

FILED
SUPREME COURT
STATE OF WASHINGTON
7/6/2022 2:50 PM
BY ERIN L. LENNON
CLERK

No. 100936-4

**IN THE SUPREME COURT OF THE
STATE OF WASHINGTON**

STATE OF WASHINGTON,
Respondent,

v.

CRISTIAN MANUEL AMADOR,
Petitioner.

**MEMORANDUM OF *AMICUS CURIAE* WASHINGTON
ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN
SUPPORT OF PETITION FOR REVIEW**

MARK W. MUENSTER
WSBA #11228
1600 Lincoln Street
Vancouver, WA 98660
(971) 404 8134
markmuen@ix.netcom.com

MARK B. MIDDAUGH
WSBA #51425
600 University Street
Suite 3020
Seattle, WA 98101
(206) 919-4269
mark@middaughlaw.com

TABLE OF CONTENTS

I. IDENTITY OF MOVING PARTY 1

II. STATEMENT OF RELIEF SOUGHT 1

III. GROUNDS FOR RELIEF AND ARGUMENT..... 1

 A. This Court should grant review to determine an issue of public importance pursuant to RAP 13.4(b)(4), namely whether the continued use of the “non-corroboration” instruction in prosecutions involving sexual misconduct should continue to be the law of this state. 1

 B. This Court should grant review under RAP 13.4(b)(3), since this case presents a significant question of state constitutional law under Article I, Section 3. 6

IV. CONCLUSION 7

TABLE OF AUTHORITIES

Cases

<i>Gutierrez v. State</i> , 177 So.3d 226 (Fla. 2015).....	4
<i>Ludy v. State</i> , 784 N.E.2d 459, (Ind. 2003).....	4
<i>State v. Amador</i> , 21 Wn.App.2d 1034 (2022)	2
<i>State v. Chenoweth</i> , 188 Wn.App 521, 354 P.3d 13 (2015)	3
<i>State v. Clayton</i> , 32 Wn.2d 571, 202 P.2d 922 (1949).....	1, 4
<i>State v. Crossguns</i> , 199 Wn.2d 282, 505 P.3d 529 (2022)	5
<i>State v. Johnson</i> , 152 Wn.App. 924, 219 P.3d 958 (2009).....	3
<i>State v. Thomas</i> , 52 Wn.2d 255, 324 P.2d 821 (1958).....	2
<i>State v. Zimmerman</i> , 130 Wn.App. 170, 121 P.3d 1216 (2005)	3

Statutes

RCW 9A.44.020	2
RCW 9A.44.030	2, 7
RCW 9A.44.050	7

Other Authorities

<i>National Public Radio</i> , “#MeToo And The Law,” April 28, 2018.....	5
Graw Leary, Mary, “Is the #MeToo Movement for Real? Implications for Juror’s Biases in Sexual Assault Cases,” 81 La. L. Rev. 81 (2020).....	5

Comment to Washington Pattern Jury Instruction—
Criminal 45.02..... 4

Rules

RAP 13.4 *passim*

Constitutional Provisions

Const. Art. I §3 6, 7

Const. Art. IV, §16 3, 6

I. IDENTITY OF MOVING PARTY

The Washington Association of Criminal Defense Lawyers (WACDL) moves for the relief specified in part II of this motion.

II. STATEMENT OF RELIEF SOUGHT

WACDL asks this court to grant the Petition for Review filed by Cristian Manuel Amador on May 18, 2022, No. 100936-4.

III. GROUNDS FOR RELIEF AND ARGUMENT

A. This Court should grant review to determine an issue of public importance pursuant to RAP 13.4(b)(4), namely whether the continued use of the “non-corroboration” instruction in prosecutions involving sexual misconduct should continue to be the law of this state.

In this case, a prosecution for rape in the second degree, the jury was instructed over defense objection as follows:

In order to convict a person of rape in the second degree as defined in these instructions, it is not necessary that the testimony of the alleged victim be corroborated. The jury is to decide all questions of witness credibility.

The Court of Appeals held that this instruction was not error, despite significant misgivings about its use, based on this court’s decision in *State v. Clayton*, 32 Wn. 2d 571, 202 P.2d 922 (1949). The Court of Appeals wrote that Mr. Amador’s arguments “have merit” and strongly implied that it was inclined to reverse his

conviction, but it nonetheless rejected his appeal on the grounds that it must follow *Clayton* until this Court expressly overrules that decision. *State v. Amador*, 21 Wn.App.2d 1034 (2022).

The issue presented by this petition is whether this court should continue to uphold *Clayton* as binding precedent in cases involving prosecutions for sexual misconduct. Amicus submits that *Clayton* is both harmful and incorrect, constitutes a comment on the evidence, and is a violation of due process, particularly in cases involving an affirmative defense such as RCW 9A.44.030(1).

At one point in Washington law, corroboration of the complaining witness' testimony was required by statute. This statute was repealed. Our State's non-corroboration law, RCW 9A.44.020(1), now states that it is not necessary for the testimony of an alleged rape victim to be corroborated. That statute made no change in the law, because since 1913, the law of Washington has followed the common law rule that no corroboration is necessary. *State v. Thomas*, 52 Wn.2d 255, 324 P.2d 821 (1958).

The *Clayton* Court upheld the "non-corroboration" instruction, rejecting the argument that the instruction was a

comment on the evidence in violation of Article IV, Section 16 of the Washington Constitution. The appellant in *Clayton* conceded that it was a correct statement of the law to inform the jury that corroboration of the complaining witness was not required in order to convict.

Several subsequent decisions have upheld convictions based on the giving of the instruction, including the panel here. The Courts of Appeals have consistently noted problems with the instruction, and might have reversed but for being bound by *Clayton*. See, e.g., *State v. Chenoweth*, 188 Wn.App 521, 354 P.3d 13 (2015) ; *State v. Zimmerman*, 130 Wn.App. 170, 121 P.3d 1216 (2005); *State v. Johnson*, 152 Wn.App. 924, 219 P.3d 958 (2009).

As noted by the *Chenoweth* decision, the Washington Pattern Jury Instruction Committee has recommended that *no* instruction of this type be given:

The matter of corroboration is really a matter of sufficiency of the evidence. An instruction on this subject would be a negative instruction. The proving or disproving of such a charge is a factual problem, not a legal problem. Whether a jury can or should accept the uncorroborated testimony of the prosecuting witness or the uncorroborated testimony of the defendant is best left to argument of counsel.

Comment to Washington Pattern Jury Instruction—
Criminal 45.02.

Other state courts have noted problems with similar non-corroboration instructions and have reversed convictions when these were used. In *Ludy v. State*, 784 NE 2d 459 (Ind. 2003), the Indiana Supreme Court reversed a conviction based on a non-corroboration instruction and reversed its own precedent upholding them. The *Ludy* Court noted that

The challenged instruction is problematic for at least three reasons. First, it unfairly focuses the jury’s attention on and highlights a single witness’s testimony. Second, it presents a concept used in appellate review that is irrelevant to a jury’s function as fact-finder. Third, by using the technical term “uncorroborated,” the instruction may mislead or confuse the jury.

Id. at 461.

Similarly, in *Gutierrez v. State*, 177 So.3d 226 (Fla. 2015), the Florida Supreme Court found the instruction to be reversible error, noting the substantial problem of bolstering one witness’s testimony of another by means of the instruction.

The historical need for a non-corroboration instruction has eroded with time. Societal attitudes about sexual assault in 2022 bear little similarity to attitudes in 1949, when the *Clayton* case was decided. *See, e.g., State v. Crossguns*, 199 Wn.2d 282, 293,

505 P.3d 529 (2022) (recognizing that past court decisions in sexual assault cases have been based on “outdated, sexist assumptions and expectations”). In just the last few years, social movements such as the #MeToo movement have begun to work changes in how jurors perceive the complaining witness in a prosecution for a sex offense. *See, e.g., National Public Radio, “#MeToo And The Law,”* April 28, 2018 (noting that “the jury [is] becoming more aware of sexual assault, harassment and rape and more skeptical of the old norms of slut shaming and dismissing witnesses as liars or whores or sluts.”)¹; Graw Leary, Mary, “Is the #MeToo Movement for Real? Implications for Juror’s Biases in Sexual Assault Cases,” 81 *La. L. Rev.* 81 (2020) (“[T]he #MeToo movement should positively affect these entrenched problems and provide more access to justice for sexual assault victims by creating more verdicts based on evidence and not improper biases.”).

It is clear that the Courts of Appeals feel hamstrung by the *Clayton* decision, when reviewing cases involving the use of a

¹ Available at <https://www.npr.org/2018/04/28/606716555/-metoo-and-the-law>, last accessed 7/5/22.

non-corroboration instruction that they recognize as legally defective, but are powerless to do anything about it. Review should be granted as a matter of public importance pursuant to RAP 13.4(b)(4) to clarify whether *Clayton* should continue to be followed.

B. This Court should grant review under RAP 13.4(b)(3), since this case presents a significant question of state constitutional law under Article I, Section 3

The *Clayton* decision considered the validity of the non-corroboration instruction under only one provision of the state constitution: Article IV, Section 16, the prohibition on comments on the evidence. This case also presents the question of whether the due process clause is violated by the use of a non-corroboration instruction when the defendant presents an affirmative defense pursuant to RCW 9A.44.030.

The prosecution in this case was based on the allegation that the complaining witness was “physically helpless” under RCW 9A.44.050(1)(b). The defense presented evidence to support the defense available to him under RCW 9A.44.030(1), that he reasonably believed the complaining witness was not physically helpless or mentally incapacitated.

The non-corroboration instruction had the effect of completely tilting the playing field in this type of case. The jury was told the state did not have to corroborate the testimony of the complaining witness in order to meet its burden of proof. The jury was told that Mr. Amador had to prove his defense by a preponderance of the evidence. Significantly, it was *not* told that it could find for the defense without corroboration of his testimony. The comparison in burdens would be telling to a jury. It gave the complaining witness' testimony an unfair advantage which our state constitution should not permit. This Court should accept review to decide whether the non-corroboration instruction is defective in a case with an affirmative defense to the charge of rape in the second degree under Article I, Section 3.

IV. CONCLUSION

Amicus WACDL submits that this case presents both an issue of public importance that should be decided by this Court pursuant to RAP 13.4 (b)(4) and a significant question under the state Constitution, pursuant to RAP 13.4(b)(3), under our state's due process clause. This Court should grant Mr. Amador's petition to decide both issues.

Respectfully submitted this 6th day of July , 2022.

s/Mark W. Muenster

WSBA #11228

Attorney for Amicus Curiae WACDL

E-mail: markmuen@ix.netcom.com

s/Mark B. Middaugh

WSBA #51425

Attorney for Amicus Curiae WACDL

E-mail: mark@middaughlaw.com

CERTIFICATION

I certify that this memorandum complies with the length limitation of RAP 18.17 and contains 1,336 words.

MIDDAUGH LAW, PLLC

July 06, 2022 - 2:50 PM

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: 100,936-4
Appellate Court Case Title: State of Washington v. Cristian Manuel Amador
Superior Court Case Number: 18-1-02419-6

The following documents have been uploaded:

- 1009364_Briefs_20220706144822SC740437_2375.pdf
This File Contains:
Briefs - Amicus Curiae
The Original File Name was Amador Amicus Memorandum 7.6.22.pdf
- 1009364_Motion_20220706144822SC740437_8377.pdf
This File Contains:
Motion 1 - Amicus Curiae Brief
The Original File Name was Amador Motion to File.pdf

A copy of the uploaded files will be sent to:

- aaron.bartlett@clark.wa.gov
- amber@swthayer.com
- cntypa.generaldelivery@clark.wa.gov
- mark@middaughlaw.com
- markmuen@ix.netcom.com
- steve@swthayer.com

Comments:

Sender Name: Mark Middaugh - Email: mark@middaughlaw.com
Address:
600 UNIVERSITY ST STE 3020
SEATTLE, WA, 98101-4105
Phone: 206-919-4269

Note: The Filing Id is 20220706144822SC740437