

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

United States Court of Appeals
Fifth Circuit

FILED

June 23, 2010

Lyle W. Cayce
Clerk

No. 08-60586

Summary Calendar

BARRINGTON BERTON MORGAN-WHITE

Petitioner

v.

ERIC H HOLDER, JR, U S ATTORNEY GENERAL

Respondent

Petition for Review of an Order of the
Board of Immigration Appeals
BIA No. A90 395 622

ON PETITION FOR REHEARING EN BANC

(Opinion 12/15/09, 5 Cir., _____, _____, F.3d _____)

Before HIGGINBOTHAM, CLEMENT, and SOUTHWICK, Circuit Judges.

PER CURIAM:*

Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is GRANTED.

Morgan-White petitioned this court for review of the decision of the Board of Immigration Appeals dismissing his appeal and affirming the immigration

*Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

No. 08-60586

judge's order that Morgan-White is ineligible for cancellation of removal pursuant to 8 U.S.C. § 1229b(a) because he committed an aggravated felony. This court affirmed the Board's decision, finding Morgan-White's appeal foreclosed by our decision in *Carachuri-Rosendo v. Holder*.¹ The Supreme Court has since reversed that decision, rejecting this court's "hypothetical approach" and holding that "the defendant must . . . have been *actually convicted* of a crime that is itself punishable as a felony under federal law."² As in *Carachuri-Rosendo*, Morgan-White was not actually convicted under the state recidivist statute. In accordance with the Supreme Court's ruling, we now REVERSE and REMAND. The outstanding motion is moot.

¹ 570 F.3d 263 (5th Cir. 2009).

² *Carachuri-Rosendo v. Holder*, No. 09-60 (U.S., June 14, 2010).