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NO. 36480-1-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

ARMANDO GOMEZ DIAZ,
Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR YAKIMA COUNTY

The Honorable Richard H. Bartheld, Judge

BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
A. ASSIGNMENTS OF ERROR.....	1
B. ISSUES PRESENTED ON APPEAL.....	1
C. STATEMENT OF THE CASE.....	2
1. Procedural History.....	2
2. Substantive Facts.....	3
a. M’s testimony at trial.....	4
b. Prosecutor argued facts not in evidence without objection.....	5
c. Jury questioned M’s age.....	5
d. Verdict.....	5
e. Judgment and Sentence ordered supervised visits with Diaz’s biological son.....	5
D. ARGUMENT.....	6
1. THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT DIAZ COMMITTED CHILD MOLESTATION IN THE FIRST DEGREE AS CHARGED IN COUNT IV	6
a. The state failed to prove beyond a reasonable doubt that Diaz committed a crime against a child under 12 under RCW 9A.44.083.....	8

TABLE OF CONTENTS

Page

2. DIAZ WAS DENIED HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHEN DEFENSE COUNSEL FAILED TO OBJECT TO THE PROSECUTOR'S PREJUDICIAL MISCONDUCT DURING CLOSING ARGUMENT9

3. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT ORDERED SUPERVISED VISITS WITH DIAZ'S BIOLOGICAL SON SUBJECT TO THE APPROVAL OF THE DEPARTMENT OF CORRECTIONS, BECAUSE THE CONDITION IMPERMISSABLY INTERFERE'S WITH DIAZ'S FUNDAMENTAL RIGHT TO PARENT AND IS NOT CRIME RELATED14

E. CONCLUSION.....17

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

<i>In re Cross</i> , 180 Wn.2d 664, 327 P.3d 660 (2014).....	10
<i>In re Heidari</i> , 159 Wn. App. 601, 248 P.3d 550 (2011), <i>aff'd</i> , 174 Wn.2d 288, 274 P.3d 366 (2012).....	9
<i>In re Marriage of Littlefield</i> , 133 Wn.2d 39, 940 P.2d 1362 (1997).....	15
<i>In re Yates</i> , 177 Wn.2d 1, 296 P.3d 872 (2013).....	11
<i>Matter of L.H.</i> , 198 Wn. App. 190, 391 P.3d 490 (2016).....	15
<i>State v. Ancira</i> , 107 Wn. App. 650, 27 P.3d 1246 (2001).....	14, 15
<i>State v. Emery</i> , 174 Wn.2d 741, 278 P.3d 653 (2012).....	11
<i>State v. Glasmann</i> , 175 Wn.2d 696, 286 P.3d 673 (2012).....	11, 13
<i>State v. Gregory</i> , 192 Wn.2d 1, 427 P.3d 621 (2018).....	10
<i>State v. Grier</i> , 171 Wn.2d 17, 246 P.3d 1260 (2011).....	10, 11, 13
<i>State v. Irby</i> , 187 Wn. App. 183, 347 P.3d 1103 (2015).....	7

TABLE OF AUTHORITIES

	Page
WASHINGTON CASES, continued	
<i>State v. Jackman</i> , 156 Wn. 2d 736, 132 P.3d 136 (2006), <i>as corrected</i> (Feb. 14, 2007)	6, 8, 9
<i>State v. Jensen</i> , 125 Wn. App. 319, 104 P.3d 717 (2005).....	7
<i>State v. Johnson</i> , 194 Wn. App. 304, 374 P.3d 1206 (2016).....	15
<i>State v. Kirwin</i> , 166 Wn. App. 659, 271 P.3d 310 (2012).....	7
<i>State v. Kylo</i> , 166 Wn.2d 856, 215 P.3d 177 (2009).....	11
<i>State v. Letourneau</i> , 100 Wn. App. 424, 997 P.2d 436 (2000), <i>as amended</i> (June 8, 2000)	15
<i>State v. Pierce</i> , 169 Wn. App. 533, 280 P.3d 1158 (2012).....	11, 12, 13
<i>State v. Riles</i> , 135 Wn.2d 326, 957 P.2d 655 (1998).....	15
<i>State v. Riley</i> , 121 Wn.2d 22, 846 P.2d 1365 (1993).....	14
<i>State v. Salina</i> , 119 Wn.2d 192, 829 P.2d 1068 (1992).....	7
<i>State v. Smith</i> , 155 Wn.2d 496, 120 P.3d 559 (2005).....	7

TABLE OF AUTHORITIES

	Page
WASHINGTON CASES, continued	
<i>State v. Sundberg</i> , 185 Wn.2d 147, 370 P.3d 1 (2016)	6
<i>State v. Wooten</i> , 178 Wn.2d 890, 312 P.3d 41 (2013)	10
FEDERAL CASES	
<i>In re Winship</i> , 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970)	7
<i>Santosky v. Kramer</i> , 455 U.S. 745, 102 S.Ct. 1388 (1982)	15
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)	10, 13
<i>Yarborough v. Gentry</i> , 540 U.S. 1, 124 S.Ct. 1, 157 L.Ed.2d 1 (2003)	10
RULES, STATUTES, AND OTHERS	
RCW 9.94A.030	14
RCW 9.94A.505	14
RCW 9A.44.083	2, 3, 6, 7, 8, 9
U.S. Const. Amend. VI	1, 10
U.S. Const. Amend. XIV	7
Wash. Const. art I, § 22	1, 7, 10

A. ASSIGNMENTS OF ERROR

1. The state failed to prove beyond a reasonable doubt that Diaz committed child molestation in the first degree as charged in Count IV.

2. Diaz was denied his Sixth Amendment and Wash. Const. art. I, § 22 right to effective assistance of counsel when defense counsel failed to object to the prosecutor's prejudicial misconduct during closing argument.

3. The trial court abused its discretion when it ordered supervised visits with Diaz's biological son subject to the approval of the Department of Corrections because it impermissibly interfered with Diaz's fundamental right to parent when the provision was not reasonably crime related.

B. ISSUES PRESENTED ON APPEAL

1. Did the state fail to prove beyond a reasonable doubt that Diaz committed first degree child molestation as charged in Count IV when: (a) the state failed to prove that M was under 12 years old because the state failed to present evidence of M's birthdate; (b) the state failed to present evidence of when the alleged molestation occurred; (c) M did

not reference any specific time period when the incident occurred and (d) the jury did not specify when the act constituting the offense occurred?

2. In closing argument, the prosecutor stated that M testified the sexual contact occurred (1) when she was in sixth grade, (2) before Diaz married M's mother and (3) when she was 11. M did not testify to any of those statements. Was Diaz denied his constitutional right to effective assistance of counsel when defense counsel failed to object to the prosecutor's improper and prejudicial statements arguing facts not in evidence?

3. Did the trial court impermissibly interfere with Diaz's fundamental right to parent when it ordered supervised visits with Diaz's biological son without identifying the necessity of supervised visits?

C. STATEMENT OF THE CASE

1. Procedural History

Armando Gomez Diaz was charged by amended information with First Degree Child Molestation (RCW 9A.44.083). CP 11. After a trial, the jury convicted Diaz as charged. CP 241. This timely appeal follows. CP 254.

2. Substantive Facts

Armando Gomez Diaz began living with Alicia Chavez and her three children, M, A, and S in September or October 2013. RP 145. The couple married on August 2, 2015. RP 145. The family first lived in a house on Jerome Avenue in Yakima and then moved to an apartment in December 2016, Chavez identified as Castlevale. RP 146. Chavez and Diaz have a son together named E. RP 263.

In 2017, Chavez called the police and reported that Diaz had sexually assaulted A. RP 58, 146-47. Officer Scott Gronewald responded and conducted an initial investigation. RP 58-59. The next morning Detective Curtis Oja interviewed both A and M. RP 104, 114. Diaz was arrested and charged by amended information as follows:

Count 4 – FIRST DEGREE CHILD MOLESTATION – RCW 9A.44.083

On, about, during or between May 1, 2014 and August 31, 2014, in the State of Washington, you engaged in sexual contact with and you were at least 36 months older than the victim, [M], a person who was less than 12 years old and not married to you and was not in the state registered domestic partnership with you.

CP 12.

In Count VI, the state charged Diaz with second degree rape of a child against M. CP 13. The jury acquitted Diaz on this charge. CP 243.

a. M's testimony at trial

At trial, M testified that Diaz touched her breasts under her bra while she and Diaz were watching a television show on Diaz's phone. RP 186-87. However, M did not testify about which house they lived in at the time of the incident, or whether it was before or after her mom married Diaz, and she did not specify which grade she attended at the time. RP 186-87. Neither M nor any other witness testified about M's date of birth. RP 190. M testified that Diaz started putting his private in her private when she was 11, but the jury did not believe her and found Diaz not guilty of child rape. CP 243. M did not testify about how old she was during the touching incident. RP 185-86. M testified that Diaz started putting his private in her private when she was 11 and that Diaz "put his thing in [her] private... like once or twice a week" but the jury did not believe her and found Diaz not guilty of child rape. CP 243. M did not testify about how old she was during the touching incident. RP 185-86.

M testified that she was 15 at the time of trial on October 11, 2018. RP 51, 184. M was 14 when Diaz left the home on May 23, 2017. RP 190.

b. Prosecutor argued facts not in evidence without objection

During closing argument, the prosecutor stated the following regarding Count 4:

This is Count 4. It's dated on May 1, 2014, through August 1, 2014. For this [M] testified that she was 11. It was before the wedding when the defendant married her mom. It was while she was in sixth grade.

So they were married on August 2, 2015. It took place before August 2, 2015. She was 11. She was in the sixth grade. So it fits that date here of May 1, 2014, through August 31, 2014.

RP 318. Defense counsel did not object. RP 318.

c. Jury questioned M's age

During deliberations, the jury submitted a question requesting M's birthdate. Jury Question, Supp. CP. The court responded they must rely on their collective memories. Jury Question, Supp. CP.

d. Verdict

The jury found Diaz guilty of first-degree child molestation as charged in Count IV. CP 241.

e. Judgment and Sentence ordered supervised visits with Diaz's biological son

As part of Diaz's Judgment and Sentence the court ordered supervised visits with his biological son, age 4, subject to the approval of the Department of Corrections and written permission

from the supervising Community Corrections Officer. CP 247. The trial court conceded there was “no indication that there was any sexual proclivity towards male children” but stated it was “still concerned about the situation.” RP 17 (12/3/18). The court did not state any specific reason for its concern. RP 17 (12/3/18).

This timely appeal follows. CP 254.

D. ARGUMENT

1. THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT DIAZ COMMITTED CHILD MOLESTATION IN THE FIRST DEGREE AS CHARGED IN COUNT IV

M’s age is an essential element of the crime charged. RCW 9A.44.083. The state failed to prove beyond a reasonable doubt that Diaz committed child molestation in the first degree as charged in Count IV because there was no evidence that M was less than 12 years old when the alleged molestation occurred. *State v. Jackman*, 156 Wn. 2d 736, 741, 745, 132 P.3d 136 (2006), *as corrected* (Feb. 14, 2007).

In a criminal prosecution the state must prove beyond a reasonable doubt every essential element of the crime charged. *State v. Sundberg*, 185 Wn.2d 147, 152, 370 P.3d 1 (2016) (citing,

In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) (quotations omitted)). A conviction based on insufficient evidence of the crime charged violates a defendant's right to due process guaranteed by both the Fourteenth Amendment and art. I, § 22. U.S. Const. Amend. XIV; art. I, § 22; *State v. Kirwin*, 166 Wn. App. 659, 672-73, 271 P.3d 310 (2012).

This Court must reverse the conviction and dismiss with prejudice if there is insufficient evidence to prove an element of a crime. *State v. Smith*, 155 Wn.2d 496, 505, 120 P.3d 559 (2005); *State v. Irby*, 187 Wn. App. 183, 204, 347 P.3d 1103 (2015). Evidence is sufficient to support a conviction if, when viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salina*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citation omitted).

As charged, the state was required to prove beyond a reasonable doubt that M was less than 12 years old at the time the crime was allegedly committed. CP 12. RCW 9A.44.083; *State v. Jensen*, 125 Wn. App. 319, 327, 104 P.3d 717 (2005).

- a. The state failed to prove beyond a reasonable doubt that Diaz committed a crime against a child under 12 under RCW 9A.44.083

The state failed to prove beyond a reasonable doubt that Diaz committed a crime against a child under 12 under RCW 9A.44.083.

In *Jackman*, the Washington Supreme Court reversed the defendant's conviction for failing to prove the complainants' ages in charges of communicating with four minors for an immoral purpose because the complaints' ages were an essential element of the crime charged. *Jackman*, 156 Wn. 2d at 745. In *Jackman*, the only evidence of the victims' ages was limited to their own testimony about their ages, which the court held insufficient to prove this element. *Jackman*, 156 Wn.2d at 740, 745, 751 n.7.

Here too, the state failed to present evidence beyond a reasonable doubt of the essential element of M's age when the crime was allegedly committed. CP 12; RCW 9A.44.083. M did not testify about what grade she attended, which house the family lived in, or whether the alleged incident occurred before or after her mom married Diaz. RP 186-87. Thus, there was insufficient evidence M was under 12 when the incident occurred.

Because M made no temporal references to when the molestation occurred, and M did not testify about when she turned 12, the jury could not find beyond a reasonable doubt the state met its burden of proof under RCW 9A.44.083. In sum, the state failed to prove beyond a reasonable doubt that M was twelve when the alleged molestation occurred. *Jackman*, 156 Wn. 2d at 745.

Because the jury was not instructed on any lesser included offense this Court must reverse Diaz's conviction and remand for dismissal with prejudice. *In re Heidari*, 159 Wn. App. 601, 602, 248 P.3d 550 (2011), *aff'd*, 174 Wn.2d 288, 296, 274 P.3d 366 (2012).

2. DIAZ WAS DENIED HIS
CONSTITUTIONAL RIGHT TO
EFFECTIVE ASSISTANCE OF
COUNSEL WHEN DEFENSE
COUNSEL FAILED TO OBJECT TO
THE PROSECUTOR'S PREJUDICIAL
MISCONDUCT DURING CLOSING
ARGUMENT

Diaz's right to the effective assistance of counsel was violated when defense counsel failed to object when the prosecutor argued facts not in evidence: that M was in sixth grade when the molestation occurred, that it was before her mom married Diaz, and that M was 11 when the touching occurred.

The Sixth Amendment to the United States Constitution and art. I, § 22 of the Washington Constitution guarantee a criminal defendant the right to effective assistance of counsel. U.S. Const. Amend. VI; art. I, § 22; *State v. Grier*, 171 Wn.2d 17, 32, 246 P.3d 1260 (2011). The Court reviews ineffective assistance of counsel claims de novo. *State v. Wooten*, 178 Wn.2d 890, 895, 312 P.3d 41 (2013).

The right to effective assistance extends to closing arguments. *Yarborough v. Gentry*, 540 U.S. 1, 5, 124 S.Ct. 1, 157 L.Ed.2d 1 (2003). Failure to object to a prosecutor's improper and prejudicial remark may be deficient performance. *In re Cross*, 180 Wn.2d 664, 721, 327 P.3d 660 (2014) *abrogated on other grounds by State v. Gregory*, 192 Wn.2d 1, 427 P.3d 621 (2018).

To prevail on an ineffective assistance of counsel claim, the defendant must show that defense counsel's representation was deficient, and that the deficient representation was prejudicial. *Grier*, 171 Wn.2d at 32-33. Failure to establish either prong is fatal to an ineffective assistance of counsel claim. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Counsel's performance is deficient if it falls below an objective

standard of reasonableness, and there is “a strong presumption that counsel’s performance was reasonable.” *Grier*, 171 Wn.2d at 33 (quoting *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009)). Counsel’s performance is not deficient if it can be characterized as legitimate trial strategy. *Grier*, 171 Wn.2d at 33. A defendant is prejudiced if there is a substantial likelihood that the misconduct affected the jury verdict. *State v. Glasmann*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012).

A prosecutor commits misconduct when he or she makes arguments unsupported by the admitted evidence. *In re Yates*, 177 Wn.2d 1, 58, 296 P.3d 872 (2013). When a defendant fails to object to an improper remark he waives the right to assert prosecutorial misconduct unless the remark was so “flagrant and ill intentioned” that it causes an incurable prejudice. *Glasmann*, 175 Wn.2d at 704. The focus of the inquiry is “more on whether the resulting prejudice could have been cured, rather than the flagrant or ill-intentioned nature of the remarks.” *State v. Pierce*, 169 Wn. App. 533, 552, 280 P.3d 1158 (2012) (quoting *State v. Emery*, 174 Wn.2d 741, 760–61, 278 P.3d 653 (2012)).

In *Pierce*, the Court of Appeals reversed and remanded for a

new trial when the prosecutor argued outside the evidence about what Pierce's thoughts were before the crime, invited the jury to relive the murders by fabricating a story about how they occurred, and invited the jury to image the crimes happening to themselves. *Pierce*, 169 Wn. App. at 556. Although Pierce did not object at trial, the Court found the prosecutor's statements caused prejudice incurable by a jury instruction because the jury was invited to imagine themselves in the position of being murdered in their own homes by means that were fabricated. *Pierce*, 169 Wn. App. at 556.

Here, as in *Pierce*, the prosecutor referenced critical and prejudicial facts not in evidence: that the sexual contact occurred before Chavez and Diaz were married when M was 11 years old and in sixth grade. RP 318.

Just like the prosecutor in *Pierce* fabricated the story about how the murders occurred, the prosecutor here fabricated the only facts that supported two of the four elements of the crime in an otherwise weak case. Here too as in *Pierce* the prosecutor's statement were reversible misconduct. *Pierce*, 169 Wn. App. at 556. Thus, there is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding would have

been different because the jury was unsure about M's age and during deliberations requested M's birth date. *Grier*, 171 Wn.2d at 34.

Under these circumstances, the jury was likely persuaded by the prosecutor's argument and not the evidence presented. There was no conceivable reason for defense counsel's failure to object. Had counsel objected the court likely would have granted a mistrial because the argument prejudicially supplied the jury with facts not in evidence sufficient to convict. The misconduct was flagrant and ill-intentioned because even if counsel objected, a curative instruction would not have removed the taint from the comments because the prosecutor supplied the missing evidence with his argument, and in a child sex offense case the jury likely had a heightened level of sympathy for the victim and an equal level of antipathy towards Diaz. *Glasmann*, 175 Wn.2d at 704; *Pierce*, 169 Wn. App. at 556.; *Strickland*, 466 U.S. at 701.

3. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT ORDERED SUPERVISED VISITS WITH DIAZ'S BIOLOGICAL SON SUBJECT TO THE APPROVAL OF THE DEPARTMENT OF CORRECTIONS, BECAUSE THE CONDITION IMPERMISSABLY INTERFERE'S WITH DIAZ'S FUNDAMENTAL RIGHT TO PARENT AND IS NOT CRIME RELATED

As a part of any sentence, the court may impose a crime-related prohibition or condition during the term of the maximum sentence. RCW 9.94A.505. "Crime-related prohibitions" are orders directly related to "the circumstances of the crime". RCW 9.94A.030(10); *State v. Ancira*, 107 Wn. App. 650, 656, 27 P.3d 1246 (2001)

This court reviews sentencing conditions for abuse of discretion. *Ancira*, 107 Wn. App. 653 (citing *State v. Riley*, 121 Wn.2d 22, 36-37, 846 P.2d 1365 (1993)). Abuse of discretion occurs when the decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. *Ancira*, 107 Wn. App. at 653 (citation omitted).

A trial court's decision is manifestly unreasonable if it is outside the range of acceptable choices considering the facts and applicable legal standard decision is based on untenable grounds if

the factual findings are not supported by the record. *Matter of L.H.*, 198 Wn. App. 190, 194, 391 P.3d 490 (2016) (citing *In re Marriage of Littlefield*, 133 Wn.2d 39, 46, 940 P.2d 1362 (1997)).

When a sentencing condition interferes with a fundamental constitutional right, such as the care custody and management of one's children, it is subject to strict scrutiny. *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S.Ct. 1388 (1982); *State v. Johnson*, 194 Wn. App. 304, 307, 374 P.3d 1206 (2016).

In the context of a sentencing condition, the fundamental right to parent can only be restricted by a sentencing condition if that condition is "reasonably necessary to accomplish the essential needs of the State." *Ancira*, 107 Wn. App. at 654; *State v. Riles*, 135 Wn.2d 326, 350, 957 P.2d 655 (1998). Prevention of harm to children is a compelling state interest. *State v. Letourneau*, 100 Wn. App. 424, 439, 997 P.2d 436 (2000), *as amended* (June 8, 2000). However, the condition must also be crime related.

In *Letourneau*, Letourneau plead guilty to second degree rape of a child with 13-year-old male. The trial court imposed supervised visitation with Letourneau's minor children, including two children who were fathered by the victim. *Letourneau*, 100 Wn. App. at 426.

The Court of Appeals struck this provision because there was no evidence Letourneau sexually molested any of her own children or that her criminal conduct put the children at risk. *Letourneau*, 100 Wn. App. at 427, 439. The trial court erroneously believed that the sexual deviancy evaluator's concern about what Letourneau might tell her children about the crime was insufficient evidence that Letourneau posed a danger of harm to her own children or that supervised visits were reasonably necessary to prevent any harm. *Letourneau*, 100 Wn. App. at 427, 44-41.

Here, the court required supervised in-person contact with Diaz's own biological minor son subject to the approval of the Department of Correction and the Community Custody Officer upon release. CP 247. Similar to *Letourneau*, the court failed to identify a legitimate risk of harm Diaz might pose to E. Thus, the provision requiring supervised visits is not crime related, is not narrowly tailored to achieve any essential need of the state, and it impermissibly interferes with Diaz's fundamental right to parent. Under *Letourneau*, this Court should strike the provision of Diaz's judgment and sentence requiring supervised visits with his son subject to DOC's or the CCO's approval. *Letourneau*, 100 Wn. App.

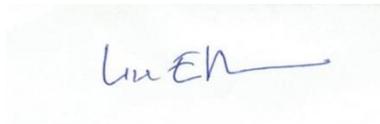
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E. CONCLUSION

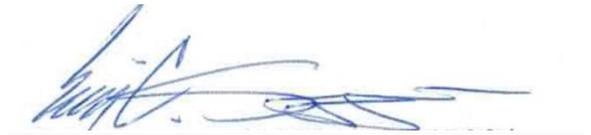
Armando Gomez Diaz respectfully requests that this court reverse his conviction for child molestation and remand for dismissal with prejudice. In the alternative, Diaz requests that this court remand for a new trial on Count IV. Finally, Diaz requests this Court remand to strike the provision in his judgment and sentence ordering supervised visits with his biological son.

DATED this 3rd day of July 2019.

Respectfully submitted,

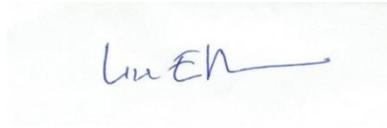
A handwritten signature in blue ink, appearing to read "Lise Ellner", is written on a light-colored rectangular background.

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