hurricane Katrina, none of that is published anymore. But at that time it was.

Q What were your feelings with regard to the Times-Picayune's decision to publish those names in the paper?

A About -- about them doing it when they used to do it?

Q Yes.

A Well, for most people who have no particular -- they're just regular folks, no one is going to notice their name in there, it's not going to be a tremendous embarrassment to them because nobody knows them.

But I feared that it would trigger a big, you know, sort of an article or an expose in the

paper that would embarrass Judge Porteous and his wife.

Q Sure. So bankruptcy, for most people who aren't public figures, is very anonymous; is that right?

A That's true.

Q But if you happen to be a public figure and the media gets hold of it, then it's likely you're going to have a very large story where they say so-and-so has filed for bankruptcy, and they're going to go through the filing in excruciating detail and discuss all the various debts and assets and -- is that correct?

A That's what I hoped to avoid. That's what I had hoped to avoid.

Q I'd like to go ahead and pull up a document that's been marked as Porteous Exhibit 1064. Once we get this turned for you, hopefully you'll be able to see it.

Take a look and let me know if you recognize that as the news article or the listing that came out in the Times-Picayune newspaper on April 8, 2001. And if it helps, the date is in the upper left-hand corner.

A I see it. That's what it is. That's how

it looked.

Q So this is the type of I guess it's not really an article, but this is what the Times-Picayune was running, listing all of the people who had filed for bankruptcy the preceding week?

A That's the way they listed it.

Q I'd like to go ahead to the fourth page of this exhibit. We'll see if we can zoom in. It's on the left hand column, probably about two-thirds of the way down, hopefully we can blow that up for you and you can see it.

But do you see the name Ortous?

A I see it.

Q And so that filing was picked up by the paper and ultimately was run on April 8, 2001?

A Right.

Q And they list here the post office box address that was included on the original petition; is that correct?

A Correct.

Q Can you look at the article for me. There are other debtors who have listed post office box addresses; correct?

A Yes.

Q A number of them, in fact?

A Yes.

Q Is there anything wrong with using a post office box as the address on your bankruptcy petition?

A No.

Q People do it all the time, don't they?

A Yes.

Q And many people don't have regular mail service or they prefer to get their mail at the post office or for a variety of reasons; is that correct?

A That's true.

Q And so you didn't have any concern with regard to advising the Porteouses to get a P.O. box and list that as the address on their bankruptcy; is that right?

A No.

Q Now, with regard to the timing, we've already discussed that the original petition was filed on March 28, 2001, and that the plan all along was to immediately amend -- file an amended petition with the correct name and the correct -- to change the address immediately after the name had been picked up and published in the Times-Picayune. That was the plan?

A It happened the next day.

Q So you filed the original petition on March 28, 2001 and then you and the Porteouses are looking in the paper. Do the articles come out every Sunday; is that right?

A I believe it was on Sunday, but as soon as -- you can see if it was in the paper on the 8th, I filed that amended voluntary petition, the plan and the schedules on the 9th.

Q Right. So Ortous hits the paper on April 8, and then you file the amended petition on April 9, 2001?

A Correct.

Q So it was immediately after?

A The next day.

Q You said you knew no creditor was going to get notice under the original petition that listed Ortous; is that correct?

A That's correct.

Q How did you know that?

A I knew that because at that time, the filing of the schedules and the plan, not the petition but the filing of the schedules and the plan, were required before the notice could be prepared to be sent out.

Q I see.

A The reason for that was because there's information on the plan that was transmitted in the notice.

Q So filing the petition alone is not enough to allow the court to issue any notice to creditors; is that correct?

A At that time it was not issued until the second part, the schedules and the plan were filed.

Q So the schedules had to be filed with the court before the court could issue any notice?

A That's true, at that time. It's changed since, but at that time that's the way it worked.

Q Sure. So in 2001 when this was all happening. So when you filed the original petition, you knew for a fact that no notice would go out to any creditor because the court lacked necessary information to put into that notice until the schedules were filed?

A Actually, I think in those days, the Chapter 13 trustee handled his own notices, and he put information from the plan into the notice. And that's how I knew.

It wasn't the court; it was the trustee doing it at the time.

Q I see. But in any event, it's the same issue, that the trustee couldn't issue the notice until the schedules were filed because the schedules contained necessary information that would go into the notice?

A That's correct.

Q So you knew for a fact that no creditor was ever going to get notice under Ortous; is that correct?

A That's true.

Q And in addition to that, you know that no creditor did actually receive any notice that listed Ortous; right?

A Oh, I know that, because I -- I saw the notice and certificate of service showing who the notice was sent to, and that's why I wanted to make sure, regardless of the P.O. box issue, I wanted to be very sure that all creditors knew that this notice related to Judge Porteous.

So the address was his home address and the names proper, et cetera. And that was actually the notice that was mailed out to the creditors in this case.

Q Sure. So you were actually very careful that when you did the amendment and provided the

schedules, you want to make sure that the notice that, in fact, went out to creditors had all of the correct information, it went to all of those creditors?

A That's correct.

Q And so when you decided or when you discussed using the name "Ortous" with the Porteouses, there was never any intent to deceive anyone; is that correct?

A The only intent was to prevent embarrassment.

Q So really the only person that you were trying to deceive was the Times-Picayune, you were just hoping to keep the name out of the paper?

A Well, you know, I -- there was no intent to really deceive them. I just -- I was just hopeful that there would be the kind of lack of notoriety that other people who file enjoy.

Q You thought that the Porteouses should get the same treatment as everyone else who seeks bankruptcy protection?

A Yes.

Q I'd like to go back to the original bankruptcy petition. That document, in fact, listed the Porteouses' true and accurate Social Security

numbers; correct?

A Correct.

Q And why did you want to include that information on the petition?

A Well, it's required to be part of the petition.

Q And --

A I don't think that the newspaper looks at the Social Security numbers or has a way to know who someone is from the Social Security number.

Q Sure. And the whole goal was just to avoid the paper publishing it?

A That was everything. That was it.

MR. O'CONNOR: Madam Chair, I'd like to move into the record Porteous Exhibit 1100(b), which is the original petition we discussed a moment ago.

CHAIRMAN MC CASKILL: Is there any objections to the original petition being moved into evidence?

MR. SCHIFF: No objection, Madam Chair.

CHAIRMAN MC CASKILL: It will be received.

MR. O'CONNOR: Thank you.

(Porteous Exhibit 1100(b) received.)

MR. O'CONNOR: I would also like to move into the record Porteous Exhibit 1064, which is the

article that was run in the Times-Picayune on April 8, 2001 that listed the Ortous filing.

CHAIRMAN MC CASKILL: Any objection?

MR. SCHIFF: No objection, Madam Chair.

CHAIRMAN MC CASKILL: It will be received.

(Porteous Exhibit 1064 received.)

MR. O'CONNOR: Thank you.

BY MR. O'CONNOR:

Q I'd like to go ahead and call up a document that's marked Porteous 1100(c), the amended petition. I believe Mr. Goodlatte already asked you about this.

Do you recognize this document?

A I do.

Q This is the document that was filed on April 9, the day after the Times-Picayune article came out; is that correct?

A That's correct.

Q This lists the Porteouses' accurate name; correct?

A Correct.

Q And their accurate Social Security numbers still; correct?

A That's right.

Q And it also changed the address from the

P.O. Box to their residential address?

A Correct.

Q Now, just so I'm clear, you didn't think there was anything wrong with the post office box but you wanted to make sure creditors had absolutely --

A I didn't. I didn't think there was anything wrong there, but I really wanted to make sure those creditors knew who they were getting a notice on. And that was the address that the statements came to.

Q Sure.

A And so that's the address that I used.

MR. O'CONNOR: Okay. Madam Chair, I'd like to move Porteous Exhibit 1100(c) into the record.

CHAIRMAN MC CASKILL: Objection?

MR. SCHIFF: No objection.

CHAIRMAN MC CASKILL: It will be received.

(Porteous Exhibit 1100(c) received.)

MR. O'CONNOR: Thank you.

BY MR. O'CONNOR:

Q I'd like to go ahead and show you what's been marked as House Exhibit 128. This is the notice of commencement. Please take a look and let

me know if you recognize this document. And if we can focus in on the top, that may help. I see United States District Bankruptcy Court, Eastern District of Louisiana, notice of commencement of the case. And then you will see the names of the debtors?

A Yes.

Q Which is Gabriel T. Porteous and Carmella A. Porteous, do you see that?

A Yes.

Q As well as their full Social Security numbers?

A I see that.

Q And at the bottom of the document it says "trustee's copy." Does that indicate to you this is a copy that came from S.J. Beaulieu, the Chapter 13 trustees -- trustee in this case, his file?

A Well, that just identifies who the trustee is.

Q At the bottom, sir, it says trustee copy. Maybe you can correct me if I'm wrong --

A I see.

Q Is it a document that's in triplicate and you pull it apart and you get a trustee copy, a court copy and creditor copy?

A This one says court copy, the one you've got on the screen.

Q Oh, I'm sorry. Let me -- we can use this one. So this is the court's copy of the document.

A And you'll notice how it has that information from the plan like I was telling you.

Q That's about two-thirds of the way down, the unsecured nonpriority claims, and it lists a percentage?

A Correct.

Q That's information -- sorry?

A And it gives you the summary of the plan as filed by the debtor, tells you how much the debtor is paying, how long the length of the plan is and what expected percentage to creditors would be.

Q Sure. And that's the information you were referring to earlier, that without that, the trustee couldn't issue the notice?

A Correct.

MR. O'CONNOR: Madam Chair, I'd like to move House Exhibit 128 into the record.

CHAIRMAN MC CASKILL: Any objection?

MR. SCHIFF: No objection.

CHAIRMAN MC CASKILL: So received.

(House Exhibit 128 received.)

MR. O'CONNOR: Thank you.

BY MR. O'CONNOR:

Q Now, I'd like to go ahead and put up Porteous 1100(d). This is a document that I believe you discussed earlier with Mr. Goodlatte. This is a copy of the Chapter 13 schedules and plan.

Do you recognize that?

A I do.

Q So this document was filed on April 9, 2001, along with the amended petition?

A Yes.

Q I'd like to go ahead and flip forward to the income statement, which is schedule I.

A Yes. I'm looking at it.

Q So with regard to schedule I, there's been some issue that many of the blanks on this statement are not filled out, there's just zeros, instead it is a single number listed at the top as well as a single number listed at the bottom.

Why does this page appear the way that it does?

A Well, because I attached right behind this page the actual check stub.

Q So if we turn the page, we'll see the check stub?

A Here it is, yes.

Q So all of the information that would have been filled in on the blanks on the preceding page is all here?

A Right.

Q So you didn't think there was any need to --

A Well, the trustee required the check stub, and I think at that time we were in the practice of just putting the net on here, because it results in the net for the computations in the plan. And then since we're attaching the actual check stub, we leave it at that.

Q Sure.

MR. O'CONNOR: Madam Chair, I'd like to move in a copy of the bankruptcy schedules into the record. This is Porteous 1100(d).

CHAIRMAN MC CASKILL: Any objection?

MR. SCHIFF: No objection.

CHAIRMAN MC CASKILL: No objection.

(Porteous Exhibit 1100(d) received.)

MR. O'CONNOR: Thank you.

BY MR. O'CONNOR:

Q I just want to be clear. You included a copy of the pay stub in the actual schedules that

were filed; right?

A I did.

Q And so it was open and obvious to anyone who wanted to look at this document that was filed publicly that the income number that was being used was based on the May 2000 pay stub; is that correct?

A Yes.

Q So that would have been obvious to the trustee who looked at it as well?

A Sure.

Q And just so I'm clear, no one, not the judge, the trustee or any of the creditors, ever objected to the Porteouses' income as it was scheduled in the plan -- or in the schedule; is that correct?

A No, there was no objection to the plan, no creditors voiced any complaint. In fact, a large number of creditors didn't even bother to file claims to collect the money that was being offered through the plan.

Q Sure. So this information about the income that was being disclosed was open to everyone, and no one objected?

A It was public record.

Q And no one objected?

A No.

Q And now I just want to go back briefly that we talked about with regard to the worksheets, that Judge Porteous had disclosed -- that he was disclosing to you his net income was approximately $7900, but you felt that using the pay stub was more appropriate and so you used that information?

A I didn't even go to work on that. The $7900 number. Because I always used the check stub.

Q Okay. And to be clear you never asked --

A Most people don't know off the top of their head exactly how much they make gross and net. They just don't know.

Q And you never asked for an updated pay stub from Judge Porteous?

A No. Frankly, as I said before, I had no reason to believe it would change. I thought it was sort of a fixed salary type of job.

Q And now there's also been an issue with regard to FICA limits. I know that you've previously testified that in 2001, that was an issue you'd never run into before; is that correct?

A FICA limits?

Q Maybe that's the first question. Do you understand what I'm talking about when I say FICA

limits?

A No, I -- not in this context, I don't.

Q Well, maybe just so we can explore it a little bit, I can represent to you that for certain high earners, that once you reach a certain maximum income for the year, some federal taxes stop being deducted from your income.

A Okay, I understand that.

Q And so that's been generally referred to as a FICA limit.

A Okay.

Q But I guess, as is clear here, that's not an issue you had ever dealt with --

A My regular clients don't approach the FICA limit.

Q So it was an issue you'd never dealt with?

A Not much.

Q It's not anything you ever discussed with Judge Porteous?

A No.

Q I'd like to ask you whether the trustee in this case, Mr. S.J. Beaulieu, whether he ever asked or requested that the Porteouses update their income or update their schedules in any way.

A No.

Q He never requested any periodic updates?

A No.

Q And so as a result, they didn't have any obligation to make additions to the schedules, if the trustee hadn't asked for it, they didn't have any obligation to do that; is that right?

A No.

Q No, they didn't have an obligation to do that?

A Well, if something were left out or -- many times the trustee will, if someone's employment appears to be unstable, perhaps they're making less than they used to now, or they might be obtaining a new job and they have a temporary job now, the trustee will include in the confirmation order a requirement to make periodic reports on income.

That's where I would look to for that sort of obligation.

Q That typically doesn't happen with debtors who have stable employment?

A Correct. Correct.

Q And ultimately, the Chapter 13 repayment plan that was proposed by the Porteouses was ultimately confirmed in June 2001; is that correct?

A Yes.

Q And after that confirmation, did you ever have any additional discussions with the Porteouses with regard to their income?

A No, not about income.

Q I'd like to go into the schedules and back up a little bit, so this is again Porteous Exhibit 1100(d). I'd like to go to schedule B.

A Okay.

Q Do you see that?

A Yeah.

Q And we'll have it pop up here in a second. It is Porteous 1100(d). We have it up on the screen. If we go ahead and move forward through the document, we'll see schedule B, and I know you have the hard copy you're looking at so we'll catch up with you here in a second.

So on schedule B, you'll see in item number 2, "checking account," there's a Bank One checking account listed?

A Correct.

Q It says the current market value of the account is $100.

Do you see that?

A Correct.

Q That was the amount that you listed as the

current market value of the Porteouses' Bank One account; correct?

A Correct.

Q And the way that you came up with that figure, and you testified to this previously, I believe, is that Judge Porteous -- you asked Judge Porteous approximately how much money do you have in that account?

A Exactly. That's one thing that will change, obviously, because checks come in and checks go out.

Q Sure.

A So last minute, check again, how much is in your bank account.

Q And again, your question is approximately, just give me an idea of how much is in that account?

A Correct.

Q Okay. So it's your general practice just to -- do you just typically call up the debtor and say can you tell me how much is in your account?

A Well, normally, it might be happening when we're signing or just before we're signing or finalizing in the couple of days, because checks are coming and going all the time. So it's -- it's frankly more important in a Chapter 7, because the

trustee is going to take the money, if it's significant. In a Chapter 13, since it's a repayment plan, the trustee is not liquidating the trust and doesn't take the money.

Q Sir, that's an important point. There's a distinction between a Chapter 7 liquidation and Chapter 13 repayment; correct?

A Correct.

Q In the Chapter 7, the debtor is going to turn over nonexempt assets to the court, which is then going to liquidate them and pay them off to creditors; is that correct?

A That's the general idea.

Q So the amount that's in that bank account in a Chapter 7 is critical on the date of filing; correct?

A It's important.

Q But on Chapter -- in a Chapter 13 case, it's a repayment plan, so the whole idea is the debtor is going to make payments going forward for a period of time, and those payments will then go to the creditors; is that correct?

A That's true.

Q And so the assets that the debtor has at the date of filing in a bank account, for example,

typically is not going to be turned over to the trustee; instead, the debtor gets to maintain that money; correct?

A Correct.

Q Because instead the debtor is turning over a portion of the future income, not the current assets?

A That's correct.

Q Okay. So again, sort of back to your earlier point, that in a Chapter 13, the actual balance in the account on the date of filing is less important, it's not like a 7, where that is critically important?

A That's true. It's important, but less important, because no one is going to take it away from you.

Q Sure. No one is going to seek to recover the money?

A Correct.

Q In 2001, was it more difficult than it is now to find out exactly how much money you have in an account on a particular day?

A I don't think so. Hard to find out? You know, people could call or sometimes people check on the computer.

Q I'm just trying to think back, back in 2001. It seems, at least in my own experience, it was a little -- it's easier now to log onto your bank account and find out exactly how much you have. I don't know if in 2001 that was the case, and I guess that's my question to you, whether there was a difference.

A I think maybe people would have to call more so back then. Now -- now many times there's no more bank statements at all, it's all on the computer.

Q Now, I'd like to ask you with regard to the tax returns. Didn't you tell the Porteouses they could keep their 2000 tax return?

A Not -- I remember a conversation with the judge about a tax return for a later year, and not that particular year. Frankly, I had been working on this case for so many months, I really wasn't thinking about a tax return. I was just thinking about my plan. Or tax refund, I should say.

At that time, in Chapter 13s, the trustee was not the Chapter 13 trustee, was not taking the Chapter -- the tax refunds from year to year to add to moneys to be distributed to creditors.

In Chapter 7, that's always been an issue.

Of course, it's a snapshot in Chapter 7. We're not talking about future years; it's only at one particular time.

Q Sure.

A So it was not something that I gave a lot of thought to.

Q I see. So it wasn't something that you would --

A Until asked after. Now, it was a later year, he -- I remember the judge -- Judge Porteous asking me about the tax refund, and I said, well, we don't have any general requirement to turn them over to the trustee. We would look to the confirmation order to see if -- that's where it would be, if it would be anywhere.

And I double-checked -- I remember double-checking Judge Greendyke's order, because it's a little different the way it was done in Houston than the way I was used to in the Eastern District of Louisiana, and it was no requirement stated in the confirmation order to turn over any tax refund.

Q Sure. So there was no requirement in connection with that?

A And the trustee in the Eastern District

did not make a regular practice of that either at that time.

Q I see. Okay. I'd like to ask you about -- in the 2001 timeframe, in Chapter 13 cases in Louisiana, the trustee didn't typically attempt to avoid or recover preferential payments or prepetition payments to creditors, did he?

A In a Chapter 13 case?

Q Yes.

A Would not be done in a Chapter 13 case. Ever. I mean, I suppose maybe there's got to be an example of it, but the 13 trustee is a distributing agent of moneys paid under a plan and not a liquidator, like a Chapter 7 trustee.

So you would not -- you would not see a trustee recovering preferences, although they would be part of his measurement of the plan, in a way, because you would, in a Chapter 13 case, there's a general -- general requirement that the creditors be paid equal to or greater than what they could have received in Chapter 7. It's called the best interest of creditors test.

Q Sure.

A And so if there had been a preference, the trustee would have -- would have considered that it

would be recovered, conceivably, in a Chapter 7. And so that would be part of that analysis of are you paying the creditors at least as much as they would have gotten in Chapter 7.

Q I see.

A That's how --

Q It would be considered, but the Chapter 13 trustee wouldn't attempt to recover those payments?

A That's correct.

Q I'd like to ask you a little bit about the plan as it was ultimately confirmed by the Porteouses. There's been some -- some indication and some testimony earlier that the ultimate percentage that was received by the Porteouses' creditors was higher than it otherwise would have been because some creditors didn't file proofs of claim; is that correct?

A That's true.

Q I'd like to get to that, but I want to take a step back. So the original plan that was proposed listed the Porteouses' actual expenses as they existed at the time of the filing; is that correct?

A Correct.

Q And ultimately, that led to a repayment

percentage to creditors, unsecured creditors, of about 14 percent; is that correct?

A Correct.

Q And that ultimately led to the trustee objecting to the plan and seeking to obtain a higher percentage repayment to creditors; is that right?

A Well, no, there was another step. The actual expense of a daughter who was in college at LSU was in the budget. And I forget if it was 3- or $400 a month. It was to help with her rent and her food plan at school.

And the trustee that we had in the Eastern District of Louisiana was arguing with me about that, and he thought that was too high and that's not the kind of expense that he liked to see on the budget and could I do something about it.

And so we trimmed it down. I know that the reality of the expense was still there, but in order to placate the trustee, we amended the plan to provide some extra money to creditors --

Q So you worked with the Porteouses to do some additional belt tightening to say where can we --

A Correct. That was before confirmation. That's the part that you didn't ask me.

Now, after confirmation, there is a deadline for the creditors to file claims. And some $75,000 worth of claims were not filed by the deadline. And then the funds that were proposed to be paid through the plan obviously extended to pay a much higher percentage to the unsecured creditor class, now composed of the total universe of claims, that is all those who had filed timely claims.

Q Sure.

A And the trustee filed a simple motion to simply amend the percentage of payback -- I'm not sure the exact number, I'm sure that you know, but it came up dramatically.

Q And I think the final repayment percentage was around 34 percent; is that correct?

A I don't know. It could have been higher than that, even.

Q Okay. Just so I can be clear and we can summarize, I guess, the ultimate -- that repayment percentage was the result of two things, really, the Porteouses tightening their belt and reducing their expenses, even though as you said the expenses didn't go away, but they just weren't listed in the budget, as well as some of the Porteouses' creditors electing not or failing to file proofs of claim in

the case?

A That's true.

Q I'd like to talk briefly about confirmation. Did you ever sit down with the Porteouses and discuss with them the confirmation order that Judge Greendyke entered?

A I mailed it to them. And I know that they were sent a copy. I didn't see anything in here that was unusual. It's a lot more detailed than what we typically will use. We sort of refer more to the plan and have the order simply approve the plan.

So I didn't see anything particularly different. It was a more relaxed standard about incurring new debt, requiring only the written approval of the trustee. But normally we would require a motion and order. So that was simply relaxation.

So I don't -- I didn't see anything in here that really needed additional highlighting than what we'd already discussed.

Q So there wasn't any additional discussion because there wasn't anything you needed to draw their attention to?

A No, huh-uh.

Q I wanted to talk a little bit about the post-confirmation debt, something you were asked earlier by the House. What is the consequence if a Chapter 13 debtor incurs debt after confirmation without court authority?

A Well, it's certainly not protected by the bankruptcy process.

Q And so for us nonbankruptcy lawyers, that basically means the debt won't go through the plan and you won't be able to discharge it after you complete the plan?

A All of that is true, but there's also no automatic stay, no protection. So such a creditor could sue the debtor, not even knowing of a bankruptcy and not being aware of a stay.

Q Sure. Are you aware of a debtor ever being held in contempt of court for incurring debt post petition without court authority?

A No, I've never seen that myself.

Q And are you aware of a debtor ever being referred for criminal prosecution for incurring debt after confirmation without court authority?

A I haven't seen it.

Q I'd just like to talk about the plan and the period of time in which the plan was in place

and the completion of the plan. So the Porteouses timely submitted all of their Chapter 13 repayment plans; is that right?

A All the payments?

Q Yes.

A Yes, sir.

Q And, in fact, they reached their expected total payments earlier, before the 36-month period of the plan had completed; is that right?

A Well, they would have, but remember, the trustee had adjusted the percentage, so that the full 36 months of required payments went a lot farther.

Obviously, they would have finished way early at the -- at the initial percentage. But the trustee continued to collect those payments for the full 36 months.

Q And do you recall Judge Porteous calling you up and asking you what to do once he had paid all of the plan payments that he was going to, the original target, but he still had months left to go in his plan? Do you remember being contacted?

A I do. I do.

Q And did you tell him that he should continue to pay into the plan, even though he had

reached his original target?

A I did. And I may have actually checked with the trustee. But I knew that that was the way we did it. And it's called a pot plan. In other words, you just pay the money into the pot. If the plan called for 36 payments, you pay them. And then how the pot gets distributed waxes or wanes depending on the creditors' claims as they are filed.

Q I'd like to go ahead and show you the document that's been marked as Porteous 1100(z). This is a copy of the trustee's final report. Would you mind taking a look at that and tell me if you recognize it?

A I do.

Q And I'd like to direct your attention to the paragraph that's near the top, just below the "In Re: Porteous." Does that list the total amount that was received from the Porteouses in connection with their Chapter 13 trustee, their plan?

A That's correct.

Q And what is that total amount?

A That would be the total amount of payments that were paid under the plan. That's the 36 months worth of payments.

Q That ended up totaling $57,600?

A Correct.

Q In your experience in 2001 was that a significant amount of money for a Chapter 13 repayment plan?

A It was -- it was higher than many. Occasionally, there would be a very, very high one. But I think that would be considered on the higher side probably at that time.

Q And I'd like to go down to the bottom. It looks like it lists the various creditors and then there's sort of a summary. And the last line on the right side says, "disbursed to unsecured creditors" and gives a total.

Do you see that?

A Yes, $52,567.01.

Q So that's the total dollar figure that was paid out to the Porteouses' unsecured creditors in connection with the plan; correct?

A That's correct.

Q And the difference between those two numbers is the costs associated with the trustee administering the case?

A Well, the trustee had a commission to fund his office to do all this work. And then the

attorney, my attorney's fee was paid through the plan as well.

Q I see. So those are the differences in the numbers?

A Those are the only two other items that came out.

MR. O'CONNOR: Madam Chair, I would like to move Porteous Exhibit 1100(z) into the record.

MR. SCHIFF: No objection.

CHAIRMAN MC CASKILL: It will be received.

(Porteous Exhibit 1100(z) received.)

BY MR. O'CONNOR:

Q I'd like to go back to one of the issues that was raised when you were being questioned by the House. There was a discussion about the text that appeared above the signature line on the original petition that discusses the penalty of perjury under which the original petition is filed. Did you ever specifically discuss that provision or that language with the Porteouses?

A I don't remember mentioning that, reading that out loud or specifically discussing it, no.

Q And with regard to the post office box, that's not -- there's nothing false about a post office box. In fact, that was a post office box

address that the Porteouses had, it just happens to be a different address than their residential address; correct?

A Correct.

Q And with regard to the original petition, the Porteouses signed it, but you also signed it, is that correct, as their lawyer?

A Yes.

Q You testified earlier that the reason for including a post-petition prohibition on additional debt is in order to preserve the viability of the plan. Do you recall that? That was earlier today?

A Yes.

Q And so it's your position that the reason why the court says don't go out and incur more debt is because they want to make sure the Chapter 13 plan is successful and it's ultimately completed?

A That's true.

Q That's a concern, because many Chapter 13 plans are unsuccessful, they, for some reason, fall apart somewhere throughout; is that correct?

A That's true.

Q In this case the Porteouses' Chapter 13 plan was completed successfully; right?

A It was.

Q And creditors were paid a significant sum of money?

A It was -- it was completed right on schedule. There was no hang-ups.

Q Also Mr. Goodlatte was asking you about the recusal. Is it your understanding that that was standard practice, if there was a federal judge who was filing a bankruptcy case, that the bankruptcy judges in that same district would recuse themselves as a matter of course?

A I wouldn't be surprised if there weren't a standard procedure like that. That was the first time I had been -- had seen it. But it certainly didn't take me by surprise. I expected something like that would happen.

Q I'd also like to go back to the plan. We talked a little bit about the belt tightening that the Porteouses did. Under the original plan, do you recall that the amount of income that was going to be paid under the plan monthly was $875? Does that sound about right?

A That's about right.

Q That was the original proposed plan; correct?

A Correct.

Q And that number was revised upwards significantly in connection with trying to meet the trustee's demand and pay additional moneys to creditors; correct?

A It was.

Q That number went from $875 to $1600 a month; correct?

A Correct.

Q That's an increase of $725 a month?

A That was after my discussion of the budget with the trustee.

Q And with the Porteouses?

A And with -- with the judge and his wife and with -- particularly the expenses for the daughter, too, came into play in that.

Q And ultimately, that change in the amount of income that was going to be paid monthly into the plan dramatically increased the return to creditors; correct?

A And that's sort of a typical pull and tug that you have where a debtor's lawyer is butting heads with the trustee, and you reach a compromise on an acceptable budget. And that's not unusual. But in this case, it resulted in a much higher payment.

(Recess.)

BY MR. O'CONNOR:

Q Mr. Lightfoot, I just have a few more questions for you. You testified previously that you didn't know that the Porteouses gambled or had gambling debts, that is correct?

A True.

Q What percentage of debtors that you worked with in the early 2000s gambled or had gambling debts?

A I didn't see it very often.

Q Now, we've already talked about this. In connection with the workout and then ultimately filing the bankruptcy for the Porteouses, you spent a considerable amount of time analyzing the Porteouses' credit card statements; is that correct?

A (No verbal response.)

Q I'm sorry, could you answer verbally?

A I'm sorry. Really looking just to get the new balances.

Q But you were reviewing the credit card statements that were coming in?

A Right. But my main function was I had -- I had the ongoing list, was maintaining of the amounts on these debts, and when new -- when I would

get a load of new statements, I'd go back and update them all to show the balance.

Q So you'd receive the new statements from the Porteouses, open them up, look through them and update your list?

A Right.

Q I'd like to show you a couple of the statements that are included in some of the files that came from you that were produced in response to a grand jury subpoena. The document I'd like to pull up has been marked by the House as 343.

I'd like to go to page 49 of this .pdf.

A I see it. It's a letter from -- or notice from Regents Bank?

Q I'd like to ask you about page 49, and we will get there in a second. Let me flip forward. And do you recognize these documents as documents that were in your file?

A Sure.

MR. O'CONNOR: Madam Chair, while we're moving forward, I'd like to offer this exhibit into evidence, House Manager's Exhibit 343.

MR. SCHIFF: No objection, Madam Chair.

CHAIRMAN MC CASKILL: Received.

(House Exhibit 343 received.)

MR. O'CONNOR: Thank you.

BY MR. O'CONNOR:

Q When we get to page 49 of the PDF, this is going to be an October 2000 MBNA credit card statement. Do you see that?

A I can see it.

Q I'd like to direct your attention to some of the charges that are listed on that credit card statement. If you will look, there are some dates, it begins on September 27. Do you see that line item?

A I do.

Q Can you read that line item across?

A September 27, there's two of them. One of them is a fee, and then there's GCA Treasure Chest, $214.

Q Are you familiar with what that reference is to? Is that the Treasure Chest Casino in Louisiana?

A I'm sure that it probably is.

Q So this is a charge for $214.99 that was incurred on the Porteouses' credit card prior to the bankruptcy at the Treasure Chest Casino?

A That's what it reads.

Q Right below it, a cash equivalent

transaction fee. Does that appear to be linked to the item we just discussed?

A I have no idea what that is.

Q So the first one is obviously a gambling-related charge; is that correct?

A I don't know --

MR. SCHIFF: Objection, Madam Chair.

CHAIRMAN MC CASKILL: Sustained. Sustained.

BY MR. O'CONNOR:

Q I'd like to move forward to page 55 of the same document. This is also an MBNA credit card statement for the Porteouses, and this one is dated as closing December 12, 2000. Again, do you see an entry that is dated 11/12, November 12, that reads GCA Treasure Chest, for $214.99?

A Same exact amount of money, yeah. I see it.

Q And again, does that appear to you that that's the Treasure Chest Casino in Louisiana?

A I would imagine that it is. These are not things that I picked out before that were noticed so --

Q Sure. So these are credit card statements that were sent to you and you had reviewed them?

A I got them and mainly was looking for the balances. And these go back to November, so this was during the workout time.

Q Sure. But even in the workout time, you were still reviewing all the statements?

A I got them almost every month, six weeks.

Q Sure. I'd like to go back briefly to the Chapter 13 schedules that you filed on behalf of the Porteouses. This has already been entered into the record as Porteous 1100(d). And I believe you have a hard copy there.

A I do.

Q What I'd like to ask you about is with regard to the case number. On the first page of the document, you'll see that it says in the matter of the Porteouses and it lists the case number as 0112363; is that correct?

A That's correct.

Q And you testified earlier that you create these schedules by using a computer software program; is that correct?

A That's right.

Q So you would input the information and then it would output the schedules?

A Right.

Q So what I'd like to ask you about is if you'll keep flipping through, you will see that the case number is listed in the upper right-hand corner of each page. So on the summary of schedules you will see the case number; is that correct?

A Correct.

Q That's on schedule A, you will see the case number?

A Correct.

Q And if you continue on, we can keep flipping, we see the case number on every page in the upper right-hand corner?

A Right.

Q I'd like you to go to the last page of the schedules, and this is the one that says declaration concerning debtors schedules. Do you see that?

A All right.

Q Wait a moment while we get it up onto the screen so everyone can see it. What I'd like to draw your attention to is if you look in the upper right-hand corner you see case number but nothing entered there?

A I see that.

Q Is that because at the time that this piece of paper was printed, you didn't have the case

number for the bankruptcy case?

A No, I wouldn't say that. I don't know why there's -- I would have expect -- I never noticed this before, but I would have expected the number to be repeated there too.

Q It's very unusual, isn't it, that the case number is listed on each of the preceding pages in the upper right-hand corner but when you get to the page that's signed by the Porteouses, there is no case number?

A I don't know if it's unusual or not. I don't know why it's not there.

Q In your experience with your bankruptcy software, when you enter in the case number, does it automatically fill it onto each page including the declaration page?

A I don't know if it does it on this page automatically or not. I would expect that it would.

Q Does it strike you as a little strange that it's not on this page?

A I don't know why it's not there so -- it's unusual. I would expect it to be there.

Q So it's unusual, you would expect it to be there?

A Well, because it's on every other place.

Q Sure. With regard to the date, do you recognize the handwriting in which the date is written on this page?

A Yes.

Q Whose handwriting is that?

A My handwriting.

Q So you added the date to this page?

A Yes.

Q So when the Porteouses signed this, they didn't date it?

A They didn't date it themselves, no.

Q Did the Porteouses sign this document prior to it ultimately being filed?

A Yes.

Q How far in advance?

A I don't remember, but I can tell you that sometime the judge would have to bring the document home to have his wife sign it.

Q So there would have been some period of time between you giving a set of documents to the judge, him taking a look through them, having them signed, getting that back to you, and ultimately the documents being filed?

A That happened because she wasn't always there and I usually saw him in his office.

Q Sure. And is it possible that he didn't know when it was ultimately going to be filed, and so the date was left blank for you to fill in when ultimately it was filed?

A That's probably true, yes.

Q So is it possible that this declaration concerning the debtor's schedules was slip-sheeted into the filing to follow behind the rest of the schedules and that's why there's no case number on this document but there is on every other page?

A I don't know.

Q But it's possible?

A I don't -- you know, I know that I prepared it, I gave it out to be signed. When I would file it, I would make sure that it's dated and I will put the date that I'm filing it on there.

Q Sure. And with regard to the date, I believe that the handwriting on all of the dates is your handwriting. Maybe we can pull this up real briefly. Porteous 1100(b). This is the original petition.

If you'll look at that, all of the dates on this document are in your handwriting, are they not? Second page of the document on the screen. If you look at the dates below the signatures, you can

tell me if that's your handwriting.

A Yes.

Q So again, these were all signed but not dated and ultimately you added the date when it was filed?

A I added the date and probably that had -- the reason for that is we weren't signing them in my office, that it was easier for us to meet in his office because I was in court every day and my office was in another part of town at that time.

Q So you weren't sure if they were going to be signed?

A If I had the two of them in front of me, I would let the computer put the date in, because I know that we would be filing it right then. Also, this goes back before electronic filing so they have to bring them physically to the court and file them.

Q Again, so it was possible there was some delay between these documents being signed and ultimately being filed?

A Could be.

MR. O'CONNOR: Madam Chair, we have no further questions at this time.

CHAIRMAN MC CASKILL: Redirect?

MR. SCHIFF: Yes, Madam Chair.

CHAIRMAN MC CASKILL: How long do you think the direct is going to take? We had scheduled an hour and 15 for this witness. We are approaching two hours. Do you anticipate a long -- I'm not telling you -- it's your time, if you want to use it this way, do you think it will be long?

MR. GOODLATTE: Chairman, 15 minutes or less. Combined time of direct and redirect will be less.

REDIRECT EXAMINATION

BY MR. GOODLATTE:

Q Mr. Lightfoot, even if Judge Porteous was not particularly knowledgeable in bankruptcy cases, and we don't know if that's the case or not, but do you think Judge Porteous as a federal judge understood what it meant to sign a court document under penalty of perjury?

A I believe so.

Q Did you really think that you needed to tell a federal judge not to perjure himself?

A I didn't think of needing to, no, sir.

Q Did the two of you agree that you had a higher duty to protect Judge Porteous from embarrassment than to tell the truth?

A No, we -- we didn't have a discussion like

that.

Q Does the penalty of perjury apply less under a Chapter 13 than under a Chapter 7?

A No.

Q Is telling the truth under penalty of perjury a concept limited to bankruptcy filings?

A No.

Q Now, let me pull up Exhibit Number 145. I think we need help from the IT folks again.

This is the application for a P.O. box. Whose name is on this application?

A It reads Gabriel T. Porteous, Jr. and that's the only -- no Carmella Porteous is underneath.

Q Do you recognize Judge Porteous's signature?

A Not really. I can't make out the letters on his signature.

Q Perhaps they can blow it up a little for you.

A All I could do would be to compare it to another signature.

Q It's not your signature, is it?

A No.

Q It's not Mrs. Porteous, doesn't say

Carmella?

A No, I can make out the Gabriel.

Q Okay. Now, on the bankruptcy petition, there's actually two blocks on there.

If you would call up Exhibit 125.

Now, this is the actual petition.

If you could blow up the section that relates to the address.

I think you'll find there's both a question for a mailing address and for a residential address, is there not?

A There is.

Q Okay. Now, when the attorney for Judge Porteous asks you if it's acceptable to use a post office box, that's perfectly acceptable for the mailing address, is it not?

A It is.

Q But for the residence, you're supposed to list the residence?

A Some physical place where they live.

Q And Judge Porteous had a residence, did he not?

A He did.

Q And that was not listed on the form?

A It wasn't.

Q Thank you. Now, with regard to the newspaper listings for bankruptcy filings, the newspaper gathers the list of bankruptcy filings and publishes it so that creditors can learn about a bankruptcy. Is that not one of the purposes?

A I don't know what their purpose is for doing that. There's no publication notice in bankruptcy unless it's a special court order.

Q No. But all of the names that are listed are available to creditors to --

A They are, yeah.

Q So when it's listed in the newspaper, that's of most interest to not the creditors who are listed on the schedules but creditors who might not be listed on the schedules.

A Could be.

Q Could be. So if they see G.T. Ortous and a P.O. box, that doesn't tell a creditor who is not listed on the schedules that Judge G. Thomas Porteous has filed bankruptcy?

A That's true.

Q Now, the newspaper could just publish articles about public figures or celebrities who file bankruptcy without doing that long, lengthy list of all the names of people. Isn't that

correct?

A They could.

Q That was shown on the exhibit. And the reason they publish the list of everyone is that there may be creditors who would otherwise not find out?

A I can't go there with you. I don't know why they list them.

Q Okay. Let's just -- I'll go back to your earlier answer -- you do acknowledge that a creditor could find out by --

A They could. They could.

Q Okay.

A All the businesses are listed in another paper, and they now stopped doing that, the business cases. And the business cases aren't in the Times-Picayune, so I don't know why they do what they do.

Q You've been practicing bankruptcy law for 20 years or more. There are a lot of people who are embarrassed to file bankruptcy, aren't there?

A Sure.

Q Absolutely. They're worried about their neighbors seeing their name in the paper filing bankruptcy, the people they work for seeing that

they filed bankruptcy. But in your 20 years as a bankruptcy attorney, this is the only case that you filed under a false name to protect an individual from embarrassment, as you say?

A Correct.

Q Now, by filing under a false name, whether it was your intention or not, the judge could accomplish an additional goal by using a false name, and that is to avoid having it in the paper so that a creditor could see it?

A I can see that could happen, yes.

Q Now, when we talked about tax refunds, you're referring to future refunds coming in after the confirmation of the plan.

A Yes, sir.

Q A refund, as we said earlier, a refund that is ascertained and liquidated at the time the plan is filed should be reported to you so you could put it on the schedules?

A It would be at that question B17.

Q There's a very important reason for having that, as well as other assets, listed on -- on the schedules, because that's the numbers you use, and the bankruptcy trustee in checking your work would use, to determine whether or not the debtor is

paying more in the Chapter 13 plan than would be received by those creditors if he went through a Chapter 7 liquidation and there was a payout.

So if $4100 in a tax refund is not listed, that reduces his payment over the course of the plan effectively by $4100, does it not?

A It could. It doesn't have to in every case, but it could.

Q Now, you said that you went over the schedules and the petition and the statement with Judge Porteous on at least two occasions?

A Yes, sir.

Q And on the schedules, his pay for 2000 is on the schedule itself, not just on the pay stub?

A The net pay is on the schedule.

Q The net pay matches the amount on the stub that you used?

A Yes, sir.

Q So when Judge Porteous reviewed these petitions prior to filing, prior to signing them under penalty of perjury, he had the opportunity to see that he had not updated his pay stub from a year previous?

A Yes.

Q Now, you had indicated earlier that if the

trustee had known about the gambling, that would have prompted other questions. What other questions would those be?

A Well, I don't know about the trustee, but had I known when I have clients with -- that I'm aware that there's gambling, I have a lot of question -- I have a lot of sort of concerns for them, and it brings me to many questions and many discussions with them about the gambling and how, you know, it causes a problem in a Chapter 13 because you can't be certain of your income if you're gambling some of it away.

If there are gambling debts, they have to be listed, and you must tell me about them. If you have markers that haven't been redeemed, you could have a bad check problem when they try to pass the marker through as a bad check.

So it gives me an opportunity to have a conversation about all those concerns of mine.

Q And at the time, notwithstanding what might have been on credit cards, you weren't going through and listing all those credit card payments as -- on your schedules? You were asking the judge to give you a schedule that says I owe this amount of money to this person; correct?

A Correct. I was just updating balances.

Q At the time, you believed that Judge Porteous was acting in good faith?

A I did.

Q When he came to you, when you helped him with the workout, when you prepared the bankruptcy petition and schedules and statement, you did not know anything about gambling?

A I didn't.

Q He clearly did not disclose that to you in any way, shape or form?

A No, sir.

Q And you had no idea that he was concealing facts from you?

A No, sir.

Q So you can't say whether Judge Porteous had motives other than personal embarrassment to avoid the listing in the paper?

A What you've heard was my experience, and I don't know anything beyond that.

Q Now, in point of fact, if Judge Porteous had objected to your filing under a false name, you wouldn't have filed under a false name?

A Oh, no.

Q Did you consider Judge Porteous a

layperson who is not capable of understanding the importance of truthfulness in a court process?

A No, sir.

Q Should he have provided you with correct information?

A Yes.

Q And you and Judge Porteous indicated you'd hoped by filing in a false name, it wouldn't have come out in the papers; is that right?

A Correct.

Q But it did anyway?

A It did.

Q If it hadn't, would creditors that Porteous failed to disclose have been kept from hearing about his bankruptcy?

A I didn't know anything about those creditors, so I don't know if they would have seen it in the paper or not. I couldn't tell you.

MR. GOODLATTE: Madam Chairman, at this time I would like to move the introduction of the exhibits that we referred to, and I'll refer to them again. That would be Exhibit 125, which is the original voluntary petition in bankruptcy, Exhibit 126, which is the amended petition, Exhibit 127, which is the Chapter 13 schedules and plan, Exhibit

141, which is Judge Porteous's tax refund, Exhibit 148, which is the trustee's brochure, Exhibit 133, which is Judge Greendyke's confirmation order, Exhibit 339, which is the letter from the trustee to Mr. Lightfoot regarding refinancing a mortgage, Exhibit 340, which is a letter from the trustee to Mr. Lightfoot regarding car leases. I believe that's it.

CHAIRMAN MC CASKILL: Any objection?

MR. TURLEY: No objection, Madam Chair.

CHAIRMAN MC CASKILL: Those are all be received into evidence.

MR. GOODLATTE: I'm sorry, and Exhibit 145, which was the post office box application.

CHAIRMAN MC CASKILL: Any objection?

MR. TURLEY: No objection, Madam Chair.

CHAIRMAN MC CASKILL: All those exhibits will be accepted in the record.

(House Exhibits 125, 126, 127, 133, 141, 145, 148, 339 and 340 received.)

MR. GOODLATTE: And those are all the questions I have.

CHAIRMAN MC CASKILL: Thank you.

MR. O'CONNOR: Madam Chair, we have no further questions.

CHAIRMAN MC CASKILL: Any questions from the panel?

SENATOR SHAHEEN: Yes.

CHAIRMAN MC CASKILL: Yes, Senator Shaheen.

EXAMINATION

BY SENATOR SHAHEEN:

Q Mr. Lightfoot, I just heard you testify that in the 20 years or so that you practiced bankruptcy law or in the entire time, that this is the only client who you recommended use a different name than his real name?

A Yes, ma'am.

Q Were you not concerned that when you filed the amended petition, that on something as basic as a name, that the court would pick that up and it would raise questions about information in the rest of the filing and that the court would take some action because of the difference in the name?

A I was -- it was a very misguided effort. It was out of compassion for somebody who I could see was suffering with the decision.

And in hindsight, it was about the stupidest thing that I could do, because of course, when the newspaper got hold of it, it made it look

even worse.

If I could go back and change that day, I would.

I knew that I was going to make sure the notices went out right, and they did. The creditors got noticed. They got paid, those that chose to be paid. And that part of it was never in doubt in my mind. It was -- it was -- it was a mistake.

Q Well, given -- given the question raised on the filing about under penalty of perjury, there was no concern that the court would see that name above that under penalty of perjury and then when they saw the amended filing, be concerned that someone had misrepresented on the bankruptcy filing something as basic as their own name?

A That concern was not in the forefront. I was -- my concern was the embarrassment, and as I tell you, looking back, I would have a completely different view today than I did then, and it would never happen again, and it never has.

SENATOR SHAHEEN: Thank you.

CHAIRMAN MC CASKILL: Any other questions by senators?

SENATOR WHITEHOUSE: Yes.

CHAIRMAN MC CASKILL: Senator Whitehouse?

EXAMINATION

BY SENATOR WHITEHOUSE:

Q Counselor, we've heard different testimony on whether a marker is a check or a debt. Whether a marker is a check or a debt, there is an underlying debt that the marker pays; correct?

A I believe a marker is at least a promise to pay. Promise to pay is a claim in bankruptcy.

The form that that promise to pay takes is as close to a negotiable instrument or a check as the gambling industry has been able to make it. Frankly, because they like the DA to collect their bad checks for them.

That's been my concern in having to deal with cases involving gambling, is making sure that the clients, when I know of gambling, those are -- those are my concerns, that it might be a bad check issue as well as just a civil debt.

Q But however you construe the marker itself as an instrument, there is necessarily an underlying debt, there is an individual, there is a casino, the individual owes money to the casino and that is a debt.

A I believe so.

SENATOR WHITEHOUSE: Thank you.

EXAMINATION

BY SENATOR RISCH:

Q Very briefly. Mr. Lightfoot, have you been disciplined at all by the bar for counseling someone to commit perjury on a document?

A I've gotten a letter from the bar and I've responded to the bar. So that's ongoing, I'd have to say, at this point.

Q So how long ago was it you got the letter?

A About two years ago.

Q And are -- is there a proceeding against you right now by the bar?

A There is a letter which they -- is a complaint, and I've responded to the complaint. And I imagine that the bar association is waiting for the completion of the proceedings here.

Q And what do you anticipate? Are they going to take to take your license or --

A I don't know. I'm too young to retire, so I hope not.

CHAIRMAN MC CASKILL: Any other questions by any other senators? The witness is excused, thank you.

THE WITNESS: Thank you.

(Witness excused.)

MR. SCHIFF: Madam Chair, ready for us to call our next witness?

CHAIRMAN MC CASKILL: Yes, we are.

MR. SCHIFF: The House calls Chief Bankruptcy Judge Duncan Keir.

Whereupon,

DUNCAN W. KEIR

was called as a witness and, having first been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. KONAR:

Q Judge Keir, good afternoon.

A Good afternoon.

Q Would you please introduce yourself to the Senate committee.

A I'm sorry, would you speak up a little?

Q Would you please introduce yourself to the Senate committee.

A I'm Chief Judge Duncan W. Keir, Chief Judge of the United States Bankruptcy Court for the District of Maryland. And I've served there, have for the last 17 years.

Q Would you please explain your expertise to us in the area of bankruptcy law.

A I started my practice in 1975, after

graduating from the University of Maryland law school with honors and Order of the Coif. And I started in the area of commercial litigation, formed and then led their practice group at the firm of Miles & Stockbridge on creditors' rights and insolvency, which, of course, has a lot to do with the bankruptcy code.

During that time, I taught a course at the University of Maryland law school as well as an adjunct professor in commercial paper.

I was asked and went to Embassy Financial Corporation in 1991 to help rescue its subsidiary banks during that real estate crisis, and I served as deputy general counsel in charge of the office of special assets counsel at those institutions until 1993, when I was appointed United States bankruptcy judge for the District of Maryland.

I'm a member -- a fellow of the American College of Bankruptcy, a past governor of the Board of Governors and the National Conference of Bankruptcy Judges, and I continue to teach as a visiting lecturer both at the University of Maryland School of Law, University of Baltimore School of Law, and the Industrial College of the Armed Forces at Fort McNair.

MS. KONAR: Madam Chair and members of the committee, the House has previously submitted a biography for Judge Keir regarding his qualifications and has indicated that it is designating Judge Keir as an expert in the area of bankruptcy. I would now move to have Judge Keir designated by the committee as an expert witness.

CHAIRMAN MC CASKILL: I assume there's no problem with this?

MR. TURLEY: There is no objection.

CHAIRMAN MC CASKILL: The witness will be treated as an expert witness for purposes of this hearing.

BY MS. KONAR:

Q Judge Keir, what materials did you review in preparation for your testimony today?

A I reviewed the docket of Judge Porteous's bankruptcy case, the case filed by Judge Porteous and his wife. I reviewed the documents filed in that case, including the original petition, the amended petition, the statement of financial affairs and the schedules, all of those documents being sworn to under penalty of perjury.

I also reviewed the plan that was confirmed in the case, the order confirming the

plan, excerpts of previous testimony before the 5th Circuit. I reviewed the House report for this proceeding and a transcript of part of the testimony before the House panel.

Q Would you please briefly describe what a Chapter 13 bankruptcy is.

A Chapter 13 bankruptcy is sometimes described as a wage earner's plan. It's actually available first of all only to an individual, and it doesn't require that the individual have wages, but it does require the individual to be in receipt of regular income. So, for example, unemployment would qualify, even though those aren't wages.

The purpose of the plan is to deliver to a trustee who then distributes to creditors an amount equal to what unsecured creditors would have received if there had been simply a straight Chapter 7 bankruptcy and the debtor's assets had been sold.

There's a number of requirements the plan has to meet. The equivalency requirement, which I just described, is one of them. The debtor is required to dedicate to the plan all reasonably disposable income. The words in the statute are "projected disposable income."

The duration of the plan may be three to

five years, depending on the circumstances, and the ultimate goal of the plan is to let the debtor continue to occupy their home, if they own one, and retain the use of their possessions, but creditors get the equivalent value of what they would have gotten in a liquidation.

At the end of the case, if successful, if the plan is completed, the debtor gets a discharge, which enjoins the collection in personam of the debts that are discharged in the case.

Q Judge Keir, is it important that a debtor be candid with the bankruptcy courts in all of his or her bankruptcy filings?

A It's absolutely essential. If the debtor is not candid, then the system will break down completely. The debtor is the person who puts down under penalty of perjury the financial information that the trustee reviews and creditors can review and follow up, if they think a question is asked or some more information may be needed.

The debtor doesn't put down accurately and completely what the schedules and statement of financial affairs require, then the trustee and creditors are deprived of that opportunity and the whole system will not work.

The United States Supreme Court in a 1934 decision often quoted in a case of a Local Loan Company versus Hunt described it as Congress affording bankruptcy relief to the honest but unfortunate debtor. And that's really the final measure.

Q The evidence in this case has shown that Judge Porteous filed his initial bankruptcy petition using a false name and using a P.O. Box address instead of his residential address. What are the significance of those facts to you?

A Well, first and perhaps most importantly to me as a judge, it was perjury. The oath on the petition is a very strong oath. It is not an oath to tell the truth according to the best of your information or knowledge and belief.

It states that all of the information put down on the petition is true and correct under penalty of perjury, period.

Judge Porteous signed that oath, when he knew that the name on the petition and the residence address were both false, so he committed perjury.

It also falsified the record of the United States bankruptcy court for the Eastern District of Louisiana. Electronically through a system called

PACER and also a phone-in system in many jurisdictions, and if it doesn't exist, you call the clerk, anyone can find out if someone has filed a bankruptcy case, and many times, people try to find that out before they enter into transactions with a person.

If they had done that -- and I don't know whether they did or not -- they would be told there was no Gabriel T. Porteous who had filed a bankruptcy case, because the record had been falsified. So it created a false record.

The residence address also did not disclose where Judge Porteous lived. That information is, first of all, used to determine whether the case is filed in the correct jurisdiction and in the correct venue where there's more than one division within that jurisdiction. And it didn't exist. It was a post office box.

Q The evidence has also shown that the idea to file the bankruptcy petition with the false name and with the post office box was that of Claude Lightfoot, Judge Porteous's bankruptcy attorney.

Do you believe that Judge Porteous can claim an advice of counsel defense as an excuse for filing with a false name?

A No. Advice of counsel is not a defense where someone commits a wrongful legal act knowingly that it's wrong. Even if someone says, well, go ahead and do it anyway, that's not advice of counsel. It might be collusion, but it's not advice of counsel. And it shouldn't form any defense, particularly where here, from the experience of the individual, Judge Porteous, it would have to be assumed that he knew what true and correct under penalty of perjury meant. He didn't need his counsel to explain it, and he would understand that that's not what he was doing. So it wouldn't mislead him into doing it.

And I omitted one fact from something you asked me, and that is the other result of putting down a wrong name and an incorrect address is it cloaked from the general public that this particular -- these two particular individuals had filed bankruptcy.

According to the report I read, it was customary at the time in New Orleans that the local papers published the names of those persons who had filed bankruptcy within the last period of time, I don't know whether it was weekly, I think it may have been.

And so the publication didn't disclose Gabriel T. Porteous, and anyone who read it would not have been alerted that they might want to follow up if they thought they had a claim or some other action that needed to be brought or question to be asked about that bankruptcy. Such as a casino.

Q Even though Judge Porteous filed his initial petition under a false name, the evidence has shown that false name was corrected several weeks later and it was corrected prior to notices going out to Judge Porteous's creditors. How do you view a claim that the filing under a false name was therefore --

MR. TURLEY: I'm sorry, I'm going to have to object. I believe you said several weeks later. The evidence in the case I believe was 12 days. I just wanted to correct that.

MS. KONAR: Fair enough.

BY MS. KONAR:

Q 12 days later the name was corrected. And it was not until after the name was corrected that any of Judge Porteous's creditors listed in his initial petition received notice.

How do you view a claim that Judge Porteous's filing under a false name was therefore

no harm, no foul?

A Well, first of all, I know of no legal defense, no harm, no foul, to this perjury. I don't believe it's any part of it, that you can't prove with particularity that a specific individual or entity suffered a quantifiable loss.

I also don't know factually that I can say that did or did not happen.

I believe the record includes that a casino extended markers, which is credit and debt, to Judge Porteous on April 7 and 8, after the filing, but before the name was corrected.

I have no way of knowing whether they tried to check court records or not before they went out on that limb.

But in any case, it simply isn't a matter of no harm, no foul. Someone goes down a one-way street at 100 miles an hour but miraculously doesn't hit anybody or do any physical damage, are they without blame or are they just lucky?

Q Judge Porteous filed a tax return on March 23 of the year 2000 claiming more than a $4000 refund. On March 28, five days later, he filed his bankruptcy petition. On April 9, when he filed his bankruptcy schedules and statement of financial

affairs, he did not disclose that tax refund.

What is the significance of his failure to disclose the tax refund?

A Well, there's two or three different elements there. First of all, the right to receive the refund is an asset. And since he had already filed the return quantifying the amount of the refund, it was what is known as a liquidated sum. Liquidated does not mean collected; it means quantified.

And the tax year having ended before the bankruptcy, he had the entitlement to it, it was his asset. Assets are required to be listed on schedule B under pain and penalty of perjury.

Question 17 of schedule B requires you to list liquidated sums owed to the debtor, and it specifically says "including tax refunds." And he did not put it down, so he falsified the schedule.

The effect on the case itself is that, as I've already stated, one of the measures of what has to be paid into a Chapter 13 plan is that the sum must be sufficient to deliver to creditors what they would have received in a Chapter 7 liquidation.

If you don't know there's an extra $4000 in asset value, your plan amount may be $4000 too

low, as a minimum.

Secondly, a tax refund is, of course, liquid once it's collected. And many trustees take the position that, therefore, it should be paid to the trustee as part of the disposable income and prevent it from being dissipated.

If the trustee doesn't know about it, they cannot either ask the debtor or if not voluntarily surrender, apply to the court by motion for an order, to take possession of the tax refund.

So by depriving the knowledge, you prevent the trustee from taking any action as well.

Q Judge Keir, are you familiar with the confirmation order entered in Judge Porteous's bankruptcy case by Judge Greendyke in July of 2001?

A I've been supplied by copy of it. I have it here in front of me.

Q Okay. Drawing your attention to paragraph 4 of that order, and this document is marked as House Exhibit 133, paragraph 4 of Judge Greendyke's confirmation order prohibited Judge Porteous from incurring post-petition debt without permission of the Chapter 13 bankruptcy trustee.

Are these types of prohibitions common?

A They are common in quite a few

jurisdictions. I know that Judge London, who wrote an exhaustive treaty on Chapter 13, states that this type of prohibition in a confirmation order is common to quite a few jurisdictions. I don't think it's universal to every jurisdiction.

Q If a debtor believes a bankruptcy judge's confirmation order is wrong or is improper in any way, can the debtor simply choose to disregard or ignore that order?

A Of course not. The order is a lawful order. If it's erroneous in its reasoning, the debtor may appeal the order, the debtor may ask by motion for reconsideration or for rehearing or for modification of the order.

But no one is -- has a right to simply disregard a lawful order at their whim. If that were true, then people would obey only those orders they thought they liked or were correct, they didn't disagree with.

Unfortunately, all too often, at least one party before me, when I enter a final judgment, is not happy with the result. Sometimes it's both parties. But that doesn't mean that they can simply disregard the order.

Q I'd like to ask you about Judge Porteous's

conduct in three specific areas after the entry of the confirmation order. The first is the evidence has established that Judge Porteous continued to take out markers at casinos after the confirmation order was entered, and he did so without the approval of the bankruptcy trustee.

Do you consider this to be a violation of the bankruptcy order?

A It's absolutely a violation of the bankruptcy order. This was an incurrence of debt after the order was entered, and that violated the order, because from the record I've reviewed, there is no indication that Judge Porteous requested permission from the trustee or, if requesting and failing to obtain it, filed a motion to obtain an order from the court.

Q Judge Keir, do you have an opinion on whether a casino marker constitutes a check versus a debt?

A Well, it is both. The debt arises, as far as the word is used in the Bankruptcy Code, when the -- when Judge Porteous has an obligation to repay the casino, and it's independent of the creation of the piece of paper called marker.

Section 101 of the Bankruptcy Code defines

debt as a claim, and claim is defined, and I have it right here in front of me, as right to payment.

When the casino pushes the markers across the counter to the gambler, who doesn't immediately pay for them, but will pay for them, the gambler is now obligated to pay the casino for the value of the markers. That's when the debt arises. That is debt, and all debts as covered by the order.

The marker is a three-party instrument under the Uniform Commercial Code. That's called a draft. It's an order by the signer on a bank to pay the payee or holder. And since it's drawn on a bank, it's also referred to as a check in Article IV.

There is an additional obligation under a draft for the drawer to pay the draft according to its tender, if it be refused by the drawee. So there is an additional UCC-imposed obligation on the instrument. But that's separate and apart from the underlying obligation which arises simply when the chips were advanced to Judge Porteous. That's when a debt arose.

Q Moving to the second area of Judge Porteous's conduct after Judge Greendyke's confirmation order was entered. The evidence has

also established that Judge Porteous filled out a credit application at Harrah's casino and thereafter gambled at that casino without the approval of the bankruptcy trustee.

Is this also a violation of the order?

A I think the answer is obviously it was. If he was gambling on credit, then as soon as he made a wager on credit, he had an obligation to repay the casino for that amount. And as soon as that obligation arose, they had a, quote, right to payment, which is the words in the code defining claim and debt.

So I think it would be very clear that that would violate an order which says shall not incur additional debts.

Q And the third and final area I want to ask you about regarding Judge Porteous's conduct post confirmation order. Judge Porteous also opened up a new credit card post confirmation order and thereafter proceeded to use that credit card on a monthly basis. He did this without the permission of the bankruptcy trustee.

Is this also a violation of the order?

A Well, yes. It would be a violation of the order at the time that the credit card was used to

make a purchase or obtain a cash advance, because at that instant, there again arose an obligation to repay. And the obligation to pay, i.e., the card issuer would have a right to payment, would be a debt.

So the debt arises as soon as the credit card is utilized.

Q Even though these actions we've just discussed were violations of the confirmation order by Judge Porteous, the defense has argued that Judge Porteous nevertheless satisfied his bankruptcy repayment plan and actually overpaid on that plan. Therefore, is it again no harm no foul, or doesn't that take away the problem that he violated the order?

A Well, I think violation of an order with impunity has no more defense of no harm no foul than perjury. I know of no doctrine where it says if you ignore the order but later can't be shown with quantification to any particular individual what the harm was you're exonerated from the potential contempt of disobeying the order.

So I don't think that that's a defense.

Q Do you think there is any special significance that the debtor in this case is a

federal judge?

A As I testified at the House panel, there's only one statute, and it applies to everyone without regard to what their occupation or position may be. So he certainly wasn't under any greater obligations to honestly report all the facts on what was filed and to obey the order.

But that said, it goes at least to intent. Because Judge Porteous served as a judge, he obviously must have known what the words "under penalty of perjury" mean. And by falsely putting down information or omitting information and admittedly falsely doing it in the petition, he obviously must have known he was committing a perjurious act. And that seems to be -- to go certainly to intent.

In addition, although not part of the bankruptcy code, it's my view that these actions cast a cloud, if you will, on the integrity of the judiciary, and that public officials, whether they're elected or appointed, have a duty to not have that kind of cloud cast on the integrity of the government.

If the public has no confidence in its courts, there aren't enough police officers, there

are not enough judges, there are not enough officials of any kind that are -- officials of any kind that are going to keep the peace in the public and make this an orderly society. There has to be that level of confidence, and this kind of activity certainly would attack and weaken that.

Q And, Judge Keir, if you had been the judge presiding over Judge Porteous's bankruptcy case and if the facts established through the evidence in this case had come to your attention, what actions, if any, would you have taken?

A Well, if I had known all the facts which the record contains at the time that the plan was before the court for confirmation, I would have denied confirmation because it's a requirement under Section 1325 of the Code that a plan be proposed in good faith, and these actions certainly would not show good faith.

If this had been converted to a Chapter 7, I would have denied a discharge under Section 727, because one of the specific provisions is dishonesty in the schedules and statements of financial affairs.

If I knew everything that I know now, I most likely would have also sent a letter of

referral to the United States Attorney under section 18 -- or rather Title XVIII, Section 3057.

A judicial officer has an obligation to report a suspicion of criminal activity, and I would have reported this one for investigation.

Q Judge Keir, do you know whether the United States District Courts handle appeals from bankruptcy courts?

A In all districts, the United States District Court is the first level appeal from bankruptcy courts with two exceptions. In some circuits and some districts within those circuits, the circuits, as authorized by Congress, have formed bankruptcy appellate panels. And if all of the parties to the dispute consent, it takes fully mutual consent, the appeal at first level will not go to the district court, it will go to what is referred to as the BAP, bankruptcy appellate panel.

In addition, in 2005, Congress amended Title XXVIII to provide an avenue by which orders can be appealed directly to the circuit and bypass either the BAP or the district court.

That takes a certification by the trial court and an acceptance of the direct appeal by the circuit court.

Q And with those two exceptions aside, it's correct, then, that bankruptcy court cases are appealed to the United States District courts?

A That's correct. In Maryland, and in Eastern Louisiana, there are no BAPs, so all first-level appeals go to the United States District Court, except for those very few under the recent statute that might bypass and go to the circuit by certification.

Q And what kind of confidence do you think the public would have in Judge Porteous as a judge potentially in a position to hear appellate cases in bankruptcy, knowing his violations in this case?

A Well, if the case on appeal dealt with alleged misconduct by a debtor, particularly if the misconduct was false swearing or some other fraudulent conduct, I think it would certainly weaken the confidence that anyone would have that the judge could sit impartially if he had already himself committed similar acts and tried to say that somehow these were innocent.

MS. KONAR: Madam Chairman, I have no further questions.

CHAIRMAN MC CASKILL: Cross-examination?

CROSS-EXAMINATION

BY MR. WALSH:

Q Good evening, your Honor. My name is Brian Walsh. I'm one of the attorneys for Judge Porteous. We haven't met, have we?

A We have not met. And good evening.

Q Judge Keir, I want to talk a little bit about the context in which the issues that you've discussed in your direct testimony arose in Judge Porteous's case. You mentioned a little bit about Chapter 13, a little context there. I want to talk a little bit about Chapter 7 as well. Those are the two principal types of consumer bankruptcy cases; right?

A Yes. Except for individuals whose debts exceed limits that prevent them from being eligible under Section 109E from being in a Chapter 13. Then Chapter 11 replaces Chapter 13, if you will, in terms of reorganization. Numerically, there are many fewer of those, though I've noticed a certain uptick in that.

Q I apologize, I didn't mean to talk over you. It happens every once in a while, not very often; right?

A I think that's a fair statement.

Q So let's stick with Chapter 7 and Chapter

13 for the present discussion, if you will indulge me. Now, in both of those chapters when a bankruptcy petition is filed, there's a bankruptcy estate that's created automatically by statute; correct?

A Correct. 11 USC Section 541A.

Q All right. And with some minor exceptions that are in Section 541, in a Chapter 7 case, the bankruptcy estate owns only what the debtor owned the moment the petition was filed. Is that a fair statement?

A That is a fair statement, as long as you acknowledge there are exceptions.

Q There are.

A The exception for certain things within 180 days post petition that will come into the estate. And an exception for certain kinds of trusts, assets that won't come in at all.

Q That's correct, there are some assets that don't --

A Spendthrift trust.

Q Right. The assets that might come in within 180 days would include an inheritance, for example?

A An inheritance.

Q Chapter 7 case, the Chapter 7 trustee will marshal that proper, other than the stuff that doesn't come into the estate at all. And other than assets that are exempt from the claims of creditors; right?

A That's correct. They will administer that estate.

Q By administering the estate, that generally means converting it to cash and distributing it to creditors; right?

A That's correct.

Q Okay. The Chapter 7 debtor gets to keep, with the exceptions we talked about, the Chapter 7 debtor gets to keep post bankruptcy assets, including post bankruptcy wages; right?

A Correct.

Q Chapter 13 --

A Unless they are proceeds of prepetition assets.

Q Other than proceeds, that's a fair clarification. Chapter 13 is a little different. In addition to the property of the debtor at the moment of the bankruptcy filing, the bankruptcy estate also sweeps in the debtor's post petition earnings; right?

A It doesn't sneak it in at all. It's open and notorious.

Q I'm sorry, I said sweeps it in.

A I'm sorry, I misheard you. The assets of an estate in a Chapter 13 consist not only of the estate assets under 541A at the time of the petition, but in addition, virtually all post-petition-acquired assets including earnings, not exclusive to earnings, just including earnings.

Q And one of the differences between Chapter 7 and Chapter 13 is that after the filing of the petition, the debtor, rather than the trustee, maintains ownership of property -- maintains control of property of the estate; correct?

A That's correct. Under Section 1303 of the Bankruptcy Code, Section 363(b), which normally only applies to trustees, applies to the debtor, which provides that the debtor may, in the ordinary course, utilize the assets, which means although they remain in control, it's not unfetterred. They have to use it in the ordinary course.

The words of the statute are course of business, which has been interpreted meaning as to an individual, an ordinary lifestyle, if you will, something necessary.

Q Let's go back to the more basic point, if we might, under Section 1306(b) in a Chapter 13 case. The debtor remains in possession of property of the bankruptcy estate unless there's a court order that says something to the contrary?

A Under Section 1306 they remain in possession, and Section 1303 by reference to 363(b), their use of the property is as described in that section. They don't have an unfetterred -- because they possess it doesn't mean that they're without some restrictions on what they can do with it.

Q Then let's move to the point where plan is confirmed in a Chapter 13 case. Unless there's a plan or court order that says otherwise, property of the estate revests in the debtor when the plan is confirmed?

A Section 1328 provides the -- unless the plan or confirmation order states to the contrary, property revests.

Q Have you reviewed the plan and confirmation order in Judge Porteous's case?

A I have. I have the confirmation order.

Q There's nothing in the plan or confirmation order --

A I don't recall seeing anything in the plan

about the property not revesting.

Q Okay. Now, I think you mentioned that the basic structure of a typical Chapter 13 plan is the use of the debtor's post bankruptcy earnings less certain expenses to make periodic payments to the trustee and then onto the creditors. Is that a fair summary?

A That's correct.

Q And again, that's different from Chapter 7, where the creditors don't have any claim to the post bankruptcy earnings; right?

A Correct.

Q Chapter 13 debtor isn't obligated to use assets that exist on the bankruptcy petition date to pay its creditors, to pay his or her creditors; right?

A I didn't understand what you just said. Please repeat it.

Q Sure. Let me ask it differently. The Chapter 13 debtor has certain assets on the date that a bankruptcy petition is filed; right?

A Certainly. Well, most of them do. I suppose it's possible that they would have none, but I wouldn't think so in Chapter 13.

Q That's true. Let's assume away that one

and assume a debtor that has a few assets at least. In that scenario, the bankruptcy code doesn't require the Chapter 13 debtor to use those existing assets to pay creditors, the focus is on the future income; right?

A It really doesn't -- there's two independent requirements for the plan to be confirmed. First of all, projected disposable income must be dedicated to the plan.

In addition, what value must be delivered to the trustee for distribution must be equal to at least the equivalent value of distribution in Chapter 7. And at times, that means the debtor is going to have to use assets in order to generate sufficient moneys to deliver the trustee to reach that equivalency value because the projected disposable income is going to be too little.

So the code doesn't state that only disposable income is the source. It actually sets a certain minimum amount based upon the higher of those two equations.

Q Let me see if I can summarize what you just said, your Honor. In certain circumstances, certain factual circumstances, the debtor might conclude if I'm going to get a plan confirmed here,

I guess I'm going to have to use something else besides my future wages if I'm going to satisfy the confirmation standard. Is that what you're saying?

A That's part of what I've said.

Q One of the key reasons that debtors file under Chapter 13 rather than Chapter 7 is because they want to preserve assets like a house or car or something like that, true?

A It varies from district to district in term of predominance, according to conversations I've had with colleagues around the country. But in many jurisdictions, including mine, and I believe in Louisiana, the principal reason why someone files a Chapter 13 is because they have an arrearage on their deed of trust or mortgage loan for their residence.

And under most state laws, they don't have a right to cure that arrearage over up to five years. And so a foreclosure is looming. And they can't afford a lump sum to bring it current, and so the way that they try to continue to retain the house and the use of it is to file a Chapter 13, cure the arrearage over the life of the plan and come out with it back as a current obligation. That's the principal reason, not the sole reason.

We also see similar situations with other secured debt like cars, where they're behind and again they can't cure it in a lump sum and they want to use the plan to cure that. There are some other more minor reasons.

Q Let me move on to a different topic, your Honor.

In your experience, would you agree that debtors often make mistakes and have inadvertent omissions in their bankruptcy filings?

A "Inadvertent" is the key word, and yes. Often? I'm not sure I would agree with that characterization. Certainly, it's not uncommon. Occasional and inadvertent mistakes certainly do happen.

Someone may have to estimate what the payoff of their total principal and interest balance on their mortgage is, and they might estimate it off a bit. That one is very common.

Someone who is not financially sophisticated and not particularly good at keeping records may underestimate how many payments they have missed over the last two or three years in sporadic payments, they owe three instead of two or they owe five instead of four. Those types of

inadvertent mistakes are found.

Sometimes somebody owes a lot of different physicians for a hospital stay and leaves one off the schedules until they realize that they have left it off and then they correct the schedules.

Q Is it fair to say, your Honor, that you've handled cases over the years where debtors have failed to make complete and accurate disclosures but nevertheless they have obtained relief in the form of a discharge?

A I think that that's an overbroad statement. To the extent that I would have known about it, if there was an inadvertent and occasional mistake that was corrected, I'm sure in a number of cases, discharges have been entered.

If there was a pattern of deceit, I know of no case where I presided over where a discharge has been entered where that was known.

I might add I've never seen perjury on the petition in a case in which a discharge was entered.

Q Understood.

Let's talk about the bank account balances on Judge Porteous's schedule B. You're aware of the allegation that Judge Porteous listed a bank account balance for one account that was too low and omitted

another account?

A I've seen that report, yes.

Q You've seen that mentioned. You would agree that unsecured claims in the Porteouses' bankruptcy cases, in their bankruptcy case were more than $196,000; is that right?

A I don't recall the exact figure, but that sounds about right.

Q And absent the requirement of the best interest test that you talked about a few minutes ago, cash the debtor has in the bank on the petition date is not required to be paid over to creditors in a Chapter 13 case; right?

A No, it's part of the equation of value that we talked about.

Q Okay. Let's talk about markers. Paul Mannes is a colleague of yours on the bankruptcy court?

A I've known Paul for many years, yes.

Q Are you familiar with his decision in the Sing case in which he held that a debtor's execution of a marker in exchange for chips was a concluded transaction and not an extension of credit?

A No, I'm not familiar with that case at all.

Q Are you familiar with the Louisiana case law to the effect that a marker is a negotiable instrument?

A I have seen a reported decision from Louisiana that so holds.

Q Okay.

A I agree with it. It's a negotiable instrument.

Q It's a negotiable instrument, all right.

A And that's why the drawer has a contractual obligation to pay it. But there's -- it's delivered for an underlying transaction as the UCC describes it. And the underlying transaction is the obligation, because there's a right to payment.

Q Would you agree that a debtor that's subject to a prohibition of the sort that's in the confirmation order in this case, don't incur debt without the trustee's approval, would be permitted to go to the grocery store and buy groceries with a check?

A With a check?

Q With an ordinary bank check.

A Well, first of all, I certainly have not researched the decisional law of Louisiana as to the effect of this order and whether there's a case out

there that says the facts that you just stated, so I don't know whether it's been tested or not.

I really can't give you an opinion, other than saying that it would appear there was an attempt to simultaneously pay for the groceries by tendering the instrument. And if there's a simultaneous transfer, then no debt arises, because there's no subsequent right to payment.

Technically, until the instrument is presented to the drawee and honored, the obligation, underlying obligation, to be paid for the groceries, just like you have to pay for the chips, is not extinguished.

Q It's suspended; right?

A It's not even suspended. It's just not extinguished. It usually will be, if the check is honored. It won't be if the check is not honored.

If the check is not honored, then the holder of the check has two separate obligations that they can pursue, the underlying obligation by a contract action, if that's where the -- what it was, and a suit on the instrument. They can only recover once.

Q So the hypothetical debtor I just mentioned who goes to the grocery store and

purchases groceries with a check technically incurs a debt until the check is honored by his or her bank; correct?

A I would think that's probably technically correct.

Q Would you agree that a debtor subject to the language of the sort we have in the confirmation order in this case could go to the grocery store and cash a check, if he could find a grocery store that would still cash a check today?

A They could cash a check, if that -- if -- I suppose they could do it. You mean without offending the order?

Q Without offending the order, that's the question, that's correct.

A Well, they undertake an obligation to take the instrument up if it's dishonored, if they cash the check. So it's the same technical question you asked me before, just another version of it.

Q Would you agree that a debtor that's subject to language like the one in the confirmation order in Judge Porteous's case could go to the grocery store, if there's an ATM there, withdraw some cash, pay cash for some groceries, without violating the order?

A That would appear not to violate the order, assuming for the moment that that ATM machine was current in terms of collectible balances of the account it's drawn on. So there's no right to repayment. There's simply a debit transaction simultaneous to the account balance. And a -- the cash is delivered to the customer at the same time. So nobody owes anything after that.

Q On schedule I, Judge Porteous listed his net monthly take-home pay as approximately $7500; right?

A That's what I've seen.

Q And some of the evidence in this case has indicated that his net take-home pay at the time was actually more like $7700. Do you recall -- recall seeing that?

A I've seen that.

Q And the difference is about $174 between the two figures; right?

A I don't remember the exact figures after the first two digits, but I'll assume that's correct.

Q Would you agree that the difference between those two amounts, in terms of significance, is on the borderline?

A Yes.

Q Those sorts of things always arise in the context of particular facts, don't they?

A That kind of discrepancy would appear more consistent, without any other facts, if -- in a vacuum would appear more consistent with the inadvertent mistake, somebody grabs a pay stub and it isn't the most current one. That could happen. If that's the only error, it probably would be treated as an inadvertent mistake.

Q And in that sort of scenario, a debtor might be underestimating his or her expenses a little bit. Is that fair?

A That sometimes happens too.

Q The difference in $174 or something in that range might be absorbed in legitimate expenses of the debtor. Is that fair?

A I'm not sure what you mean by "absorbed," so I don't really understand the question. It sounds like you're saying if they underestimated their expenses, then the two will offset and there's no harm. I've already spoken about this idea of no harm, no foul.

If the mistake is inadvertent and isolated and seems to be that way, then it's not treated as

an intentional false statement, whether it's an underestimate of a particular expense or a slightly inaccurate pay stub.

Q Let me go back to markers for a moment, your Honor. Before the House task force, you talked about another problem with the marker taken out post petition. And since that -- since your prior testimony may be introduced into evidence, I want to make sure I explore that.

And the issue you identified was that the payment of a marker taken out post confirmation might be a violation of the automatic stay. Do you recall that testimony?

A Yes. I said that if the marker was presented to the drawee bank, which I believe the prior testimony of the FBI agent, there's a slang term "deposit," it's really a presentment of an instrument. If that happens, you have a creditor who is collecting. It's their action.

And the automatic stay stays collection of post petition debts from the bankruptcy estate.

So if the money in the account, as we've already discussed, included post petition earnings, post petition acquisition under Section 1306, it's likely that estate property, estate moneys in the

account, would have been grabbed, if you want to use that term, by the presentment of the instrument. So it's an action of the creditor, it would violate the stay.

Albeit if the creditor had been deprived of knowledge of the filing of the bankruptcy, they did it innocently. Still a violation.

However, I also testified that if Judge Porteous went back to the casino or up to the window and paid the marker off in cash -- paid the debt off in cash with whatever source, and so presentment didn't occur, it doesn't appear that the creditor took action, but it appears possible that the debtor was using the same estate property after acquired cash for a purpose that's not in the ordinary course, as that term has been interpreted in Section 363(b), so there's a violation of the code, but the violation appears to be the debtor's violation.

Q Let me go back to the presentment issue just for a moment, your Honor. The automatic stay does not prohibit the presentment of a negotiable instrument, does it?

A It does not prohibit presentment for purposes of where necessary, such as where a note has to be demanded. I can look it up if you'd like

to be precise. It prohibits an act to collect, however. And if that is used to collect, as opposed to simply establish such as a demand note, making demand in order to bring to present the maturity of a demand note, which is another form of instrument, that's not prohibited.

But it is prohibited if the intent is actually to collect the debt. That's prohibited.

Q From estate property?

A From estate property. It's prohibited also as to a debtor's property, as to prepetition debts.

Q Not post petition?

A Post-petition debts, it's only prohibited as to estate property.

MR. WALSH: May I have a moment, Madam Chair?

CHAIRMAN MC CASKILL: Yes.

MR. WALSH: Nothing further, thank you.

CHAIRMAN MC CASKILL: Thank you.

MS. KONAR: Madam Chair, we have no further questions.

CHAIRMAN MC CASKILL: Thank you very much. Any questions by the panel? Any Senators have questions of this witness?

Thank you, Judge, very much, for your cooperation and your time this afternoon.

THE WITNESS: You're welcome.

(Witness excused.)

MR. SCHIFF: Madam Chair, subject to our introduction of documentary evidence, and counsel for both sides will be meeting later in the week to agree to as much of that as possible, subject to the introduction of that evidence, the House rests.

CHAIRMAN MC CASKILL: Thank you.

MR. TURLEY: Madam Chair, the defense is ready to present its case for G. Thomas Porteous. Can you just give us a few minutes, about five minutes for us to confer and then we'll be ready to start?

CHAIRMAN MC CASKILL: And how many witnesses do you have here prepared to testify right now?

MR. TURLEY: Well, we could present two more, if the Senators have the time for it. We could certainly do that. We have two witnesses available. It depends on how late the Senators want to go.

CHAIRMAN MC CASKILL: How long do you anticipate the first of those two witnesses will

take? I won't hold you to it. Just trying to see how long -- we're doing -- if you noticed, we haven't adjourned, and people are just tagging out to go back and use the facilities and grab a drink.

And I'm trying to maybe see if I can give my colleagues some kind of estimation of when I'm --

MR. TURLEY: I would think that our first witness would not go beyond 45 minutes. We can try to shave off some time as we go. But that would be my rough estimate.

CHAIRMAN MC CASKILL: All right. Why don't you take a few minutes, and we won't adjourn, but people -- if people want to go back and refill your water glass, let's take your first witness, as soon as you're ready.

MR. TURLEY: Thank you.

MR. SCHIFF: And Madam Chair, may I ask who the first couple witnesses will be? We have their trial order, but of course they're not obligated to follow it.

CHAIRMAN MC CASKILL: Who will your first witness be?

MR. TURLEY: Our first witness will be Judge Porteous's son, Timmy.

CHAIRMAN MC CASKILL: Your second witness

if we have time for that one?

MR. TURLEY: My assumption is the second witness would be Judge Bodenheimer.

CHAIRMAN MC CASKILL: Okay.

(Recess.)

(6:00 p.m.)

CHAIRMAN MC CASKILL: Judge Porteous may call his first witness.

MR. SCHWARTZ: We would call Timothy Porteous.

Whereupon,

TIMOTHY A. PORTEOUS

was called as a witness and, having first been duly sworn, was examined and testified as follows:

CHAIRMAN MC CASKILL: Thank you. Be seated.

MR. SCHWARTZ: Thank you, Madam Chairman.

DIRECT EXAMINATION

BY MR. SCHWARTZ:

Q Mr. Porteous, my name is Daniel Schwartz. I'm one of the attorneys for Judge Porteous. Would you please state your name.

A Timothy A. Porteous.

Q And where do you reside?

A I live in Kenner, Louisiana.