EXHIBIT 2

FILED

APR 24 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re: CLIVEN D. BUNDY, _____ CLIVEN D. BUNDY, AKA Cliven Bundy, Petitioner, v. UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA, LAS VEGAS, Respondent, UNITED STATES OF AMERICA, Real Party in Interest.	No. 18-70359 D.C. No. 2:16-cr-00046-GMN-PAL-1 District of Nevada, Las Vegas ORDER

Before: W. FLETCHER, GOULD, and BYBEE, Circuit Judges.

The petition for writ of mandamus is hereby DENIED.

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In re Cliven Bundy, 18-70359

GOULD, Circuit Judge, dissenting:

I respectfully dissent for the reasons stated in my prior dissent on the initial mandamus petition filed by Mr. Klayman after his *pro hac vice* application to represent then criminal defendant Cliven Bundy had been denied by the district court. *See In re Bundy*, 840 F.3d 1034, 1049 (9th Cir. 2016) (Gould, J., dissenting). I dissent also based on the Supreme Court's authority in *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950), because at this stage the district court has dismissed the criminal claims against Cliven Bundy, based on alleged government misconduct, and so the matter of Mr. Klayman's desired *pro hac vice* application to represent Bundy is currently and effectively moot.

The Government suggests in footnote 5 of its Answer from the United States (Plaintiff–Real Party in Interest), that Klayman's mootness premise may be undermined if the district court grants a pending motion to reconsider its dismissal, or if the Government filed an appeal of the dismissal and prosecuted after a reversal in the appellate courts. However, those possibilities are speculative because there is now no criminal prosecution pending the defense of which would be assisted by Klayman's *pro hac vice* application for admission. But if there were to occur a renewed prosecution of Bundy, for either of those potential reasons, then

Klayman could once more seek to represent him *pro hac vice* and proceedings would follow. I view those possibilities as speculative at present because no one could say that either would occur. The immediate problem for Klayman is the existence of the prior decisions of the district court denying *pro hac vice* admission and of this panel denying mandamus relief. Those opinions are now effectively unreviewable on further appeal, and the only appeals thus far have concerned only the extreme standards governing issuance of mandamus relief.

It is true that our circuit's law only requires vacatur for mootness in civil cases under the authority of *Munsingwear*. So in that sense, because Klayman's attempted *pro hac vice* admission arises in the context of a criminal case, it might be difficult to say there is any "clear error" here, such as ordinarily animates the giving of mandamus relief under *Bauman v. U.S. Dist. Court*, 557 F.2d 650 (9th Cir. 1977). In fact that argument is asserted by the government in opposing this mandamus petition, that this petition relates to a criminal case and *Munsingwear* relief is only the rule for civil cases. But while Klayman's client Cliven Bundy was the target defendant of the dismissed criminal case, the denial of Klayman's petition for writ of mandamus cannot be viewed as anything other than a civil proceeding. And even if a mandamus petition related to a representation in a criminal case should be viewed as a criminal matter, there's no sound reason why the reasoning and policy of *Munsingwear* would not make its rule still applicable.

Although Bundy now is out of his original criminal case which has been dismissed as a result of the government misconduct, the damage to Klayman from wrongful denial of his attempted *pro hac vice* admission, is still present. So his current mandamus petition is not moot by analogy to the collateral order doctrine of *Cohen v. Benefit Indus. Loan Corp.*, 337 U.S. 541, 546 (1949).

I respectfully dissent from denial of the current mandamus petition because of what I consider to be an unnecessary and excessive negative impact of the district court's decision denying *pro hac vice* admission, and our prior decisions denying mandamus relief, on the practice and reputation of Klayman.

I do not share the Petitioner's view that there has been any bias against him by any member of our panel. But I am motivated to dissent because these proceedings have become overblown. If, as I believe, the criminal case against Bundy is over, with the *pro hac vice* admission issue here being a dead letter, then I see no substantial reason in fairness why the prior decisions of the district court and of our court on this matter need to stand of record, serving no purpose at this stage, and potentially and unfairly being to the detriment of Klayman's practice and reputation. Having dissented from the initial denial of mandamus relief by us when Klayman first challenged the denial of *pro hac vice* status in the district court, I respectfully maintain my dissent here.

I respectfully continue to believe that the initial denial of *pro hac vice* was wrong, in substance and in the standard applied. It was wrong in substance because Klayman is an inventive and aggressive criminal defense attorney, a counsel of choice for Bundy who faced the risk of life imprisonment at his age of more than 70. In my view Klayman was just what Bundy needed because of Bundy's controversial status as a defendant, and the broad array of federal power lined up against Bundy. In those circumstances, archaic rules giving district courts substantial discretion to control what attorneys appear in the district court, should necessarily give way to the Sixth Amendment right of the defendant to the counsel of his or her choice as part of the defense team, except when exclusion of a chosen defense counsel is justified by the most extreme circumstances showing a superior government interest, but such circumstances were not presented here.

The decision is also wrong for applying the incorrect standard in this respect. Like the Fifth Circuit in *In re Evans*, 524 F.2d 1004, 1007 (5th Cir. 1975), and the Eleventh Circuit in *Schlumberger Techs., Inc. v. Wiley*, 113 F.3d 1553, 1561 (11th Cir. 1997), we should have held that only a prior suspension or disbarment of Klayman or facts warranting that could justify denying *pro hac vice* admission. *See In re Bundy*, 840 F.3d at 1056 (Gould, J., dissenting). Instead, we mistakenly allowed the district court to deny Klayman's admission when a major part of the district court's reasoning concerned a pending negative bar proceeding that had

never been completed and subjected to appeals. The standard we chose too easily let a district court eliminate a criminal defense lawyer who promised to be a thorn in the side of the district court; but indeed that was just what Bundy then needed and what should have been permissible in a high stakes contest like this with liberty for life at stake. We should instead have applied the standard used by the Fifth and Eleventh Circuits suggesting that a defense counsel of choice should not be eliminated through the *pro hac vice* admission process absent an ethical violation sufficient to warrant a disbarment or facts determined finally to that extent.

For these reasons, I respectfully dissent.