KRULEWITCH *v.* UNITED STATES, 336 U.S. 440 (1949)
KRULEWITCH *v.* UNITED STATES.
CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.
No. 143.
Argued January 10, 1949.
Decided March 28, 1949.

Petitioner was convicted in a federal district court for inducing a woman (the complaining witness) to go from New York to Florida for the purpose of prostitution, transporting her from New York to Miami for that purpose, and conspiring with another woman to commit those offenses. At his trial, there was admitted in evidence over his objection testimony concerning a statement made by the co-conspirator to the complaining witness more than six weeks after the transportation to Miami had been completed, which implied that petitioner was guilty and suggested concealing his guilt. *Held:*

1. The hearsay declaration attributed to the co-conspirator was not admissible on the ground that it was made in furtherance of the conspiracy to transport. Pp. 441-443.

2. Nor was it admissible on the ground that it was in furtherance of a continuing subsidiary phase of the conspiracy — *i.e.*, an implied agreement to conceal the crime. Pp. 443-444.

3. Since it cannot be said on the record in this case that the erroneous admission of the hearsay declaration may not have tipped the seales against petitioner, it cannot be considered a harmless error under 28 U.S.C. (1946 ed.) § 391; and the conviction is reversed. Pp. 444-445.

167 F.2d 943, reversed.

Petitioner was convicted in a federal district court of violations of the Mann Act and of conspiracy to commit those offenses, 18 U.S.C. §§ 88, 398, 399 (now 18 U.S.C. §§ 371, 2421, 2422). The Court of Appeals affirmed. 167 F.2d 943. This Court granted certiorari. 335 U.S. 811. *Reversed*, p. 445.

Jacob W. Friedman argued the cause and filed a brief for petitioner.

Robert W. Ginnane argued the cause for the United States. With him on the brief were *Solicitor General*

Perlman, Assistant Attorney General Campbell, John R. Benney, Robert S. Erdahl and *Joseph M. Howard.*

MR. JUSTICE BLACK delivered the opinion of the Court.

A federal district court indictment charged in three counts that petitioner and a woman defendant had (1) induced and

persuaded another woman to go on October 20, 1941, from New York City to Miami, Florida, for the purpose of prostitution, in violation of 18 U.S.C. § 399 (now § 2422); (2) transported or caused her to be transported from New York to Miami for that purpose, in violation of 18 U.S.C. § 398 (now § 2421); and (3) conspired to commit those offenses in violation of 18 U.S.C. § 88 (now § 371). Tried alone, the petitioner was convicted on all three counts of the indictment. The Court of Appeals affirmed. 167 F.2d 943. And see disposition of prior appeal, 145 F.2d 76. We granted certiorari limiting our review to consideration of alleged error in admission of certain hearsay testimony against petitioner over his timely and repeated objections.

The challenged testimony was elicited by the Government from its complaining witness, the person whom petitioner and the woman defendant allegedly induced to go from New York to Florida for the purpose of prostitution. The testimony narrated the following purported conversation between the complaining witness and petitioner's alleged co-conspirator, the woman defendant.

> "She asked me, she says, 'You didn't talk yet?' And I says, 'No.' And she says, 'Well, don't,' she says, 'until we get you a lawyer.' And then she says, 'Be very careful what you say.' And I can't put it in exact words. But she said, 'It would be better for us two girls to take the blame than Kay (the defendant) because he couldn't stand it, he couldn't stand to take it.'"

Page 442

The time of the alleged conversation was more than a month and a half after October 20, 1941, the date the complaining witness had gone to Miami. Whatever original conspiracy may have existed between petitioner and his alleged co-conspirator to cause the complaining witness to go to Florida in October, 1941, no longer existed when the reported conversation took place in December, 1941. For on this latter date the trip to Florida had not only been made – the complaining witness had left Florida, had returned to New York, and had resumed her residence there. Furthermore, at the time the conversation took place, the complaining witness, the alleged co-conspirator, and the petitioner had been arrested. They apparently were charged in a United States District Court of Florida with the offense of which petitioner was here convicted.[fn1]

It is beyond doubt that the central aim of the alleged conspiracy – transportation of the complaining witness to Florida for prostitution – had either never existed or had long since ended in success or failure when and if the alleged co-conspirator made the statement attributed to her. *Cf. Lew Moy* v. *United States,* 237 F. 50. The statement plainly implied that petitioner was guilty of the crime for which he was on

trial. It was made in petitioner's absence and the Government made no effort whatever to show that it was made with his authority. The testimony thus stands as an unsworn, out-of-court declaration of petitioner's guilt. This hearsay declaration, attributed to a co-conspirator, was not made pursuant to and in furtherance of objectives of the conspiracy charged in the indictment, because if made, it was after those objectives either had failed or had been achieved. Under these circumstances, the hearsay declaration attributed to the alleged co-conspirator was not admissible
Page 443
on the theory that it was made in furtherance of the alleged criminal transportation undertaking. *Fiswick* v. *United States,* 329 U.S. 211, 216-217; *Brown* v. *United States,* 150 U.S. 93, 98-99; *Graham* v. *United States,* 15 F.2d 740, 743.

Although the Government recognizes that the chief objective of the conspiracy – transportation for prostitution purposes – had ended in success or failure before the reported conversation took place, it nevertheless argues for admissibility of the hearsay declaration as one in furtherance of a continuing subsidiary objective of the conspiracy. Its argument runs this way. Conspirators about to commit crimes always expressly or implicitly agree to collaborate with each other to conceal facts in order to prevent detection, conviction and punishment. Thus the argument is that even after the central criminal objectives of a conspiracy have succeeded or failed, an implicit subsidiary phase of the conspiracy always survives, the phase which has concealment as its sole objective. The Court of Appeals adopted this view. It viewed the alleged hearsay declaration as one in furtherance of this continuing subsidiary phase of the conspiracy, as part of "the implied agreement to conceal." 167 F.2d 943, 948. It consequently held the declaration properly admitted.

We cannot accept the Government's contention. There are many logical and practical reasons that could be advanced against a special evidentiary rule that permits out-of-court statements of one conspirator to be used against another. But however cogent these reasons, it is firmly established that where made in furtherance of the objectives of a going conspiracy, such statements are admissible as exceptions to the hearsay rule. This prerequisite to admissibility, that hearsay statements by some conspirators to be admissible against others must be made in furtherance of the conspiracy charged, has been
Page 444
scrupulously observed by federal courts. The Government now asks us to expand this narrow exception to the hearsay rule and hold admissible a declaration, not made in furtherance of the alleged criminal transportation conspiracy charged, but made in furtherance of an alleged implied but uncharged conspiracy aimed at preventing detection and punishment. No federal court case cited by the Government suggests so hospitable a reception to the

use of hearsay evidence to convict in conspiracy cases. The Government contention does find support in some but not all of the state court opinions cited in the Government brief.[fn2] But in none of them does there appear to be recognition of any such broad exception to the hearsay rule as that here urged. The rule contended for by the Government could have far-reaching results. For under this rule plausible arguments could generally be made in conspiracy cases that most out-of-court statements offered in evidence tended to shield co-conspirators. We are not persuaded to adopt the Government's implicit conspiracy theory which in all criminal conspiracy cases would create automatically a further breach of the general rule against the admission of hearsay evidence.

It is contended that the statement attributed to the alleged co-conspirator was merely cumulative evidence, that without the statement the case against petitioner was so strong that we should hold the error harmless under 28 U.S.C. (1946 ed.) § 391. In *Kotteakos* v. *United States,* 328 U.S. 750, we said that error should not be held harmless
Page 445
under the harmless error statute if upon consideration of the record the court is left in grave doubt as to whether the error had substantial influence in bringing about a verdict. We have such doubt here. The Florida District Court grand jury failed to indict. After indictment in New York petitioner was tried four times with the following results: mistrial; conviction; mistrial; conviction with recommendation for leniency. The revolting type of charges made against this petitioner by the complaining witness makes it difficult to believe that a jury convinced of a strong case against him would have recommended leniency. There was corroborative evidence of the complaining witness on certain phases of the case. But as to all vital phases, those involving the sordid criminal features, the jury was compelled to choose between believing the petitioner or the complaining witness. The record persuades us that the jury's task was difficult at best. We cannot say that the erroneous admission of the hearsay declaration may not have been the weight that tipped the scales against petitioner.

Reversed.