the cases in which the rulings were denied retroactive application involved preindictment lineups.[401] Nevertheless, in *Kirby v. Illinois*,[402] the Court held that no right to counsel exists with respect to lineups that precede some formal act of charging a suspect. The Sixth Amendment does not become operative, explained Justice Stewart's plurality opinion, until "the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearings, indictment, information, or arraignment. . . . The initiation of judicial criminal proceedings is far from a mere formalism. It is the starting point of our whole system of adversary criminal justice. For it is only then that the government has committed itself to prosecute, and only then that the adverse positions of Government and defendant have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law. It is this point, therefore, that marks the commencement of the 'criminal prosecutions' to which alone the explicit guarantees of the Sixth Amendment are applicable."[403] The Court's distinguishing of the underlying basis for *Miranda v. Arizona*[404] left that case basically unaffected by *Kirby*, but it appears that *Escobedo v. Illinois*,[405] and perhaps other cases, is greatly restricted thereby.

Post-Conviction Proceedings.—The right to counsel under the Sixth Amendment applies to "criminal prosecutions," a restriction

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[401] Stovall v. Denno, 388 U.S. 293 (1967); Foster v. California, 394 U.S. 440 (1969); Coleman v. Alabama, 399 U.S. 1 (1970).

[402] 406 U.S. 682, 689 (1972).

[403] 406 U.S. at 689–90. Justices Brennan, Douglas, and Marshall, dissenting, argued that it had never previously been doubted that *Wade* and *Gilbert* applied in preindictment lineup situations and that, in any event, the rationale of the rule was no different whatever the formal status of the case. Id. at 691. Justice White, who dissented in *Wade* and *Gilbert*, dissented in *Kirby* simply on the basis that those two cases controlled this one. Id. at 705. Indictment, as the quotation from *Kirby* indicates, is not a necessary precondition. Any initiation of judicial proceedings suffices. *E.g.*, Brewer v. Williams, 430 U.S. 387 (1977) (suspect had been seized pursuant to an arrest warrant, arraigned, and committed by court); United States v. Gouveia, 467 U.S. 180 (1984) (Sixth Amendment attaches as of arraignment—there is no right to counsel for prison inmates placed under administrative segregation during a lengthy investigation of their participation in prison crimes).

[404] "[T]he *Miranda* decision was based exclusively upon the Fifth and Fourteenth Amendment privilege against compulsory self-incrimination, upon the theory that custodial *interrogation* is inherently coercive." 406 U.S. at 688 (emphasis by Court).

[405] "But *Escobedo* is not apposite here for two distinct reasons. First, the Court in retrospect perceived that the 'prime purpose' of *Escobedo* was not to vindicate the constitutional right to counsel as such, but, like *Miranda*, 'to guarantee full effectuation of the privilege against self-incrimination. . . .' Johnson v. New Jersey, 384 U.S. 719, 729. Secondly, and perhaps even more important for purely practical purposes, the Court has limited the holding of *Escobedo* to its own facts, Johnson v. New Jersey, *supra*, at 733–34, and those facts are not remotely akin to the facts of the case before us." 406 U.S. at 689. *But see* id. at 693 n.3 (Justice Brennan dissenting).