

The Burger Court Opinion Writing Database

Jenkins v. Anderson

447 U.S. 231 (1980)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University



Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

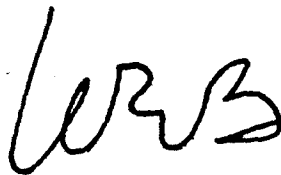
May 12, 1980

Re: 78-6809 - Jenkins v. Anderson

Dear Lewis:

I join.

Regards,

A handwritten signature in dark ink, appearing to be 'LFB' or 'LFB', written in a cursive, stylized manner.

Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

May 21, 1980

RE: 78-6809 - Jenkins v. Anderson

Dear Lewis:

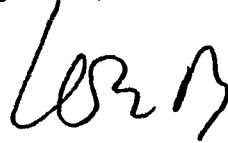
I joined you May 12 in this case but John's separate statement led to a re-examination of the problem. I do not agree with his opinion but it prompts me to make small suggestions regarding the early lines on page 7.

I am unwilling to concede that people are ever "prevented" from testifying by the risks attendant of doing so. You make that clear in other parts of your opinion but the first full sentence, line 2, page 7, would be much stronger cast in the affirmative. To illustrate:

.....a defendant may indeed decide not to take the witness stand because of the attendant risks of cross-examination on that confrontation. But this is a litigation choice; he cannot have it both ways. Once a defendant, etc.

My "hackles" elevate when I read some of our earlier cases with tripe about "being compelled to give up one Constitutional right to assert another." Choices are inherent in the adversary system, as you have demonstrated. I fear your first sentence, page 7, will be plucked out of context and thrown back one day.

Regards,



Mr. Justice Powell

✓
Supreme Court of the United States
Washington, D. C. 20543

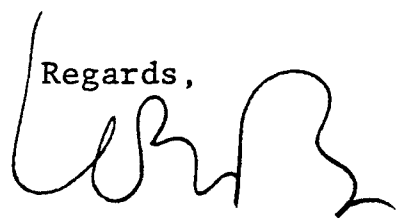
CHAMBERS OF
THE CHIEF JUSTICE

May 22, 1980

Re: 78-6809 - Jenkins v. Anderson

Dear Lewis:

Count me as approving release of this opinion
Tuesday next.

Regards,


Mr. Justice Powell

Copies to the Conference

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 21, 1980

RE: No. 78-6809 Jenkins v. Anderson

Dear Thurgood:

Please join me.

Sincerely,

Bill

Mr. Justice Marshall

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

May 19, 1980

Re: No. 78-6809, Jenkins v. Anderson

Dear Lewis,

I should appreciate your adding the following
at the foot of your opinion in this case:

Mr. Justice Stewart concurs in the judgment,
agreeing with all but Part II of the opinion
of the Court, and with Part I of the concurring
opinion of Mr. Justice Stevens.

Sincerely yours,

Mr. Justice Powell

Copies to the Conference

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

May 23, 1980

Re: No. 78-6809 - Jenkins v. Anderson

Dear Lewis:

While the decision will necessarily depend upon those who have written opinions in this case, I would hope it can be announced next Tuesday.

Sincerely yours,

PS.
✓

Mr. Justice Powell

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

April 7, 1980

Re: No. 78-6809 - Jenkins v. Anderson

Dear Lewis,

Please join me.

Sincerely yours,



Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

May 22, 1980

Re: 78-6809 - Jenkins v. Anderson

Dear Lewis:

I have no objection to bringing this
case down on Tuesday.

Sincerely yours,



Mr. Justice Powell

Copies to the Conference

cjc

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

April 7, 1980

Re: No. 78-6809 - Jenkins v. Anderson

Dear Lewis:

In due course I shall circulate a dissent.

Sincerely,



T.M.

Mr. Justice Powell

cc: The Conference

20 MAY 1980

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78-6809

Dennis Seay Jenkins, Petitioner, v. Charles Anderson, Warden.	}	On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.
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[May —, 1980]

JUSTICE MARSHALL, dissenting.

Today the Court holds that a criminal defendant's testimony in his own behalf may be impeached by the fact that he did not go to the authorities before his arrest and confess his part in the offense. The decision thus strikes a blow at two of the foundation stones of our constitutional system: the privilege against self-incrimination and the right to present a defense.

I

The Court's decision today is extraordinarily broad. It goes far beyond a simple holding that the common-law rule permitting introduction of evidence of silence in the face of accusation or in circumstances calling for a response does not violate the privilege against self-incrimination. For in this case the prosecution was allowed to cast doubt on an accused's testimony that he acted in self-defense by forcing him to testify that he did not go to the police of his own volition, before he had been indicted, charged, or even accused of any offense, and volunteer his version of the events.

The Court's holding that a criminal defendant's testimony may be impeached by his prearrest silence has three patent—and, in my view, fatal—defects. First, the mere fact of prearrest silence is so unlikely to be probative of the falsity of the defendant's trial testimony that its use for impeachment

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

May 23, 1980

Re: No. 78-6809 - Jenkins v. Anderson

Dear Lewis:

Please do not bring this opinion down on Tuesday. I will be making several changes in my dissent.

Sincerely,



T.M.

Mr. Justice Powell

cc: The Conference

1,3,5-6,8

28 MAY 1980

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78-6809

Dennis Seay Jenkins,
Petitioner,
v.
Charles Anderson,
Warden.

On Writ of Certiorari to the United
States Court of Appeals for the
Sixth Circuit.

[May —, 1980]

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN
joins, dissenting.

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pp. 3, 6

2 JUN 1980

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78-6809

Dennis Seay Jenkins, Petitioner, v. Charles Anderson, Warden.	}	On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.
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[May —, 1980]

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN joins, dissenting.

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

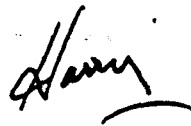
April 7, 1980

Re: No. 78-6809 - Jenkins v. Anderson

Dear Lewis:

Please join me.

Sincerely,

A handwritten signature in dark ink, appearing to read "Harry", with a horizontal line underneath.

Mr. Justice Powell

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

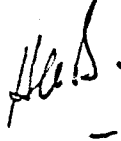
May 22, 1980

Re: No. 78-6809 - Jenkins v. Anderson

Dear Lewis:

Whatever you, Thurgood, and John decide is all right
with me.

Sincerely,



Mr. Justice Powell

cc: The Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: APR 4 1980

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78-6809

Dennis Seay Jenkins,	}	On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.
Petitioner,		
v.		
Charles Anderson,		
Warden.		

[April —, 1980]

MR. JUSTICE POWELL delivered the opinion of the Court.

The question in this case is whether the use of prearrest silence to impeach a defendant's credibility violates either the Fifth or the Fourteenth Amendments to the Constitution.

I

On August 13, 1974, the petitioner stabbed and killed Doyle Redding. The petitioner was not apprehended until he turned himself in to governmental authorities about two weeks later. At his state trial for first-degree murder, the petitioner contended that the killing was in self-defense.

The petitioner testified that his sister and her boyfriend were robbed by Redding and another man during the evening of August 12, 1974. The petitioner, who was nearby when the robbery occurred, followed the thieves a short distance and reported their whereabouts to the police. According to the petitioner's testimony, the next day he encountered Redding, who accused him of informing the police of the robbery. The petitioner stated that Redding attacked him with a knife, that the two men struggled briefly, and that the petitioner broke away. On cross-examination, the petitioner admitted that during the struggle he had tried "[t]o push that knife

April 10, 1980

78-6809 Jenkins v. Anderson

Dear John:

Thank you for your note of yesterday.

My longhand Conference notes, after recording your vote to affirm, states that our opinion:

"Should make clear that Griffin does not apply to precustody - nor does Doyle."

I recognize that this note (even if 100% correct) is too cryptic to mean very much. Yet, based on my Conference notes, I thought that you, Bill Rehnquist and I probably were closer together on the analysis than anyone else.

In any event, I asked my clerk, Jon Sallet, to go back to your scholarly dissent in Doyle and give me a memorandum on it. With Jon's consent, I enclose a copy of his memo to me. He states that he would not have written it quite this way for general circulation, but - after all - it is simply a Chambers memo and I know you will accept it as such.

Although I have not gone back to the books myself, as Jon has, I agree that my opinion in this case seems to be entirely compatible with your Doyle dissent. But, as Harry would say, perhaps I have overlooked something.

Sincerely,

Mr. Justice Stevens

lfp/ss

April 30, 1980

78-6809 Jenkins v. Anderson

Dear Potter:

Here is the memo that my clerk Jon Sallet prepared for me when John Stevens first raised a question as to the continuing vitality of Raffel. John also continues to have some concern about Doyle, in which he dissented.

I sent this memorandum to John Stevens sometime ago, explaining that it was an internal memorandum prepared for me by Jon Sallet.

Sincerely,

Mr. Justice Stewart

lfp/ss

4-5 FNs renumbered

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

5-12-80

From: Mr. Justice Powell

Circulated: _____

Recirculated: _____ MAY 16 1981

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78-6809

Dennis Seay Jenkins, Petitioner, v. Charles Anderson, Warden.	}	On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.
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[April —, 1980]

MR. JUSTICE POWELL delivered the opinion of the Court.

The question in this case is whether the use of prearrest silence to impeach a defendant's credibility violates either the Fifth or the Fourteenth Amendments to the Constitution.

I

On August 13, 1974, the petitioner stabbed and killed Doyle Redding. The petitioner was not apprehended until he turned himself in to governmental authorities about two weeks later. At his state trial for first-degree murder, the petitioner contended that the killing was in self-defense.

The petitioner testified that his sister and her boyfriend were robbed by Redding and another man during the evening of August 12, 1974. The petitioner, who was nearby when the robbery occurred, followed the thieves a short distance and reported their whereabouts to the police. According to the petitioner's testimony, the next day he encountered Redding, who accused him of informing the police of the robbery. The petitioner stated that Redding attacked him with a knife, that the two men struggled briefly, and that the petitioner broke away. On cross-examination, the petitioner admitted that during the struggle he had tried "[t]o push that knife

P. 9

5-20-80

Chief Justice
Justice Brennan
Justice Stevens
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice O'Connor

Chief Clerk: Mary M. Lasker

Circulated

3rd DRAFT

Recirculated

MAY 20 1980

SUPREME COURT OF THE UNITED STATES

No. 78-6809

Dennis Seay Jenkins,
Petitioner,
v.
Charles Anderson,
Warden.

On Writ of Certiorari to the United
States Court of Appeals for the
Sixth Circuit.

[April —, 1980]

MR. JUSTICE POWELL delivered the opinion of the Court.

The question in this case is whether the use of prearrest silence to impeach a defendant's credibility violates either the Fifth or the Fourteenth Amendments to the Constitution.

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The petitioner testified that his sister and her boyfriend were robbed by Redding and another man during the evening of August 12, 1974. The petitioner, who was nearby when the robbery occurred, followed the thieves a short distance and reported their whereabouts to the police. According to the petitioner's testimony, the next day he encountered Redding, who accused him of informing the police of the robbery. The petitioner stated that Redding attacked him with a knife, that the two men struggled briefly, and that the petitioner broke away. On cross-examination, the petitioner admitted that during the struggle he had tried "[t]o push that knife

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

May 22, 1980

No. 78-6809 Jenkins v. Anderson

MEMORANDUM TO THE CONFERENCE

I am recirculating herewith my opinion in the above case.

With one exception (p. 7), the changes are in footnotes added in response to the opinions of Thurgood and John.

As all of the votes are in, it occurs to me that possibly we could bring the case down on Tuesday unless, of course, Thurgood or John wishes to respond.

I am in no hurry myself, and will bring the case down Tuesday only with unanimous consent.

L.F.P.
L.F.P., Jr.

Copies to the Conference

LFP/lab

5-8

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Reite
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Burger
Mr. Justice Stevens

5-22-80

From: Mr. Justice Powell

Circulated: _____

Recirculated: MAY 22 1980

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78-6809

Dennis Seay Jenkins, Petitioner, v. Charles Anderson, Warden.	} On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.
---	--

[April —, 1980]

MR. JUSTICE POWELL delivered the opinion of the Court.

The question in this case is whether the use of prearrest silence to impeach a defendant's credibility violates either the Fifth or the Fourteenth Amendments to the Constitution.

I

On August 13, 1974, the petitioner stabbed and killed Doyle Redding. The petitioner was not apprehended until he turned himself in to governmental authorities about two weeks later. At his state trial for first-degree murder, the petitioner contended that the killing was in self-defense.

The petitioner testified that his sister and her boyfriend were robbed by Redding and another man during the evening of August 12, 1974. The petitioner, who was nearby when the robbery occurred, followed the thieves a short distance and reported their whereabouts to the police. According to the petitioner's testimony, the next day he encountered Redding, who accused him of informing the police of the robbery. The petitioner stated that Redding attacked him with a knife, that the two men struggled briefly, and that the petitioner broke away. On cross-examination, the petitioner admitted that during the struggle he had tried "[t]o push that knife

8

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

5-29-80

From: Mr. Justice Powell

Circulated: _____

5th DRAFT

Recirculated: MAY 29 1980

SUPREME COURT OF THE UNITED STATES

No. 78-6809

Dennis Seay Jenkins,
Petitioner,
v.
Charles Anderson,
Warden.

On Writ of Certiorari to the United
States Court of Appeals for the
Sixth Circuit.

[April —, 1980]

MR. JUSTICE POWELL delivered the opinion of the Court.

The question in this case is whether the use of prearrest silence to impeach a defendant's credibility violates either the Fifth or the Fourteenth Amendments to the Constitution.

I

On August 13, 1974, the petitioner stabbed and killed Doyle Redding. The petitioner was not apprehended until he turned himself in to governmental authorities about two weeks later. At his state trial for first-degree murder, the petitioner contended that the killing was in self-defense.

The petitioner testified that his sister and her boyfriend were robbed by Redding and another man during the evening of August 12, 1974. The petitioner, who was nearby when the robbery occurred, followed the thieves a short distance and reported their whereabouts to the police. According to the petitioner's testimony, the next day he encountered Redding, who accused him of informing the police of the robbery. The petitioner stated that Redding attacked him with a knife, that the two men struggled briefly, and that the petitioner broke away. On cross-examination, the petitioner admitted that during the struggle he had tried "[t]o push that knife

178

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 10, 1980

MEMORANDUM TO CONFERENCE

No. 78-6809, Jenkins v. Anderson

There is one case held for Jenkins. It is No. 78-1531, Franzen (Warden) v. Allen.

Resp was convicted for the murder of his wife in state court. After he shot his wife, he called the police. A police officer arrived and met resp outside a house. The officer asked resp what had happened. Resp said "I shot my wife." When the police officer was patting resp down for weapons, resp also said that the gun was inside on a table and that his wife was hurt pretty bad. The officer and resp entered the house. The officer gave resp his Miranda warnings. The resp then remained silent.

At trial, the police officer testified as to resp's initial pre-Miranda statements. The officer also said that the resp appeared calm. The resp took the stand and testified that he had acted in self-defense. On cross-examination, the prosecutor and the resp engaged in the following colloquoy:

Q. Now, Mr. Allen, when the police show [sic] up pursuant to your call on January 3, 1974 at 431 West 7th in Peoria, and you talked to Officer Melloy, you never mentioned any fear for your life, did you?

....

A. Would you repeat the question?

Q. When the police showed up at 431 West 7th on January 3, 1974 pursuant to your call, you never told them your [sic] were in fear for your life from your wife did you?

A. No.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

April 7, 1980

Re: No. 78-6809 - Jenkins v. Anderson

Dear Lewis:

Please join me.

Sincerely,



Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

May 23, 1980

Re: No. 78-6809 Jenkins v. Anderson

Dear Lewis:

I have no objection to bringing this case down
on Tuesday.

Sincerely,

WHR/CR

Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

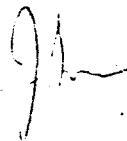
April 9, 1980

Re: 78-6809 - Jenkins v. Anderson

Dear Lewis:

The reason I have not yet responded in this case is that there is some question in my mind as to whether it is necessary to rely on the Raffel rationale in order to justify using pre-arrest silence for impeachment purposes. You may recall that even though I dissented from your Doyle opinion, I had some trouble with the Fifth Amendment issue in that case. (Under your due process rationale, you did not have to reach that problem.) As soon as I can find time, I'll give you a definitive response.

Respectfully,



Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS



April 11, 1980

Re: 78-6809 - Jenkins v. Anderson

Dear Lewis:

Many thanks for your note and for enclosing the excellent memorandum concerning my dissent in Doyle. Neither you nor John has overlooked anything. Nevertheless, I am still troubled by deciding the case on the basis of the Raffel rationale rather than on the basis of a distinction between pre-arrest and post-arrest silence. That is the problem I intended to identify in the conference note which you recorded, and which I think is 100% accurate. Please bear with me until I have had a little more time to reflect on this problem.

Respectfully,

A handwritten signature, likely of Justice John Paul Stevens, is written below the word "Respectfully,".

Mr. Justice Powell

Mr. Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Mr. Justice Stevens

1st DRAFT

Circulated: May 18 80

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

No. 78-6809

Dennis Seay Jenkins,
Petitioner,
v.
Charles Anderson,
Warden.

On Writ of Certiorari to the United
States Court of Appeals for the
Sixth Circuit.

[May —, 1980]

MR. JUSTICE STEVENS, concurring in the judgment.

My approach to both of petitioner's constitutional claims differs from the Court's. I would reject his Fifth Amendment claim because the privilege against compulsory self-incrimination¹ is simply irrelevant to a citizen's decision to remain silent when he is under no official compulsion to speak. I would reject his due process claim for the reasons stated in my dissenting opinion in *Doyle v. Ohio*, 426 U. S. 610, 620.

I

The Court holds that a defendant who elects to testify in his own behalf waives any Fifth Amendment objection to the use of his prior silence for the purpose of impeachment. As the Court correctly points out, this holding is squarely supported by *Raffel v. United States*, 271 U. S. 494. Nevertheless, I would not rely on *Raffel* because ~~reliance on *Raffel*~~ ^{such} incorrectly implies that a defendant's decision not to testify at his own trial is constitutionally indistinguishable from his silence in a precustody context.² ~~The two situations are~~ ^{not} fundamentally different.

¹ The Fifth Amendment provides in pertinent part:

"No person . . . shall be compelled in any criminal case to be a witness against himself. . . ." U. S. Const. Amdt. V.

² Moreover, there is a serious question about the continuing vitality of *Raffel*. In *Johnson v. United States*, 318 U. S. 189, 199, the Court

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Mr. Justice Stevens

Circulated: _____

Recirculated: MAY 19 '80

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78-6809

Dennis Seay Jenkins,
Petitioner,
v.
Charles Anderson,
Warden.

On Writ of Certiorari to the United
States Court of Appeals for the
Sixth Circuit.

[May —, 1980]

MR. JUSTICE STEVENS, concurring in the judgment.

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To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Mr. Justice Stevens

Circulated: _____

Recirculated: MAY 21 '80

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78-6809

Dennis Seay Jenkins, Petitioner, v. Charles Anderson, Warden.	}	On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.
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[May —, 1980]

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

May 22, 1980

Re: 78-6809 - Jenkins v. Anderson

Dear Lewis:

I have no objection to bringing this case
down on Tuesday.

Respectfully,

A handwritten signature in cursive script, appearing to read "John", followed by the initials "mp." in a smaller, less stylized script.

Mr. Justice Powell

Copies to the Conference

To: The Chief Justice
Mr. Justice Brennan ✓
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Mr. Justice Stevens

4th DRAFT

SUPREME COURT OF THE UNITED STATES

Circulated: _____
Recirculated: _____ MAY 28 '80

No. 78-6809

Dennis Seay Jenkins,
Petitioner,
v.
Charles Anderson,
Warden.

On Writ of Certiorari to the United
States Court of Appeals for the
Sixth Circuit.

[May —, 1980]

MR. JUSTICE STEVENS, concurring in the judgment.

My approach to both of petitioner's constitutional claims differs from the Court's. I would reject his Fifth Amendment claim because the privilege against compulsory self-incrimination¹ is simply irrelevant to a citizen's decision to remain silent when he is under no official compulsion to speak. I would reject his due process claim for the reasons stated in my dissenting opinion in *Doyle v. Ohio*, 426 U. S. 610, 620.

I

The Court holds that a defendant who elects to testify in his own behalf waives any Fifth Amendment objection to the use of his prior silence for the purpose of impeachment. As the Court correctly points out, this holding is squarely supported by *Raffel v. United States*, 271 U. S. 494, in which the Court upheld the use of a defendant's failure to take the stand at his first trial to impeach his testimony on retrial. Nevertheless, I would not rely on *Raffel* because such reliance incorrectly implies that a defendant's decision not to testify at his own trial is constitutionally indistinguishable from his silence

¹ The Fifth Amendment provides in pertinent part:

"No person . . . shall be compelled in any criminal case to be a witness against himself. . . ." U. S. Const. Amdt. V.