

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERTO RODRIGUEZ,
Petitioner,
vs.
THE EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF
CLARK; AND THE HONORABLE
JENNIFER P. TOGLIATTI, DISTRICT
JUDGE,
Respondents,
and
THE STATE OF NEVADA,
Real Party in Interest.

No. 70830

FILED

SEP 16 2016

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

ORDER DENYING PETITION

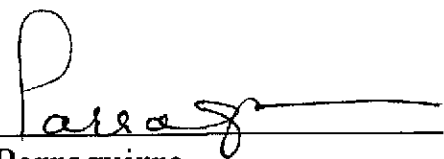
This is an original petition for a writ of mandamus. Petitioner Roberto Rodriguez challenges the district court's denial of a pretrial petition for a writ of habeas corpus. Rodriguez argues that there was insufficient evidence presented at the preliminary hearing to establish that the victim was sexually assaulted because NRS 200.364 requires penetration and there was no evidence that his penis entered the victim's mouth. Rodriguez seeks to overrule this court's decision in *Maes v. Sheriff*, 94 Nev. 715, 582 P.2d 793 (1978), holding that fellatio does not require penetration.

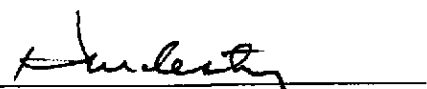
A writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust, or station or to control an arbitrary or capricious exercise of discretion. NRS 34.160; *see also Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008) (internal footnote omitted). The issuance of a writ of mandamus is discretionary, *Smith v. Eighth Judicial*

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Dist. Court, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991), and our review of a probable cause determination through an original writ petition is disfavored, *Kussman v. Eighth Judicial District Court*, 96 Nev. 544, 545-46, 612 P.2d 679, 680 (1980). This court, however, has made an exception to this general rule for purely legal issues. See *Ostman v. Eighth Judicial Dist. Court*, 107 Nev. 563, 565, 816 P.2d 458, 459-60 (1991). Rodriguez' argument that the statutory definition of fellatio requires sexual penetration is just such an argument. However, the legal argument is without merit because of the disjunctive phrasing in NRS 200.364(5) defining sexual penetration, and this court's holding in *Maes* that fellatio does not require penetration of the victim's mouth, see 94 Nev. at 716, 582 P.2d at 794.¹ To the extent that Rodriguez challenges the factual sufficiency of the evidence, we decline to consider this argument in this proceeding. Accordingly, we

ORDER the petition DENIED.


_____, C.J.
Parraguirre


_____, J.
Hardesty


_____, J.
Pickering

¹We decline Rodriguez' invitation to overrule the decision in *Maes*.

cc: Hon. Jennifer P. Togliatti, District Judge
Joseph W. Houston, II
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk