



1 of the United States District Court for the Western District  
2 of New York (Arcara, J.) that dismissed his 42 U.S.C. § 1983  
3 complaint. The motions are denied on the ground that Mills  
4 has filed three or more frivolous lawsuits. See 28 U.S.C.  
5 § 1915(g).

6 Richard Mills, pro se, Romulus,  
7 NY.

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9 Elmer F. Mills, Jr., pro se,  
10 Byron, NY.

11  
12 Kate H. Nepveu, New York State  
13 Office of the Attorney General,  
14 Albany, NY, for Defendants-  
15 Appellees.

16  
17 DENNIS JACOBS, Chief Judge:

18  
19 Plaintiff-Appellant Richard Mills, pro se and  
20 incarcerated, moves for leave to proceed in forma pauperis  
21 ("IFP") and for appointment of counsel in this appeal from  
22 an order of the United States District Court for the Western  
23 District of New York (Arcara, J.) that dismissed his 42  
24 U.S.C. § 1983 complaint.

25 **I**

26 Under the Prison Litigation Reform Act ("PLRA"), a  
27 prisoner who accumulates three "strikes" (dismissed actions  
28 that were "frivolous, malicious, or fail[ed] to state a  
29 claim") is barred from bringing additional civil actions or

1 appeals in forma pauperis, unless she is "under imminent  
2 danger of serious physical injury." See 28 U.S.C.  
3 § 1915(g). Mills's complaint, which concerns limitations to  
4 his visitation rights at the prison, does not allege danger  
5 of serious physical injury.

6 Mills has, at a minimum, five strikes: (1) Mills v.  
7 Appellate Div. Fourth Dep't, No. 05-cv-612 (W.D.N.Y. Mar. 7,  
8 2006), a complaint dismissed for failing to state a claim  
9 and for seeking monetary relief against a defendant who is  
10 immune; (2) the subsequent appeal in Appellate Division that  
11 was dismissed as lacking an arguable basis in fact and law,<sup>1</sup>  
12 No. 06-1541-pr (2d Cir. Sept. 20, 2006); (3) Mills v.  
13 Genesee Cnty., No. 04-cv-989 (W.D.N.Y. Oct. 5, 2005), a  
14 complaint dismissed for failing to state a claim and for  
15 seeking monetary relief against a defendant who is immune;  
16 (4) the subsequent appeal in Genesee County that was  
17 dismissed as lacking an arguable basis in fact and law, No.  
18 05-6591-pr (2d Cir. Aug. 29, 2006); (5) Mills v. Noonan, No.  
19 04-cv-142 (W.D.N.Y. May 10, 2004), a complaint that was

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<sup>1</sup> "[A]n incarcerated plaintiff incurs two strikes when a complaint and a subsequent appeal are independently dismissed for grounds listed in [28 U.S.C.] § 1915(g)." Chavis v. Chappius, 618 F.3d 162, 165 (2d Cir. 2010).

1 dismissed for failing to state a claim and for seeking  
2 monetary relief against a defendant who is immune.

3 In some instances, Mills's litigation initiations were  
4 dismissed on the ground of judicial immunity. See, e.g.,  
5 Noonan, No. 04-cv-142 (W.D.N.Y. May 10, 2004) at 3 ("[The  
6 judge] is entitled to absolute judicial immunity with  
7 respect to all of the claims alleged and the complaint must  
8 be dismissed against him."). The IFP statute does not  
9 explicitly categorize as frivolous a claim dismissed by  
10 reason of judicial immunity,<sup>2</sup> but we will: Any claim  
11 dismissed on the ground of absolute judicial immunity is  
12 "frivolous" for purposes of 28 U.S.C. § 1915(g). Mills's  
13 (more than) three strikes therefore disqualify him from IFP  
14 status. See id.

## 15 II

16 Mills's ineligibility for IFP status precludes him from  
17 receiving appointed counsel.<sup>3</sup> All the relevant IFP

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<sup>2</sup> The criteria for accumulating strikes under § 1915(g) track two of the three grounds upon which "the court shall dismiss [a] case" if they exist, § 1915(e)(2)(B)(i)-(ii), but do not include the third ground of "seek[ing] monetary relief against a defendant who is immune from such relief," § 1915(e)(2)(B)(iii).

<sup>3</sup> A district court is empowered only to "request" an attorney to represent an IFP plaintiff, § 1915(e)(1), but

1 provisions, including those concerning "three strikes" and  
2 appointment of counsel, are in Section 1915 of Title 28 of  
3 the U.S. Code. See 28 U.S.C. § 1915(e)(1), (g). The "three  
4 strikes" provision effects disqualification from "bring[ing]  
5 a civil action or appeal[ing] a judgment in a civil action  
6 or proceeding under this section." Id. § 1915(g) (emphasis  
7 added). It follows that a litigant barred from proceeding  
8 under § 1915 is likewise ineligible for the benefits  
9 provided therein, such as appointment of counsel. Accord  
10 Brightwell v. Lehman, 637 F.3d 187, 192 (3d Cir. 2011). To  
11 hold otherwise would violate the PLRA's "principal purpose"  
12 of "detering frivolous prisoner lawsuits and appeals."  
13 Nicholas v. Tucker, 114 F.3d 17, 19 (2d Cir. 1997).

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15 For the foregoing reasons, Mills's motion for leave to  
16 proceed in forma pauperis and for appointment of counsel is  
17 denied. The appeal will be dismissed in 30 days unless  
18 Mills pays the applicable filing fees.

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case law commonly refers to the arrangement as "appointed"  
counsel.