## UNITED STATES DISTRICT COURT EASTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION

## LARRY HOWARD,

Plaintiff,

v.

Case Number 2:17-CV-13084 HONORABLE PAUL D. BORMAN UNITED STATES DISTRICT JUDGE

SHANE PLACE,

Defendant.

OPINION AND ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT (ECF NO. 6) FILED SUBSEQUENT TO COURT'S DISMISSAL OF HIS CIVIL RIGHTS CASE (ECF NO. 6)

Plaintiff filed a civil rights complaint pursuant to 42 U.S.C. § 1983. On October 24, 2017, this Court dismissed the case without prejudice pursuant to 28 U.S.C. § 1915(g), because plaintiff had four prior civil rights cases that had been dismissed for being frivolous, malicious, or for failing to state a claim upon which relief could be granted. (ECF No. 5, Opinion and Order Denying IFP and Dismissing Case.)

Plaintiff filed a motion for summary judgment, in which he seeks habeas relief from his conviction pursuant to 28 U.S.C. § 2254. The motion is denied

without prejudice to plaintiff filing a petition for writ of habeas corpus in a new case.

This Court will not convert plaintiff's civil rights complaint into a petition for a writ of habeas corpus. When a suit that should have been brought under the habeas corpus statute is prosecuted instead as a civil rights suit, it should not be "converted" into a habeas corpus suit and decided on the merits. *Pischke v. Litscher*, 178 F.3d 497, 500 (7th Cir. 1999). Instead, the matter should be dismissed, leaving it to the prisoner to decide whether to refile it as a petition for writ of habeas corpus. *Id*.

Accordingly, the motion for summary judgment (ECF No. 6) is DENIED. The denial is without prejudice to plaintiff filing a petition for writ of habeas corpus under a new case number.

## SO ORDERED.

<u>s/Paul D. Borman</u> Paul D. Borman United States District Judge

Dated: November 8, 2017

## CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing order was served upon each attorney or party of record herein by electronic means or first class U.S. mail on November 8, 2017.

<u>s/Deborah Tofil</u> Case Manager