

1 STATE OF WISCONSIN : CIRCUIT COURT : MANITOWOC COUNTY
2 BRANCH 1

3 STATE OF WISCONSIN,
4 PLAINTIFF, JURY TRIAL
5 vs. TRIAL - DAY 25
6 STEVEN A. AVERY, Case No. 05 CF 381
7 DEFENDANT.

8 **DATE:** MARCH 16, 2007

9 **BEFORE:** Hon. Patrick L. Willis
10 Circuit Court Judge

11 **APPEARANCES :**

12 KENNETH R. KRATZ
13 Special Prosecutor
14 On behalf of the State of Wisconsin.

14 THOMAS J. FALLON
15 Special Prosecutor
16 On behalf of the State of Wisconsin.

16 DEAN A. STRANG
17 Attorney at Law
18 On behalf of the Defendant.

18 JEROME F. BUTING
19 Attorney at Law
20 On behalf of the Defendant.

20 STEVEN A. AVERY
21 Defendant
22 Appeared in person.

22 * * * * *

23 **TRANSCRIPT OF PROCEEDINGS**

24 Reported by Diane Tesheneck, RPR

25 Official Court Reporter

1 THE COURT: At this time the Court, again,
2 calls State of Wisconsin vs. Steven Avery, Case No.
3 05 CF 381. I will indicate that we are on the
4 record at this time, outside of the presence of the
5 jurors. Will the parties present state their
6 appearances for the record, please.

7 ATTORNEY KRATZ: Good morning, Judge, the
8 State appears by Calumet County District Attorney
9 Ken Kratz and Assistant Attorney General Tom Fallon
10 as Special Prosecutors.

11 ATTORNEY STRANG: And good morning as well,
12 Steven Avery in person and Jerome Buting and Dean
13 Strang on his behalf.

14 THE COURT: All right. Before I get to the
15 specific reason that we're going on the record this
16 morning, I wanted to address an item that came to
17 the Court's attention yesterday, after the jurors
18 began deliberations. There were a couple of
19 requests from the jury for accessories, if you will,
20 to assist them in their deliberations.

21 Specifically, at about 1:20 in the
22 afternoon the jurors requested a magnifying
23 glass, because of the size of the photos that
24 they received. And at 2:30, the jurors request a
25 dry board, a flip chart, or something along those

1 lines, that they could use in the course of their
2 deliberations.

3 When requests like this are typically
4 received, the Court generally will, informally,
5 discuss with counsel if any of them have any
6 problem, but normally the Court simply sends the
7 items back. It's practice and, in fact, it's
8 required to go on the record whenever a question
9 is received from the jury, but normally it's this
10 Court's practice and counsel confirmed yesterday
11 that they did not see a need to go on the record
12 for the requests that were made by the jury.

13 One difference in this case is that the
14 Court has been alerted that the media interest in
15 the juror deliberations extends to the request of
16 the nature of those that were made yesterday.
17 And the Court was, frankly, simply not thinking
18 about that yesterday afternoon.

19 But it would be my proposal, if there's
20 any requests like that received in the future,
21 although we may not go on the record for them, if
22 either party feels the need to do so, I will,
23 after any such requests are acted on, simply pass
24 information to the media coordinator and alert
25 all the media of what happened. Is that

1 procedure acceptable to both parties?

2 ATTORNEY KRATZ: Yes, judge.

3 ATTORNEY STRANG: Yes.

4 THE COURT: The next item has do with one
5 of the jurors in this case. Last evening, sometime
6 around 9 p.m., the Court received a telephone call
7 from Sheriff Pagel indicating that one of the jurors
8 had presented a request to a -- one of the
9 supervising deputies over at the hotel, to be
10 excused because of an unforeseen family emergency.

11 The Court, mindful of its duty to
12 exercise reasonable efforts to void the discharge
13 of a juror, once deliberations have begun,
14 nevertheless, concluded that based on the
15 information provided, the request appeared to
16 have merit and warranted further consideration.

17 After I received the information, I
18 contacted Attorney Kratz and both defense counsel
19 by telephone conference call to inform them of
20 the request. Counsel agreed that if the
21 information that had been presented to the Court
22 was correct, excusing the juror was appropriate
23 in this case.

24 Counsel further authorized the Court to
25 speak with the juror individually and excuse the

1 juror if the information provided to the Court
2 was verified. The Court did verify that
3 information with the juror and excused the juror
4 last evening.

5 Case law in Wisconsin provides three
6 alternatives in a situation now before the Court.
7 One alternative is that the parties can stipulate
8 to proceed with 11 jurors.

9 The second alternative is that the
10 parties can stipulate to substitute an alternate
11 juror. In this case the Court has previously
12 sequestered one of the alternate jurors to be
13 available for that purpose, if it became
14 necessary.

15 The third alternative is to declare a
16 mistrial in the absence of a stipulation by the
17 parties to proceed with one of the other two
18 alternatives.

19 It's my understanding that at this time
20 the parties do have a stipulation to present to
21 the Court. Mr. Strang.

22 ATTORNEY STRANG: Your Honor, thank you.
23 Mr. Avery and his counsel are willing to offer their
24 agreement to pursue the following course: One, if
25 the Court gives a proper instruction that jury

1 deliberations must begin entirely anew. And, two,
2 if each of the 11 presently deliberating jurors
3 provides satisfactory assurance that they can and
4 will follow an instruction to begin deliberations
5 anew, then, three, the defense will agree that the
6 person who has been the alternate to date should
7 join the ranks of the 11, becoming the 12th regular
8 juror and the deliberations may begin anew with this
9 newly composed group of 12.

10 If the State thinks the three aspects of
11 this agreement acceptable, the defense, too, will
12 be bound by it. And we have discussed that with
13 Mr. Avery. It has his concurrence and he
14 understands that the Court will want to make
15 brief personal inquiry of him as well.

16 THE COURT: Thank you. Mr. Kratz.

17 ATTORNEY KRATZ: Judge, the State joins in
18 the stipulation. After our conversation last
19 evening where the Court discussed the options, and
20 after hearing, this morning, of the defense
21 willingness to enter the stipulation, the State
22 agrees that the alternate juror, who was reserved
23 just for this unusual circumstance or occasion,
24 that -- that the Court do just that. And so we join
25 in Mr. Strang's request that the Court adopt and

1 approve this stipulation.

2 THE COURT: All right. As a supplement to
3 Mr. Strang's request, I should indicate for the
4 record that I did meet with counsel in chambers
5 before we began today and went over a proposed
6 instruction to the jury and question for the jurors
7 to make sure that they could follow the Court's
8 instruction.

9 The Court prepared that instruction with
10 input from both of the parties. And Mr. Strang
11 when you refer to an appropriate instruction, I'm
12 assuming you are referring to the one that was
13 discussed in chambers today.

14 ATTORNEY STRANG: The instruction that the
15 Court read to us in chambers this morning, after
16 hearing input from both sides, we think a proper
17 instruction.

18 THE COURT: Thank you. All right. Then,
19 Mr. Avery, I do have a few questions to ask of you
20 at this point. First of all, have you heard the
21 discussion that we just had, on the record, and the
22 proposal of how to address the issue of the excused
23 juror?

24 THE DEFENDANT: Yes, sir.

25 THE COURT: Have you taken some time this

1 morning to discuss this matter with your attorneys?

2 THE DEFENDANT: Yes, sir.

3 THE COURT: Are you aware that you are
4 under no obligation to join in the stipulation, that
5 is, you have the right to require a jury of 12 and
6 the right to request a mistrial if the juror is
7 excused.

8 THE DEFENDANT: Yes, sir.

9 THE COURT: Do you feel that you need any
10 more time to consider your decision on this issue?

11 THE DEFENDANT: No, sir.

12 THE COURT: Are you in agreement with the
13 stipulation that has just been placed on the record
14 by your attorney, Mr. Strang?

15 THE DEFENDANT: Yes, sir.

16 THE COURT: Very well, the Court finds that
17 the parties have jointly stipulated, and the defense
18 has stipulated with the knowing and voluntary
19 consent of the defendant, to recall the alternate
20 juror in this case and allow the jurors to begin
21 deliberating anew, following an instruction from the
22 Court as to how those deliberations are to proceed.

23 Is there anything else that either party
24 wishes to bring up on the record before we bring
25 in the jurors?

1 ATTORNEY KRATZ: No, your Honor.

2 ATTORNEY STRANG: No, thank you, your
3 Honor.

4 THE COURT: And I believe it's the
5 understanding and agreement of both parties that,
6 when the jurors are brought in, we'll be bringing in
7 the remaining 11 original jurors and the alternate
8 to take the seat she normally takes.

9 ATTORNEY STRANG: Yes, and, that because
10 this procedure, very soon, will require naming
11 jurors, that arrangements have been made with the
12 media to preserve the Court's requirement that
13 jurors not be named publicly.

14 THE COURT: All right. I will cue the
15 media, the camera operators, when that time comes in
16 the instructions. At this time, then, we can bring
17 in the jurors.

18 (Jury present.)

19 THE COURT: You may be seated. We're going
20 to wait a minute for Ms Stienmetz to join us.

21 Members of the jury, one of your members
22 has been excused from jury deliberations in this
23 case, because of an unforeseen family emergency.
24 Although excusing a juror during deliberations
25 rarely occurs, it is sometimes necessary.

1 The Court has brought back the last
2 alternate juror excused, to participate in the
3 deliberations in this case. Before those
4 deliberations begin, I have an important further
5 instruction for all of you.

6 The law requires that, during
7 deliberations, 12 people must have the
8 opportunity to review the evidence in light of
9 each juror's perception, memory, and reaction.
10 It is important that the jury reach its consensus
11 through deliberations, which are the common
12 experience of all 12 jurors.

13 Each of the 12, must have the
14 opportunity to persuade the other members of the
15 jury and to be persuaded by them. If you have
16 formed any views about the evidence up until now,
17 you must set those views aside and start over.

18 To assure that these requirements are
19 followed in this case, you are instructed that
20 you must commence your deliberations anew. That
21 means that you should begin by electing a
22 foreperson and then proceed to evaluate all the
23 evidence as though you are just beginning to
24 deliberate. This is necessary to assure the full
25 participation of all 12 jurors in the

1 deliberation process.

2 Before I excuse you to begin
3 deliberating, it is necessary that I be assured
4 that each of you will be able to deliberate on
5 this basis. Therefore, I'm going to individually
6 ask each of you one more question. At this time
7 I will ask the media to cut the audio portion.
8 Thank you.

9 Each of you must accept this juror as an
10 equal member of this jury, giving her the full
11 respect and authority that you would give to any
12 other juror.

13 Mr. Slaby, will you be able to follow
14 this instruction I have just given you and begin
15 your deliberations anew?

16 MR. SLABY: Yes.

17 THE COURT: Ms Free, will you follow this
18 instruction I have just given you and begin your
19 deliberations anew?

20 MS FREE: Yes.

21 THE COURT: Ms Schmidt, will you follow the
22 instruction I have just given you and begin your
23 deliberations anew?

24 MS SCHMIDT: Yes.

25 THE COURT: Ms Thorne, will you follow this

1 instruction I have just given you and begin your
2 deliberations anew?

3 MS THORNE: Yes.

4 THE COURT: Ms Dorn, will you follow the
5 instruction I have just given you and begin your
6 deliberations anew?

7 MS DORN: Yes.

8 THE COURT: Mr. Nelesen, will you follow
9 the instruction I have just given you and begin your
10 deliberations anew?

11 MR. NELESEN: Yes, sir.

12 THE COURT: Mr. Klein, will you follow the
13 instruction I have just given you and begin your
14 deliberations anew?

15 MR. KLEIN: Yes.

16 THE COURT: Mr. Schuette, will you follow
17 the instruction I have just given you and begin your
18 deliberations anew?

19 MR. SCHUETTE: Yes.

20 THE COURT: Ms Flint, will you follow the
21 instruction I have just given you and begin your
22 deliberations anew?

23 MS FLINT: Yes.

24 THE COURT: Mr. Mohr, will you follow this
25 instruction I have just given you and begin your

1 deliberations anew?

2 MR. MOHR: Yes, your Honor.

3 THE COURT: And, Mr. Wardman, will you
4 follow the instruction I have just given you and
5 begin your deliberations anew?

6 MR. WARDMAN: Yes.

7 THE COURT: Last, Ms Stienmetz, have you
8 heard the instructions that I have given to the jury
9 and are you willing to resume your role as a juror
10 under those instructions in this case?

11 MS STIENMETZ: Yes, I am.

12 THE COURT: Thank you. Members of the
13 jury, the Court will prepare a written copy of the
14 instruction that I have just given you to send back
15 so that you will have it with your other
16 instructions in this case. Ms Stienmetz, do you
17 still have your original instructions or do you need
18 another set sent back?

19 MS STIENMETZ: It was left in the room.

20 THE COURT: All right. I will see to it
21 that another set of full instructions gets sent back
22 for you. At this time, then, members of the jury,
23 you are excused and you may begin your
24 deliberations.

25 (Jury not present.)

1 THE COURT: You may be seated. Counsel, I
2 will ask you to stop back, then, in about 10 minutes
3 so that I can prepare a written version of this
4 instruction, sent back to the jury, and each of you
5 can sign off on it.

6 ATTORNEY BUTING: All right.

7 THE COURT: Anything else while we're on
8 the record?

9 ATTORNEY KRATZ: No, Judge. Thank you.

10 ATTORNEY STRANG: No. Thanks.

11 THE COURT: Very well. Counsel, I'm going
12 to ask you to stop back right away.

13 ATTORNEY BUTING: Okay.

14 (Court in recess, jury deliberating.)

15 *****

16 (Question from the jury and the Judge's reply.)

17 THE COURT: At this time we are on the
18 record, outside the presence of the jury. All
19 counsel, except Mr. Gahn, are present, and the
20 defendant is also present, in person.

21 I can indicate for the record that the
22 Court has received a written question from the
23 jury dated today, at 1:29 p.m. Following receipt
24 of the question, I met with counsel in chambers
25 and discussed a proposed answer to the question.

1 I believe the parties are in agreement
2 with that answer. I will read the question and
3 the answer at this time and then ask the parties
4 if the answer is acceptable. The question from
5 the jury reads: Could we please read or hear a
6 transcript of Bobby Dassey's testimony. It is
7 signed by Daniel Slaby, who I presume to be the
8 foreperson, dated today at 1:29 p.m.

9 The proposed answer is the following:

10 Dear Jury Members, this is in response to your
11 request for a transcript of Bobby Dassey's
12 testimony. As the Court has instructed you, you
13 will not have a copy of the written transcript of
14 the trial testimony available for use during your
15 deliberations. You may ask to have specific
16 portions of the testimony read to you. You must
17 continue to rely primarily on your memory of the
18 evidence and the testimony introduced during the
19 trial.

20 The Court does not have and cannot
21 provide you with a transcript of Bobby Dassey's
22 entire testimony. If you can identify a specific
23 portion of his testimony, the Court will attempt
24 to address your request. Please do not disclose
25 the state of your deliberations in any such

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request. Signed by me. Mr. Kratz, is that answer acceptable to the State?

ATTORNEY KRATZ: Yes.

THE COURT: Mr. Strang, Mr. Buting, I don't know if you discussed this matter with your client, I will give you an opportunity to do so if you wish.

ATTORNEY STRANG: Mr. Buting did, briefly. The answer is acceptable both to defense counsel and to Mr. Avery.

THE COURT: Very well, if there's nothing further, I will send the original copy of the answer back to the jury and then keep the jurors question and a copy of the answer for the court file.

ATTORNEY FALLON: Do you want us to wait here in case there is a quick reply?

THE COURT: Actually, I have got another matter I would like to talk to you in chambers about, so let's meet back there.

(Court in recess, jury deliberating.)

1 STATE OF WISCONSIN)
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2 COUNTY OF MANITOWOC)

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I, Diane Tesheneck, Official Court Reporter for Circuit Court Branch 1 and the State of Wisconsin, do hereby certify that I reported the foregoing matter and that the foregoing transcript has been carefully prepared by me with my computerized stenographic notes as taken by me in machine shorthand, and by computer-assisted transcription thereafter transcribed, and that it is a true and correct transcript of the proceedings had in said matter to the best of my knowledge and ability.

Dated this 11th day of January, 2008.

Diane Tesheneck, RPR
Official Court Reporter

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Gahn [1] 14/19 General [1] 2/9 generally [1] 3/4 gets [1] 13/21 give [2] 11/11 16/6 given [13] 11/14 11/18 11/22 12/1 12/5 12/9 12/13 12/17 12/21 12/25 13/4 13/8 13/14 gives [1] 5/25 giving [1] 11/10 glass [1] 2/23 going [4] 2/15 9/19 11/5 14/11 good [2] 2/7 2/11 group [1] 6/9	keep [1] 16/12 Ken [1] 2/9 KENNETH [1] 1/12 Klein [2] 12/12 12/15 knowing [1] 8/18 knowledge [1] 17/14 KRATZ [5] 1/12 2/9 4/18 6/16 16/1	obligation [1] 8/4 occasion [1] 6/23 occurs [1] 9/25 off [1] 14/5 offer [1] 5/23 Official [3] 1/25 17/4 17/19 once [1] 4/13 operators [1] 9/15 opportunity [3] 10/8 10/14 16/6 options [1] 6/19 original [3] 9/7 13/17 16/11 other [4] 5/17 10/14 11/12 13/15 our [1] 6/18 outside [2] 2/4 14/18 over [3] 4/9 7/5 10/17
H	L	P
happened [1] 3/25 hear [1] 15/5 heard [2] 7/20 13/8 hearing [2] 6/20 7/16 hereby [1] 17/6 Hon [1] 1/9 Honor [4] 5/22 9/1 9/3 13/2 hotel [1] 4/9	last [5] 4/5 5/4 6/18 10/1 13/7 law [4] 1/16 1/18 5/5 10/6 left [1] 13/19 let's [1] 16/18 light [1] 10/8 lines [1] 3/1	p.m [3] 4/6 14/23 15/8 Pagel [1] 4/7 participate [1] 10/2 participation [1] 10/25 parties [11] 2/5 4/1 5/7 5/10 5/17 5/20 7/10 8/17 9/5 15/1 15/3 party [2] 3/22 8/23 pass [1] 3/23 Patrick [1] 1/9 people [1] 10/7 perception [1] 10/9 person [4] 1/21 2/12 6/6 14/20 personal [1] 6/15 persuade [1] 10/14 persuaded [1] 10/15 photos [1] 2/23 placed [1] 8/13 PLAINTIFF [1] 1/4 please [3] 2/6 15/5 15/24 point [1] 7/20 portion [2] 11/7 15/23
I	M	
I'm [3] 7/11 11/5 14/11 identify [1] 15/22 important [2] 10/4 10/10 in [49] indicate [3] 2/3 7/3 14/21 indicating [1] 4/7 individually [2] 4/25 11/5	machine [1] 17/10 made [3] 3/12 3/16 9/11 magnifying [1] 2/22 make [2] 6/14 7/7 MANITOWOC [2] 1/1 17/2 MARCH [1] 1/8 matter [5] 8/1 16/5 16/17 17/7 17/13 means [1] 10/21 media [6] 3/14 3/24 3/25 9/12 9/15 11/7 meet [2] 7/4 16/18 member [1] 11/10 members [6] 9/21 9/21 10/14 13/12 13/22 15/10 memory [2] 10/9 15/17 merit [1] 4/16 met [1] 14/24 mindful [1] 4/11 minute [1] 9/20 minutes [1] 14/2 mistrial [2] 5/16 8/6 Mohr [2] 12/24 13/2 morning [6] 2/7 2/11 2/16 6/20 7/15 8/1 Mr [7] 7/19 11/16 12/11 12/15	

<p>P</p> <p>portions [1] 15/16 practice [2] 3/7 3/10 prepare [2] 13/13 14/3 prepared [2] 7/9 17/8 presence [2] 2/4 14/18 present [6] 2/5 5/20 9/18 13/25 14/19 14/20 presented [2] 4/8 4/21 presently [1] 6/2 preserve [1] 9/12 presume [1] 15/7 previously [1] 5/11 primarily [1] 15/17 problem [1] 3/6 procedure [2] 4/1 9/10 proceed [4] 5/8 5/17 8/22 10/22 proceedings [2] 1/23 17/13 process [1] 11/1 proper [2] 5/25 7/16 proposal [2] 3/19 7/22 proposed [3] 7/5 14/25 15/9 Prosecutor [2] 1/12 1/14 Prosecutors [1] 2/10 provide [1] 15/21 provided [2] 4/15 5/1 provides [2] 5/5 6/3 publicly [1] 9/13 purpose [1] 5/13 pursue [1] 5/24</p>	<p>requires [1] 10/18 reserved [1] 6/22 respect [1] 11/11 response [1] 15/10 resume [1] 13/9 review [1] 10/8 right [9] 2/14 7/2 7/18 8/5 8/6 9/14 13/20 14/6 14/12 role [1] 13/9 room [1] 13/19 RPR [2] 1/24 17/19</p>	<p>talk [1] 16/17 telephone [2] 4/6 4/19 Tesheneck [3] 1/24 17/4 17/19 testimony [7] 15/6 15/12 15/14 15/16 15/18 15/22 15/23 thank [7] 5/22 6/16 7/18 9/2 11/8 13/12 14/9 Thanks [1] 14/10 their [4] 2/5 2/20 3/1 5/23 there's [2] 3/19 16/10 thereafter [1] 17/11 Therefore [1] 11/5 these [1] 10/18 think [1] 7/16 thinking [1] 3/17 thinks [1] 6/10 third [1] 5/15 THOMAS [1] 1/14 Thorne [2] 11/25 12/3 those [6] 2/25 3/16 8/22 10/3 10/17 13/10 though [1] 10/23 three [3] 5/5 6/5 6/10 through [1] 10/11 time [11] 2/1 2/4 5/19 7/25 8/10 9/15 9/16 11/6 13/22 14/17 15/3 today [4] 7/5 7/13 14/23 15/8 Tom [1] 2/9 transcribed [1] 17/11 transcript [7] 1/23 15/6 15/11 15/13 15/21 17/8 17/12 transcription [1] 17/11 trial [4] 1/4 1/4 15/14 15/19 true [1] 17/12 two [2] 5/17 6/1 typically [1] 3/3</p>
<p>Q</p> <p>question [10] 3/8 7/6 11/6 14/16 14/22 14/24 14/25 15/2 15/4 16/12 questions [1] 7/19 quick [1] 16/15</p>	<p>S</p> <p>said [1] 17/13 satisfactory [1] 6/3 Schmidt [2] 11/21 11/24 Schuette [2] 12/16 12/19 seat [1] 9/8 seated [2] 9/19 14/1 second [1] 5/9 send [2] 13/14 16/11 sends [1] 3/6 sent [3] 13/18 13/21 14/4 sequestered [1] 5/12 set [3] 10/17 13/18 13/21 Sheriff [1] 4/7 shorthand [1] 17/10 should [3] 6/6 7/3 10/21 sides [1] 7/16 sign [1] 14/5 signed [2] 15/7 16/1 simply [3] 3/6 3/17 3/23 sir [6] 7/24 8/2 8/8 8/11 8/15 12/11 situation [1] 5/6 size [1] 2/23 Slaby [3] 11/13 11/16 15/7 something [1] 2/25 sometime [1] 4/5 sometimes [1] 9/25 soon [1] 9/10 speak [1] 4/25 Special [3] 1/12 1/14 2/10 specific [3] 2/15 15/15 15/22 Specifically [1] 2/21 ss [1] 17/1 start [1] 10/17 state [14] 1/1 1/3 1/13 1/15 2/2 2/5 2/8 6/10 6/17 6/21 15/25 16/2 17/1 17/5 stenographic [1] 17/9 STEVEN [4] 1/6 1/20 2/2 2/12 Stienmetz [5] 9/20 13/7 13/11 13/16 13/19 still [1] 13/17 stipulate [2] 5/7 5/10 stipulated [2] 8/17 8/18 stipulation [7] 5/16 5/20 6/18 6/21 7/1 8/4 8/13 stop [2] 14/2 14/12 STRANG [6] 1/16 2/13 5/21 7/10 8/14 16/4 Strang's [2] 6/25 7/3 substitute [1] 5/10 such [2] 3/23 15/25 supervising [1] 4/9 supplement [1] 7/2</p>	<p>U</p> <p>under [2] 8/4 13/10 understanding [2] 5/19 9/5 understands [1] 6/14 unforeseen [2] 4/10 9/23 until [1] 10/16 unusual [1] 6/23 use [2] 3/1 15/14</p>
<p>R</p> <p>ranks [1] 6/7 rarely [1] 9/25 reach [1] 10/10 reaction [1] 10/9 read [4] 7/15 15/2 15/5 15/16 reads [1] 15/5 reason [1] 2/15 reasonable [1] 4/12 recall [1] 8/19 receipt [1] 14/23 received [7] 2/24 3/4 3/9 3/20 4/6 4/17 14/22 recess [2] 14/14 16/19 record [13] 2/4 2/6 2/15 3/8 3/11 3/21 7/4 7/21 8/13 8/24 14/8 14/18 14/21 refer [1] 7/11 referring [1] 7/12 regular [1] 6/7 rely [1] 15/17 remaining [1] 9/7 reply [2] 14/16 16/15 reported [2] 1/24 17/6 Reporter [3] 1/25 17/5 17/19 request [11] 2/24 3/15 4/8 4/15 4/20 6/25 7/3 8/6 15/11 15/24 16/1 requested [1] 2/22 requests [5] 2/19 3/3 3/12 3/20 3/23 require [2] 8/5 9/10 required [1] 3/8 requirement [1] 9/12</p>	<p>T</p> <p>take [1] 9/8 taken [2] 7/25 17/9 takes [1] 9/8</p>	<p>V</p> <p>verified [1] 5/2 verify [1] 5/2 version [1] 14/3 very [4] 8/16 9/10 14/11 16/10 views [2] 10/16 10/17 void [1] 4/12 voluntary [1] 8/18</p> <p>W</p> <p>wait [2] 9/20 16/14 want [2] 6/14 16/14 wanted [1] 2/16 Wardman [2] 13/3 13/6 warranted [1] 4/16 we [11] 2/3 3/21 6/12 6/24 7/5 7/16 7/21 8/24 9/16 14/17 15/5 we'll [1] 9/6 we're [3] 2/15 9/19 14/7 went [1] 7/5 whenever [1] 3/8 while [1] 14/7 willing [2] 5/23 13/9 willingness [1] 6/21 Willis [1] 1/9 WISCONSIN [8] 1/1 1/3 1/13 1/15 2/2 5/5 17/1 17/6</p>

W**wish** [1] 16/6**wishes** [1] 8/24**written** [4] 13/13 14/3 14/22 15/13**Y****yesterday** [4] 2/17 3/10 3/16 3/18