

Case Brief: *Heyer v. United States Bureau of Prisons**

INTRODUCTION

The ability to communicate with others is vital to one's life fulfillment. However, before *Heyer v. United States Bureau of Prisons (Heyer II)*,¹ Deaf detainees were left with virtually no means to communicate with their fellow inmates and members of the Deaf community living outside of prison since they lacked access to videophone devices.² In *Heyer II*, the Fourth Circuit became the first circuit court to rule that a Deaf detainee has a First Amendment right to communicate with the Deaf community outside detention walls, and thus requires access to a videophone device.³ In doing so, the Fourth Circuit acknowledged the need for more accommodating resources for the Deaf community. Additionally, the court emphasized the importance of Deaf culture and being able to communicate with the other members of the Deaf community.⁴

In *Heyer II*, the Fourth Circuit reversed the district court's grant of summary judgment for the Bureau of Prisons ("BOP").⁵ *Heyer* first went to the Fourth Circuit Court of Appeals in 2017,⁶ when the court held that the district court erred by granting summary judgment for the BOP on *Heyer*'s First Amendment videophone claim.⁷ In his videophone claim, *Heyer* argued that, despite his confinement, he had a First Amendment "right to communicate with

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1. 984 F.3d 347 (4th Cir. 2021).

2. The National Deaf Center explains how deaf individuals communicate every day:

Broadly defined, communication for deaf individuals occurs through visual, auditory, or tactile modes (for individuals who are deafblind). Common visual communication modes include American Sign Language, cued speech, speech reading (lip reading), and gestures. Auditory communication includes using residual hearing and spoken English received through the ear, often augmented with a hearing aid or cochlear implant to enhance the ability to interpret sound. Tactile communication translates visual and auditory communication into the hand and other parts of the body.

NAT'L DEAF CTR., COMMUNICATING WITH DEAF INDIVIDUALS 1 (2019), <https://nationaldeafcenter.org/wp-content/uploads/2019/04/Communicating-with-Deaf-Individuals.pdf> [<https://perma.cc/MU2M-5WJK>] (last updated 2019).

3. *Heyer II*, 984 F.3d at 366.

4. *See id.* at 358–59; *see also The Deaf Community: An Introduction*, NAT'L DEAF CTR. (2021), <https://nationaldeafcenter.org/resource-items/deaf-community-introduction/> [<https://perma.cc/84AT-RL8U>] (explaining that deaf individuals often identify as members of "the Deaf community").

5. *Heyer II*, 984 F.3d at 366.

6. *Heyer v. U.S. Bureau of Prisons (Heyer I)*, 849 F.3d 202, 202 (4th Cir. 2017).

7. *Id.* at 221.

those outside the prison,” and given his “inability to communicate in written English,” the BOP’s refusal to provide him with a videophone device violated his First Amendment rights.⁸ However, after remand to the district court, the district court still ruled in favor of the BOP, causing Heyer to appeal once again to the Fourth Circuit.⁹ On January 13, 2021, the Fourth Circuit reversed the district court’s decision once more and held that Heyer has a First Amendment right to communicate with those outside of detention walls, specifically the Deaf community, and thus required access to a videophone device.¹⁰

BACKGROUND

Thomas Heyer was born deaf,¹¹ “considers himself a ‘big part’ of the Deaf community,”¹² and communicates primarily in American Sign Language (“ASL”).¹³ Heyer is a Deaf detainee who was civilly committed to the Federal Correctional Institution (“FCI”) Butner¹⁴ under the Adam Walsh Child Protection and Safety Act of 2006¹⁵ (“Adam Walsh Act”). From 2008 through the filing of his case in 2017, Heyer was housed in the Maryland Unit, which only houses Adam Walsh Act detainees.¹⁶ Before his civil commitment, Heyer “was incarcerated for violating the conditions of his supervised release on an earlier child pornography conviction.”¹⁷

While in prison and civilly committed, Heyer’s access to the Deaf community “dwindled.”¹⁸ He testified that he had a total of twenty Deaf friends that he was unable to communicate with due to a lack of access to the necessary videophone technology.¹⁹ Absent video calls, Heyer has a number of options for

8. *Id.* at 212–13.

9. *Heyer II*, 984 F.3d at 355.

10. *Id.* at 366.

11. *Id.* at 351.

12. *Id.* at 352. As the National Deaf Center describes,

[M]any deaf people refer to themselves as being members of the Deaf community and ascribe to Deaf culture. These people view themselves as a unique cultural and linguistic minority who use sign language as their primary language. The characteristics of Deaf culture are formed out of many shared life experiences rooted in a visual world designed for communication ease.

The Deaf Community: An Introduction, *supra* note 4, at 1.

13. *Heyer II*, 984 F.3d at 349.

14. *Heyer II*, 984 F.3d at 352.

15. Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587 (codified in scattered sections of 8, 10, 18, 28, 34, and 42 U.S.C.). The purpose of the Act is “[t]o protect children from sexual exploitation and violent crime, to prevent child abuse and child pornography, to promote Internet safety, and to honor the memory of Adam Walsh and other child crime victims.” § 103, 120 Stat. at 591.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

communicating with the outside world, but none allow him to communicate effectively with other Deaf individuals.²⁰ Heyer can write letters to friends and family, have in-person visitation, send emails, make TeleType (“TTY”) calls, or make Video Relay Service (“VRS”) calls.²¹ TTY calls are “essentially a keyboard connected to an analog phone line that permits users to type messages back and forth.”²² However, TTY requires users to have “some fluency in written English,”²³ and it is not uncommon for Deaf individuals who use ASL to lack fluency in written English.²⁴ In addition to TTY calls, Heyer has access to VRS calls,²⁵ which permit him to communicate with non-ASL speakers.²⁶ However, VRS calls cannot support phone calls between two Deaf participants because a deaf participant usually “calls an interpreter who in turn calls the hearing participant and then translates back and forth.”²⁷

Point-to-point calls²⁸ are used for deaf individuals to communicate with each other, but Heyer did not have access to these while committed.²⁹ These types of calls are analogous to Skype calls and allow the participants to “sign directly to each other.”³⁰ However, because Heyer did not have access to point-to-point calls, he had to rely on his ability to read and write in English, which was comparatively less advanced, restricting his ability to communicate.³¹

20. *Id.*

21. *Id.* at 352–53.

22. *Id.* at 352; see also *Teletypewriter (TTY) Type and Read Calls*, ACCESSIBLE TELECOMS, <https://www.accessibletelecoms.org.au/disclaimer.html?view=article&id=2764&catid=41> [https://perma.cc/NF5W-GJTD] (explaining the mechanics of a TTY call).

23. *Heyer II*, 984 F.3d at 350–51.

24. See Collin Matthew Belt, *American Sign Language Is Not English on the Hands*, LIFEPRINT (July 18, 2013), <https://www.lifeprint.com/asl101/topics/history8.htm> [https://perma.cc/F7TP-WTP3] (explaining that ASL is its own unique language with rules entirely different than English).

25. As the Federal Communications Commission describes,

Video Relay Service (VRS) allows persons with hearing or speech disabilities who use American Sign Language to use video equipment to communicate with voice telephone users. A video link allows a communication assistant (CA) and the ASL user to view and sign with each other, and the CA is also connected to a user on the voice side of the call through telephone. The CA interprets and relays the conversation back and forth between the two parties.

Video Relay Service (VRS), FED. COMM’NS COMM’N (July 1, 2022), <https://www.fcc.gov/vrs> [https://perma.cc/9QJL-R4PE].

26. *Heyer II*, 984 F.3d at 352–53.

27. *Id.* at 351.

28. “In the context of telecommunication, a point to point communication (also known as P2P) is an established connection between two nodes that can be used to communicate back and forth.” *Point to Point Communication Explained*, NETMORE, <https://www.netmorem2m.com/iot-wiki/point-to-point-communication-explained/> [https://perma.cc/UH6L-3DMU] (last updated 2019).

29. *Heyer II*, 984 F.3d at 351.

30. *Id.*

31. *Id.* at 353.

LEGAL ISSUES AND OUTCOME

On his second appeal, Heyer argued that the First Amendment,³² providing individuals with freedom of speech, gave him a right to receive “access to point-to-point calls to communicate with other Deaf individuals,”³³ and that the BOP violated that First Amendment right.³⁴ Federal jurisprudence has shown that “[p]rison officials are owed deference, and prisoner’s constitutional claims receive a lower level of scrutiny than they might outside of prison walls.”³⁵ Therefore, as a result of incarceration, prisoners are subject to substantial restrictions on their constitutional rights.³⁶ However, since Heyer is civilly detained, he is “entitled to more considerate treatment and conditions of confinement than a prisoner.”³⁷

A. *Expert Testimony*

The Fourth Circuit looked extensively at relevant expert testimony on deafness, the Deaf community, and ASL.³⁸ First, the court looked to Heyer’s expert witness and sociolinguist, Dr. Thomas Cokely, who provided testimony “on deafness, its effect on literacy, and its consequences for incarcerated and confined person.”³⁹ Dr. Cokely explained how deafness is defined as an inability to both “‘hear *and* understand speech,’ and it is a uniquely social condition.”⁴⁰ Therefore, those who are deaf view themselves “as part of a larger ‘linguistic and cultural’ community—the American Deaf Community.”⁴¹ Additionally, those who are born deaf tend to face unique barriers to learning English and are thus more likely to gravitate toward the Deaf community than individuals who are late deafened.⁴²

Dr. Cokely then went on to explain how most Deaf individuals have “limited language exposure in early childhood” and “grow up in a linguistically impoverished and deprived environment,”⁴³ making it even more difficult to

32. U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”).

33. *Heyer II*, 984 F.3d at 355.

34. *Id.* at 349.

35. *Id.* at 355–56; *see also* *Turner v. Safley*, 482 U.S. 78, 95 (1987) (explaining that many rights are subject to “substantial restrictions as a result of incarceration”).

36. *Turner*, 482 U.S. at 95.

37. *Heyer II*, 984 F.3d at 356 (quoting *Youngberg v. Romeo*, 457 U.S. 307, 322 (1982)).

38. *Id.* at 349.

39. *Id.* at 350.

40. *Id.* (citation omitted).

41. *Id.*

42. *Id.*

43. *Id.*

pick up English skills.⁴⁴ As a result, “most Deaf high-school graduates communicate in written English at the third-grade level.”⁴⁵ Therefore, Deaf individuals often only have basic English language skills that allow them to navigate their daily life successfully in hearing society, such as reading “directions, street signs, and other basic printed material.”⁴⁶

Finally, the Fourth Circuit noted how professors and practitioners of psychiatry and psychology explained in their amicus curiae brief that denying access to videophones, specifically point-to-point calls, for Deaf individuals would mimic “the effects of traditional solitary confinement, which include long-lasting psychiatric and physical difficulties.”⁴⁷ Dr. Cokely also “opined that unless Heyer is allowed to make point-to-point calls, he is likely to experience social isolation and loss of language skills.”⁴⁸

B. *Turner Test*

In determining whether Heyer’s First Amendment rights “require[] access to point-to-point calls to communicate with other Deaf individuals,”⁴⁹ the court looked to the *Turner* test.⁵⁰ The *Turner* test is used to determine whether a prison regulation that impinges on an inmate’s constitutional rights is constitutional.⁵¹ The court noted that “[c]ivil detainees like Heyer ‘are entitled to more considerate treatment and conditions of confinement than’ a prisoner”;⁵² however, courts in the Fourth Circuit “accord the same level of deference when applying the *Turner* framework to civil detainees.”⁵³ Accordingly, the *Turner* framework “looks to the government’s legitimate *nonpunitive* interests, rather than its penological interests.”⁵⁴

The *Turner* test has two prongs: (1) whether the government’s decision impinges on the plaintiff’s First Amendment rights and (2) whether the

44. Generally, this is due to more than ninety percent of deaf children being born to hearing parents. *Quick Statistics About Hearing*, NAT’L INST. ON DEAFNESS & OTHER COMM’N DISORDERS (Mar. 25, 2021), <https://www.nidcd.nih.gov/health/statistics/quick-statistics-hearing> [<https://perma.cc/9SGK-NEXP>].

45. *Heyer II*, 984 F.3d at 350.

46. *Id.* (citation omitted).

47. *Id.* at 351.

48. *Id.*

49. *Id.* at 355.

50. *Id.* at 355–59 (applying the two-prong test established in *Turner v. Safley*, 482 U.S. 78, 97–100 (1987)).

51. *Turner*, 482 U.S. at 89.

52. *Heyer II*, 984 F.3d at 356 (quoting *Youngberg v. Romeo*, 457 U.S. 307, 322 (1982)).

53. *Id.* Some courts have modified the *Turner* factors to differentiate prisoners from detainees, but in *Heyer I*, the plaintiff “did not ask for such a modified standard,” so the Fourth Circuit declined to decide whether the *Turner* factors should be adjusted generally for all cases of civil detainees. *See Matherly v. Andrews*, 859 F.3d 264, 281–82 (4th Cir. 2017).

54. *Heyer II*, 984 F.3d at 356.

impingement is reasonable.⁵⁵ First, the *Turner* test asks whether the “BOP’s decision impinges on [a civil detainee’s] First Amendment rights.”⁵⁶ Broadly, Adam Walsh Act detainees “have a First Amendment right to communicate with those outside of the Maryland Unit.”⁵⁷ However, Heyer’s specific First Amendment interest is his “right to communicate with the Deaf community.”⁵⁸ The court held that it remains “undisputed” that the “BOP’s total ban on point-to-point calls restricts Heyer’s access to the outside world,” specifically the Deaf community, and thus “impinges on his First Amendment rights.”⁵⁹

Second, the *Turner* test “asks whether that impingement is reasonable.”⁶⁰ In deciding whether the impingement is reasonable, the court must look to a four-factor test announced by the *Turner* Court:

(1) [W]hether a “valid, rational connection [exists] between the prison regulation and the legitimate governmental interest put forward to justify it,” (2) whether “alternative means of exercising the right [exist] that remain open to prison inmates,” (3) what “impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally,” and (4) whether there was an “absence of ready alternatives” to the regulation in question.⁶¹

As applied to Heyer, the first *Turner* factor “asks whether there is a rational connection between BOP’s ban on point-to-point calls and BOP’s legitimate, non-punitive interests.”⁶² The Fourth Circuit reasoned that the BOP satisfied this factor due to their rational interests in “guaranteeing safety at FCI Butner, protecting the public, rehabilitating Heyer, and defraying costs.”⁶³ Specifically, the BOP staff testified “that point-to-point calls create a risk of sexual exploitation, a security concern within the prison, and a potential impediment to Heyer’s own rehabilitation.”⁶⁴ Additionally, the BOP will need to “translate and monitor his calls, which likely involves some cost.”⁶⁵

The second *Turner* factor “asks whether Heyer has ‘alternative means of exercising’ his First Amendment rights.”⁶⁶ The court reasoned that this factor

55. *Turner*, 482 U.S. at 89.

56. *Heyer II*, 984 F.3d at 356.

57. *Id.*

58. *Id.* at 357.

59. *Id.* at 356.

60. *Id.*

61. *Id.* (alterations in original) (first quoting *Heyer I*, 849 F.3d 202, 214 (4th Cir. 2017); then quoting *Turner v. Safley*, 482 U.S. 78, 89–90 (2017)).

62. *Id.* at 357.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.* (quoting *Turner v. Safley*, 482 U.S. 78, 90 (1987)).

weighed in Heyer's favor since there were no alternative means for Heyer to communicate with the Deaf community.⁶⁷ The BOP argued that Heyer could communicate with his Deaf friends through (1) in-person visitation, (2) letters, (3) emails, or (4) TTY calls.⁶⁸ However, the court rejected this argument because in-person visitations are of no help "in emergencies or other situations where there is need for immediate contact," and the other forms of communication require Heyer to effectively communicate in written English despite Heyer only being able to communicate in English at a third-grade level.⁶⁹ The Fourth Circuit recognized that "alternatives 'need not be ideal,'"⁷⁰ but Heyer's English skills are so "far from ideal" that they cannot support the finding of a sufficient alternative.⁷¹

The third *Turner* factor "requires [the court] to weigh 'the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally.'" ⁷² The court reasoned that this factor weighed in Heyer's favor since the BOP's impact of the proposed accommodation was focused on hypothetical risks, which overlook "substantial evidence that BOP already utilizes resource-efficient means of mitigating the risks associated with these calls."⁷³

Lastly, "*Turner* Factor Four asks Heyer to identify a 'ready alternative[.]' to a total ban on point-to-point calls 'that fully accommodates [his] rights at de minimis cost to' BOP's nonpunitive interests."⁷⁴ Heyer argued that the BOP could provide "point-to-point calls with the additional safeguards it provides for other forms of communication."⁷⁵ Specifically, "providing point-to-point calls through the SecureVRS system with the same protocols associated with TTY calls would greatly reduce the risk that those calls will result either in child exploitation or disruptive behavior within the prison."⁷⁶ Additionally, testimony clearly established that "treating Heyer's point-to-point calls like foreign language calls will protect against other risks associated with coded messages," since the "BOP already records and then translates calls made by

67. See *id.* at 360–62 (finding that Heyer's English language abilities are "so far from ideal" that they provide no "sufficient alternatives" for communication).

68. See *id.* at 359–60.

69. *Id.* at 360.

70. *Id.* at 362 (quoting *Overton v. Bazzetta*, 539 U.S. 126, 135 (2003)).

71. *Id.*

72. *Id.* (quoting *Turner v. Safley*, 482 U.S. 78, 90 (1987)).

73. *Id.* at 364–65. The potential risk involved was Heyer abusing the point-to-point video calls in a way that would have created an internal security issue. *Id.* at 363. However, BOP was able to monitor Heyer's calls or record them for later. *Id.* Additionally, "Heyer could make his point-to-point calls in a hallway under staff supervision (as BOP already requires for TTY calls), those calls could be restricted to numbers pre-approved by BOP, and those calls would be recorded and stored." *Id.*

74. *Id.* at 365 (quoting *Turner*, 482 U.S. at 90–91).

75. *Id.*

76. *Id.*

thousands of inmates in sixty foreign languages.”⁷⁷ The court reasoned that these “additional safeguards will impose only a de minimis burden on BOP’s resources” and thus there was a ready alternative for Heyer to satisfy *Turner* Factor Four.⁷⁸

Weighing all four factors, the Fourth Circuit held that the impingement on Heyer’s First Amendment rights was not reasonable; thus, the BOP’s restrictions on point-to-point videophone calls must be eliminated.⁷⁹

POTENTIAL IMPACT

In holding that Heyer’s First Amendment rights included the ability to communicate with the Deaf community,⁸⁰ and that denying him access to point-to-point videophone calls was in violation of this right, the Fourth Circuit recognized the detrimental effects Deaf detainees face when cut off from their community. The court emphasized that “Heyer’s constitutional rights are not defined merely by his status as a civil detainee or his past conduct. They are also defined by his status as a Deaf individual cut off from his community in a manner more complete than even foreign language prisoners.”⁸¹ This decision can leave a lasting impact on Deaf detainees and their access to devices that will allow them to fully communicate with their community.

The Fourth Circuit was the first circuit to explicitly address Deaf detainees’ right to access a videophone for communication with members of the Deaf community outside detention center walls. Therefore, there is potential for the remaining judicial circuits to use the Fourth Circuit’s opinion in *Heyer* as persuasive precedent. Moving forward, the remaining circuits should follow the Fourth Circuit and require detention centers (including prisons) to allow Deaf individuals to use videophone services to communicate with other members of the Deaf community.

Despite this decision and its potential to influence other circuits, there is much more to be done for Deaf detainees, beyond merely giving them access to videophone services. For example, mental health counseling catered to the Deaf community should be implemented in all prisons and detention centers that house Deaf individuals. Deaf individuals are even more likely than the general population to suffer from mental health illnesses due to the immense amount of isolation they face while detained. Since the Deaf community is a marginalized group, members of the community have an increased likelihood of

77. *Id.*

78. *See id.*

79. *Id.* at 366.

80. *Id.*

81. *Id.*

experiencing isolation and loneliness.⁸² In turn, this isolation means they are more likely to face “higher anxiety, depression, and suicide rates.”⁸³ Therefore, mental health counseling specifically tailored to Deaf detainees is necessary to prevent mental health illnesses and outcomes, such as suicide. Although more needs to be done to aid Deaf detainees and prisoners, the Fourth Circuit’s decision in *Heyer II* is one step in the right direction.

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82. See *Understanding the Effects of Social Isolation on Mental Health*, TUL. UNIV. SCH. PUB. HEALTH & TROPICAL MED. (Dec. 8, 2020), <https://publichealth.tulane.edu/blog/effects-of-social-isolation-on-mental-health/> [<https://perma.cc/QP6S-TEVD>]. Specifically, it has been observed that

[m]ental and physical health are interconnected. Social isolation’s adverse health consequences range from sleeplessness to reduced immune function. Loneliness is associated with higher anxiety, depression, and suicide rates. Isolation and loneliness are also linked to poor cardiovascular health and cognitive function: A study led by an epidemiologist at Newcastle University concluded that deficiencies in social relationships are associated with a higher risk for coronary heart disease and stroke. A study published in *The Journals of Gerontology* concluded that loneliness was associated with a 40 percent increase in the risk of dementia.

Id.

83. See *id.*

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