

**FILED**  
**United States Court of Appeals**  
**Tenth Circuit**

**UNITED STATES COURT OF APPEALS**

**May 6, 2011**

**TENTH CIRCUIT**

**Elisabeth A. Shumaker**  
**Clerk of Court**

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DANIEL LEWIS POWELL, a/k/a  
Midnight Rider,

Defendant-Appellant.

No. 10-8028  
(D.C. No. 2:09-CR-00140-ABJ-7)  
(D. Wyo.)

**ORDER AND JUDGMENT\***

Before, **GORSUCH, HOLLOWAY** and **MATHESON**, Circuit Judges.

Daniel Powell appeals his sentence for two drug crimes. He charges that the district court erred in: failing to give him an opportunity to allocute before it pronounced sentence; determining the drug quantity for which he should be held responsible; and applying a gun enhancement to his sentence. The government concedes that the district court plainly erred on the first two scores, contests only the last question, and admits that resentencing will be required. Because the one

\* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a)(2) and 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent except under the doctrines of law of the case, *res judicata* and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

contested gun enhancement issue may or may not remain relevant after resentencing, we need not decide it at this time.

Mr. Powell's sentence is vacated and this matter is remanded for resentencing.

ENTERED FOR THE COURT

Neil M. Gorsuch  
Circuit Judge