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January 17, 2006

Honorable Sim Lake
United States District Judge
515 Rusk
Houston, Texas 77002
By Hand Delivery

IN RE: Assignment of Tables

Your Honor:

To avoid burdening the Court with yet another tome, I ask the liberty to address a discretionary issue by informal letter.

Request. Both Mr. Skilling and Mr. Lay request to be seated at the table nearer the witness stand so that they may have an unimpeded, unobstructed and uncluttered "face-to-face" confrontation with the witnesses against them. This request is bottomed upon two modern Supreme Court cases, *Coy v. Iowa,* 108 S.Ct. 1011 (1988) and *Maryland vs. Craig,* 110 S.Ct. 3157 (1990), and depends upon the Court's appreciation of the core Constitutional values emphasized in those two cases.

Factual Proposition. Due to the layout of the courtroom, persons *seated* at the farther table do not have a direct, unimpeded, "face-to-face" view of the testifying witnesses and *vice-versa.* Depending upon the placement of computer monitors, position, size and number of lawyers, clerks and case-agents, placement of the podium, angle of vision and such like, *seated* individuals at that table usually have no practical view of the witnesses at all. Other than minor inconveniences, this fact is of little consequence to the lawyers, who stand to examine. (In fact, the personal predilections, conveniences and superstitions of the lawyers should be given zero weight in deciding the issue, while all focus should be upon the best method to give life and vitality to the core Constitutional value of "face-to-face" confrontation emphasized in the cases cited.)

(Unstated in the controversy is the natural desire of both sides to be "close to the jury". I feel that way and very much suspect that the Task Force does too. Either side can

posture and claim they fear inappropriate jury contact, I guess—I once had a case before Judge Kent where the case-agent was caught, among other sins, slipping candy mints to the jury—but somehow I doubt such a suggestion would be made with much conviction. Indeed, were the preferences of the lawyers all that were at stake, then the issue should be, quite properly, submitted to the vagaries of a coin toss. But there is another issue which, properly balanced, may weigh on the Court's judgment. And that is the physical juxtaposition of the witnesses to Mr. Skilling and Mr. Lay.)

Anecdote. Last year I tried a case before Judge Werlein. His courtroom is almost identical to yours. There were two defendants and seven defense lawyers and/or law clerks at the farther table. At the closer table there were two prosecutors, one clerk and two case-agents, for a total of five. I can certify that from a seated position it was difficult and often impossible to freely view a testifying witness. Indeed, one could rarely see witnesses' facial expressions, body language and other non-verbal signals. Of course, when I stood to examine the problem went away. However, in no sense was the defendant "confronted" by the witnesses. For psychological reasons most witnesses come into court like bats into a lighted room—blinking and gawking about, trying to orient themselves. In the case I refer to, most witnesses, when asked to identify my client (the only black female inside the rail), had such trouble finding her in the crowd that I took to having her stand for the identification process. It is a far different view than one has when seated upon the bench and the courtroom must be full for its impact to take full effect.

Law. Both *Coy* and *Craig* emphasize the "face-to-face" aspect of confrontation as distinguished from the cross-examination aspect. Both cases can be distinguished in the sense that each turned upon an intentional legislative attempt to avoid such confrontation in order to protect juvenile complainants in sex cases whereas the present case involves only the layout of the courtroom. The Task Force will be well within the bounds of logic and reality to argue that an adverse ruling on this request would not be reversible error. That said, this appeal is to the Court's best judgment as to how to implement and give life to the Constitutional values which are explained in those cases.

The Task Force may also suggest that the Court finesse the issue by finding that, after all, the witnesses and the defendants are in the same courtroom. But such argument begs the question of, "What can the Court do to better implement the core Constitutional value of 'face-to-face' confrontations as an aid to fact finding?" Placing Mr. Skilling and Mr. Lay at the farther table immerses them in a sea of blue suits and diminishes the non-verbal aspects of confrontation referred to by Mr. Justice Scalia in *Coy* and Ms. Justice O'Connor in *Craig*. True, by stretching and craning the defendants might occasionally make eye contact with the witnesses, but such conduct would certainly carry its own message.

In the last ditch, I once heard a prosecutor argue that since he had the burden of proof he had a right to be nearer the jury. This argument falls into the category of "magical thinking"; the burden of proof is carried from the podium. There is no logical reason to be nearer the jury; there is a core Constitutional reason to place the defendants in the best position to "face their accusers" in the fullest view of the jury.

It may also be argued that much of the applicable vitality in the cases I rely upon comes from *dicta*. But *dicta* is in cases not to keep the covers of the books from banging together, but to inform and infuse the Trial Courts—where ninety-nine percent of the equity is done—with the spirit and rationale of the decision. While *dicta* is generally advisory, not mandatory, neither is it meant to be disregarded. Both cases teach that there is more to a trial than the cold logical application of law to fact. The jury's province and burden is to determine what the facts are and whatever can be done to make that function easier should be done and the superstitions of the various lawyers take the hindmost. Mr. Justice Scalia is dead right when he says in *Coy*, at 2801-2:

> The phrase still persists, "look me in the eye and say that." Given these human feelings of what is necessary for fairness, the right of confrontation "contributes to the establishment of a system of criminal justice in which the perception as well as the reality of fairness prevails." [citations omitted]
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> The perception that confrontation is essential to fairness has persisted over the centuries because there is much truth in it. A witness "may feel quite differently when he has to repeat his story looking at the man whom he will harm greatly by distorting or mistaking the facts...[citations omitted]...It is always more difficult to tell a lie about a person "to his face" than "behind his back." In the former context, even if the lie is told, it will often be told less convincingly. The Confrontation Clause does not, of course, compel the witness to fix his eyes upon the defendant; he may studiously look elsewhere, but the trier of fact will draw its own conclusions.
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> That face-to-face presence may, unfortunately, upset the truthful rape victim or abused child; but by the same token it may confound and undo the false accuser, or reveal the child coached by a malevolent adult. It is a truism that Constitutional protections have costs.

Likewise, in *Craig*, Ms. Justice O'Connor was dead right when she taught, [trimming Scalia's rhetorical sails somewhat, as often is her wont], at 3165:

> In sum, our precedents establish that "the Confrontation Clause reflects a *preference* for face-to-face confrontation at trial," [citations omitted] a preference that "must occasionally give way to considerations of public policy and the necessities of the case." [citations omitted]

There are no such policies or necessities in the present case.

Peroration. Defendants urge that this issue is much more than a matter of convenience or personal preference. Mr. Skilling and Mr. Lay are real persons and vital participants who respectfully feel they have a right to face their accusers and *have their accusers face them* in the most direct fashion. To relegate them to back row positions in what is the most important event of the remainder of their lives should never be intentionally done nor should it be relegated to the law of chance. To the lawyers and the Court the trial is "just another day at the office"; to Mr. Skilling and to Mr. Lay it is a life-altering event. They have both a demonstrable Constitutional "fair trial" interest and a visceral need to be front and center. The trial is about *them.*

The Task Force has no countervailing argument.

(I have the honor to say that Mr. Petrocelli joins this argument on behalf of Mr. Skilling.)

Respectfully,

Michael Ramsey

MR/dc

cc: Enron Task Force
By Hand Delivery

Daniel Petrocelli
By email:

P.S: Under separate cover I deliver to the Court and Task Force highlighted versions of the two cases cited herein. Also, I am filing a copy of the letter with the Clerk of the Court.