Episode 809: How Gun Laws Cost Him His Son and His Freedom

Guest: Brian Aitken

WOODS: Brian, this book and your story, just this whole thing blows me away. This is very, very different from most of the — well, probably all of the guests that I've ever had on the show. I bring people on to talk about certain topics in public policy, and we sometimes have an animated discussion, and some people read the book, and that's the end of it. You lived this. You continue to live this. And you've probably told this story many times. I've seen it in print. I've read your book; I've read articles about it. In a sense, it must be tiresome and emotionally draining to go through it again, so I do want to take the opportunity to take your story and apply it to certain larger issues, so as not to just bog down in the minutiae. But it's not just minutiae; it really is your life, and we should start off by taking some time to explain exactly what happened to you back in 2009.

AITKEN: Yeah, so in early 2009 I was moving from Colorado to New Jersey, and then again from southern New Jersey to northern New Jersey, with firearms that I had lawfully owned, that were legally purchased, legally acquired, legally possessed, locked and unloaded in the trunk of my car, and was effectively forced to consent to a search of my car. I didn't want to have my car searched, but I was told that if I didn't that they would take me away, impound my car, and as a function of impounding my car they would be obligated — they being the police — obligated to itemize everything in my car and effectively search it without a warrant.

So they were like, You can do it the easy way or the hard way, and I think one of the biggest mistakes that I've made in my past — well, in my entire life has been doing it the easy way. And so I was like, Okay, well, if it's spending the weekend locked up and then going and picking up my car on Monday, then I might as well just consent to the search. I felt like I didn't do anything wrong. I knew that I hadn't, but I didn't trust that the police would know that.

And I called the New Jersey State Police about three days before moving — so I was being pulled over when I was moving from South Jersey to North Jersey, and I asked the state police, "What do I have to do in order to be legal to move from one residence to another? I know there's a lot of problems with New Jersey gun laws, so tell me what I have to do." And I did everything that the New Jersey detective told me to. He said, "You don't need a license to transport them. You need a license to have it concealed on your person. You need a permit to purchase, but you don't need any sort of special permission just to own firearms or to transport them from one house to another when you're moving or going to the shooting range or going hunting or anything like that. So I

thought that I would be fine doing exactly what the state police officer told me, but when the municipal cops pulled me over, they had no idea what the laws were.

And then it just got weird. So obviously they found the firearms locked, unloaded, disassembled in the trunk of my car, and with everything else, because I was moving one household to another. So imagine a 1999 Honda Civic packed from floor to ceiling with clothing, dishes, a book collection, computers, mountaineering gear, ropes, ice axes, crampons — the whole nine yards. Just a packed car. The search took several hours, and they weren't really concerned about anything except for the firearms.

And then they weren't really convinced that my firearms weren't illegal. So they actually brought the firearms to my father and said, Hey, why don't you put these in a safe inside of your house, and Brian can come back and pick them up at a later date? And so my dad walked inside the house, went to his safe, and the gun boxes didn't fit in his safe. So being relatively naive and having family — and my dad's brother was a Philadelphia police officer for 23 years. So being a little naive and too trustworthy, my dad walked back to the front door and told the police officers, They don't fit. So the police officer took the guns back, and about three minutes later, I was booked on charges of illegal possession of unregistered firearms.

And in New Jersey it's not illegal to own unregistered firearms. You don't have to register your firearms in the state of New Jersey. So that was an erroneous charge to have in the first place. But they corrected that, and then they added on the other charges that were illegal possession of high capacity magazine and illegal possession of hollow point ammunition. And that began, you know, my trip into what I jokingly refer to as "wild trip into the blue tent sky." It's been crazy. I faced ten years incarceration merely for possessing things that I was legally allowed to possess, and it played havoc with the custody situation with me and my son. My son will be turning nine in just about a month and a half now, and largely because of this and the way that they've been able to manipulate my being a convicted felon, I haven't been able to see my son in eight years now.

WOODS: That's unbelievable to me. That is unbelievable to me. That is heart-wrenching and horrible. Now, let's talk about how much time — again, I do want to get to the other things, but how much time did you actually serve, and tell me what Chris Christie did.

AITKEN: So before I get to that, I originally just wanted this to be taken care of. I was a rising guy within the advertising world. I didn't want any public notice of the indictment or anything. I wanted to get a lawyer to help me take care of this quickly. And I think that's kind of the approach that any working professional would take.

And when I went to the judge and the prosecutor, they were like,
No, you had firearms in the state of New Jersey. You're guilty, and you're going to go to jail. This is something the judge said to me before trial." He said, "You had guns in the state of New Jersey. You had them illegally. You're guilty, and you're going to go to jail." And he was saying this to me, because he was trying to get me to take a plea deal, which really isn't something that a judge should be involved in. But the offer for a plea deal was made almost a dozen times, and every time they made it after the

first time, just to reinforce the fact that I knew I had done nothing wrong and that they didn't want to take this to trial.

Ultimately we took it to trial, and the judge refused to tell the jury about the exemptions that allowed me to possess my firearms. So in New Jersey it's illegal to really have firearms, unless you meet a number of exemptions, and the same is true for ammunition. So it's pretty much all guns are illegal inside New Jersey, unless they're inside of your residence, unless you're picking them up from the place of purchase and taking them back to your house, or unless you're taking them from your house to the shooting range or from one house to another when you're moving. And I met that exemption. And then of course I also had a residence in Colorado that I'd just moved from a few days earlier, so I was also arguing that I fell under the Federal Firearm Owners' Protection Act, which allows for me to transport from one state to another.

The state of New Jersey pretty much refused for us to make that argument, and they refused to let the jury know that the state of New Jersey has carved out these exemptions that allow people to transport firearms from one house to another and that the federal government has done the same thing. So they effectively forced the jury to find me guilty.

Now, the jury wasn't stupid. The jury came back three times and asked specifically for the movement exemptions, and every single time — three times, Tom. Three. Every single time the judge said, "I am the law, and I am telling you as a matter of law that you're not allowed to consider any exemptions that would make Brian Aitken not guilty of these charges."

WOODS: Wow.

AITKEN: And about two weeks later, he was no longer a judge. Governor Chris Christie effectively kicked him off the bench by refusing to reappoint him to his life term.

WOODS: So this is just a travesty of justice all around. You haven't done anything wrong. There's — It almost — It boggles the mind. But now Christie pardoned you, but when he pardoned you, did that mean — See, the thing is I don't know how this all works. If he pardons you, does that mean, "I forgive you for doing something wrong, and I'll let you go," or, "You didn't actually do anything wrong, so therefore I'm letting you go"? It seems like that would have some legal significance, which one he means.

AITKEN: So it's called executive commutation, and under that you can get a commutation — or executive clemency, rather. And then you can get your commutation of sentence, which effectively says, "You've been sentenced to X amount of years, and I'm letting you out early," or you can get a pardon, and you can try and get — you know, the pardon will also allow you to get out of prison. I was in prison. I was sentenced to seven years in state prison with a minimum mandatory sentence of three years for a nonviolent victimless offense, which wasn't even an offense. Who did I offend? The sensitivity of the state? I certainly didn't break any real laws.

Well, ultimately I requested specifically — this was something that I did. I requested only to have my sentence commuted. I wanted to get out of prison, and I wanted to fight this on its merit, and I wanted to ability to appeal this to the court, and we did. And Governor Christie signed my commutation so that I spent four months behind bars. I managed to read 42 books when I was in prison for those four months, so it was a well read stay, but it was — you know, it's quite the ordeal, as anybody who's read my book realizes. Prison is not the place you want to be, innocent or not, but I think especially when you're innocent it's a strange world to live in.

WOODS: Couldn't you sue them? Don't you ever get asked that question? You must get asked this question all the time.

AITKEN: Yeah, so it is like a 42 U.S.C. § 1983 claim. That's the deprivation of civil rights claim, which was really recourse for freed slave to try and get some sort of recompense from the government. Now you can't sue the government specifically. You can sue departments and individuals, agencies acting on behalf of the government who have deprived you of your civil rights. And we thought about doing that.

Now, the state of New Jersey was very smart with the way that they handled my appeal. So when I appealed to the state of New Jersey, they overturned my conviction of illegal possession of firearms, because they found that it was legal. they overturned my conviction of illegal possession of high capacity magazines, because they couldn't prove that they were high capacity.

But they refused to overturn the illegal possession of hollow point ammunition, which is legal to own in the state of New Jersey. If you have a permit to purchase firearms and ammunition in the state of New Jersey, you can go to a Dick's Sporting Goods and buy hollow point ammunition. It's not like a banned ammunition in the state of New Jersey. In fact, it's what the law enforcement officers carry. But they upheld that one conviction, even though it should have fallen under the same exemption as the firearms, just so that way they could technically say, Well, technically we didn't deprive Brian of his civil rights, because we still found him guilty, and we're upholding this one conviction.

WOODS: It's convoluted.

AITKEN: It is. It's crazy. I mean, it was the kind of thing that we petitioned not just the New Jersey Supreme Court, but Evan Nappen, my firearms attorney, and the NRA, who helped finance the bulk of this, we took this all the way up to SCOTUS, but they denied cert.

WOODS: Oh, geez. Well, look, I know there's — I mean, the most heart-wrenching thing about all of this would be the separation from your son, and that is discussed in the book. And I know we could spend a lot of time on that, and it would — it's heartbreaking.

AITKEN: Yeah, I was just emailing with my ex-wife last night trying to convince her to just let me see him.

WOODS: It's just — Now, tell me — then I want to turn to some of the larger issues beyond your own case — what the status of things is right now. What is it that you are attempting to do right now to try and once and for all clear this and be able to resume normal life? I mean, you have resumed normal life, but there are certain barriers that you face, no doubt, with this on your record.

AITKEN: Absolutely. I mean, obviously the biggest one is really just not being able to see my son, and the ability of individuals to utilize this atrocity, this false conviction, as a means to keep me from my son is just atrocious. But it's an easy thing for the government to do, especially the way that the family court systems are structured. I have been for — I'll tell you what, Tom. I never sympathized with people who told me their stories about family court before I went through it. I didn't have any common ground, and I thought, Okay, well, I'm sure you must have done something.

And now that I've heard people say, "I'm sure there has to be more to the story," over and over and over, I really sympathize with people who have to go through family court, especially when children are involved, but even more so when you have offended the sensitivities of the state government and played a role in shining a light on state corruption and played a role in — a small part. You know, I wasn't the only reason why this judge got kicked off the bench. He had done a lot of other things that were really the driving force for Chris Christie not to give Judge Morley his lifetime appointment. But I think I might have been the tipping point for Governor Christie.

Right now what I'm trying to do is, because they've upheld that one conviction, two weeks ago we officially filed the paperwork with Governor Christie's office to ask him to pardon me on that last and final conviction so that I can just move on with my life.

WOODS: Okay, so is there any average amount of time that you would expect to have to wait for an answer for that?

AITKEN: It's impossible to say.

WOODS: Okay.

AITKEN: I've never been pardoned before, so I don't have any experience with this.

WOODS: Yeah, sure.

AITKEN: But I do know people who have been pardoned. I know at least two people who have been pardoned by Governor Christie, and they both were in similar positions to myself: Shaneen Allen and Steffon Josey-Davis. They were both in very similar situations to me. They didn't have to serve any real prison time at all. So they didn't ask for a commutation, and their cases came a couple years after mine.

In many ways, when I put my foot down and said enough is enough, I have nothing really to lose at this point in my life, so I'm going to stand up against the Goliath, and I'll take you on at this point, that's really when people started paying attention and realizing, hey, you don't have to take these plea deals. Hey, we can actually fight this. If we force them to take it to court and we force the media to pay attention to

what New Jersey is doing to law-abiding gun owners, then they might actually not try to prosecute us, and we might actually get out of this. And so Governor Christie has pardoned individuals, including Shaneen and Steffon, for incredibly similar charges, and I'm just waiting for Governor Christie to do the right thing with my case.

WOODS: I have to say I'm a little bit curious to know what Judge Napolitano would say about your case. I don't suppose in the course of promoting your book you ever interacted with him?

AITKEN: Judge Napolitano is the reason people know about my case.

WOODS: Oh, really? I should have known. I should have known.

AITKEN: So I was at — I don't know if you're familiar with Advanced Austrian Economics at the Foundation for Economic Education —

WOODS: I am.

AITKEN: — but I was attending that weeklong seminar, and I believe it was August 29th of 2009 when somebody at FEE told me, Hey, we know about your story, and we've asked Judge Napolitano to have you on his show. So I had to skip out on one of my days at the Advanced Austrian Econ seminar and go down to New York, and this was when Judge Napolitano was up on one of those higher floors and he had the Internet-only show at the time. And he had me on his show, and that really lit the fire. I mean, after that moment, people paid attention. At that point I was fighting pro se, which means I was acting as my own lawyer against the state, and that's a very difficult position for anyone to be in. And the very next day I had over 1,000 emails in my inbox, including an offer from Evan Nappen to help represent me and to try and get the NRA to finance it. And the NRA did.

WOODS: Wow, fascinating. Fascinating.

AITKEN: Yeah, so I have Judge Napolitano to thank for a lot.

WOODS: That is really wonderful. Well, again, he's such a good guy; I should have known. Let's talk about some issues that are raised by all of this. Let's say a little something about — and I'm sure because of your situation you've had ample time to research these things and think about them: the abuse of the plea bargain. And I think people don't realize that the plea bargain, I think people think is a perfectly fine institution of our legal system. I don't think they know what it's really used for.

AITKEN: Yeah, so the plea bargain dilemma, as it's known, is a huge problem. There was a study done at a university in Florida that found — Let me explain the study that was done. They went out to a sample of students, and they picked these students and told them, Listen, we know that you cheated on this exam. Now, if you admit that you cheated on this exam, we're just going to put something in your record that says that we know that you cheated on the exam, but you're not going to have to go in front of a hearing committee, and you won't be expelled, but you have to admit fault. You have to admit your guilt.

And these individuals hadn't actually cheated on an exam; they were just being told that they had and being told that there was a possibility that they could have to go in front of a panel and that they could be expelled. So the majority of these individuals, even though they had done nothing wrong, decided to just admit culpability, so that way they wouldn't have to risk, effectively like people in the criminal justice system, going to prison or facing more severe consequences.

And this is something that we — you know, what we refer to as the justice system, which I think is a little ironic to refer to it as the justice system. America doesn't have a justice system; we have a legal system. We have a system that follows laws and ordinances, and we look to follow the letter of the law. We don't pursue justice; we look to see whether or not somebody has broken, infringed upon some sort of statute or ordinance or law, whether or not it's in the interest of justice.

Now of course, individuals on the jury have an opportunity to nullify that, which brings us to another issue, which is jury nullification, the right to nullify a law, that most individuals aren't even allowed to know about and that people who have tried to raise the issue of jury nullification just by informing jury members — They've gone to jail just for trying to inform jury members that, Hey, you have the right to nullify a law. You don't have to say that — Even though you might believe that an individual has broken a law, if you believe that that law is unjust, you are allowed to find that person innocent.

WOODS: Or even if that sounds too radical for some people — it doesn't to me, but to some people it might — then you can even think of it in the lesser way, that if the particular application of the law in this case would result in a legal atrocity, then you can say, I don't want it to be applied in this case.

AITKEN: That's absolutely true. Now, in my case the jurors weren't allowed to know the possible sentencing that I was facing, so they didn't know that I was facing ten years in prison with a mandatory minimum of three years. So now we're really opening the Pandora's box of all the problems with the criminal justice system. Now we're talking about mandatory minimum sentencing, and that means that even though I hadn't committed a violent crime — there was no violence, there were no victims — I still had to serve a minimum of three years in prison before I could be considered for parole, just because New Jersey has determined that the mere possession of firearms — not the possession of firearms during the commission of a violent crime, but just the possession of firearms, including legally owned firearms — is a violent crime in and of itself.

WOODS: Now, I have a feeling, even though I don't know the legislative history of it in New Jersey, that mandatory minimums in general are introduced by conservatives who feel like they need to have these mandatory minimums, because otherwise these bleeding heart judges will give out these little sentences that don't satisfy our demands for retribution, and so we have to impose mandatory minimums. I assume that's probably the origin of these things?

AITKEN: It is, and there are organizations that you're probably familiar with, like Right on Crime down in Texas, who is working on providing really like the fiscal arguments for really rehabilitating nonviolent offenders and getting them to spend much less

time incarcerated and repealing a lot of these mandatory minimum laws, so that way we spend less time on sending people to what is really just a camp for criminals to teach them how to be better criminals.

WOODS: All right, I don't — I'm sorry to say I don't even know where to take this now, because I can't believe you lived this, man. I just can't believe it. And you're still living it to some degree. I can't believe this happened.

AITKEN: You know, I've been fortunate, because when I was in prison, there had to have been a quarter of a million people — and this is a long time ago. This is six years ago now. But there was probably a quarter of a million people that came out of the woodwork and signed petitions. Different Second Amendment groups, including the New Jersey Second Amendment Society and the Second Amendment Foundation, they delivered massive amounts of petitions to the governor's office. And people made so many phone calls. On one day near my birthday when I was in prison they shut down the phone lines to Governor Christie's office.

WOODS: Wow.

AITKEN: It's been an incredibly humbling experience, and it kind of forces me every day to think about the people who took time and money out of their lives to help me, and every single day I am forced to kind of reconcile that with, okay, who am I going to be today. What are the actions that I'm going to take today to try and make sure that I deserve the second chance that all of these people who I have never met felt the need to give me?

WOODS: With regard to your book, *The Blue Tent Sky* — which I urge people to read because you need to see not only can this happen, but this is also a reason that you shouldn't think to yourself, Well, meh, maybe there might be something wrong with this search, but to heck with it; I think I'll just go ahead and consent to it. Things that you would think you could just do without giving it another thought, unfortunately you can't do in America today. Early on in the book you point out that you wrote the book in large part because you would tell your story to people, and their response would be, Oh, there must be more to the story than that. They don't arrest you for that. This sort of thing doesn't happen. And so you wrote the book, and you told the whole story. At what point did you decide — at what point in this ordeal did you say to yourself, "I have to put this to paper. I can't just write articles. I've got to tell a book-length version of what happened."

AITKEN: I had just been — There's never enough time onstage to tell the whole story, and once you start telling the story there's always more questions about, Okay, well, how did that happen? What is the law there? Isn't there a law to protect that? There's no way that this could really happen. And so it would just open up this cascade of questions from the audience that there was never enough time to answer.

And people were always asking me to write this down in a book, write it down in a book, and I'd always kind of been a little dismissive of it. I wasn't sure that I was ready. It's a difficult thing to sit down for 11 months and relive something that was incredibly difficult, not just for me but my entire family. And it's easy day to day to

kind of push it out of my mind and pretend like, you know, things are going well now, just pretend like it didn't happen, just push it aside.

But when you sit down to write it, you relive everything. The threats in prison, watching people getting beaten up in prison, watching people getting carried out on stretchers, remembering vividly my mother screaming in pain when they put the cuffs around my wrists in that courtroom and hauled me off to prison, remembering the judge yelling at my girlfriend, who's now my wife, Jenna, not to touch me when she tried to hug me before they pulled me away. I mean, you remember all of that so vividly, and it's really — I mean, it's better for me if I just don't sit down and write the book.

But then I thought about my son —

WOODS: Yeah.

AITKEN: — and the fact that he's out there somewhere, and he doesn't know what happened, and he doesn't know why he doesn't know his dad, and he may never know if something doesn't change. And I felt ultimately a responsibility to put that story down on paper. I don't know how old he might be when he picks up the book. It's heavy subject matter. It's an adult topic. But I feel like he has a right to know about the events that led to his relationship with his father, or lack of.

WOODS: Yeah, see, I would say that alone is reason to write the book, to write it for your son, and so that you can have a record of everything that happened. And especially when you're in one of these awful custody sort of situations, I've known many of them where the other parent — I don't want to get into the personal details of your situation, but where the other parent is poisoning the child's mind about you unjustly.

AITKEN: And I don't even know — I mean, maybe my son thinks that I am overseas, maybe he thinks that I passed away. I have no idea what's being told to my son. I tried recently to be reunited with him, and the state of New Jersey is not dealing its punishment on me. There are drug dealers and murderers and pedophiles who are allowed to see their children, and they always seem to find a reason to keep me from being able to see my son. I volunteered to only see him once a week for one hour under the direct supervision of a police officer if need be just so that I could see my son, and they refused to give me even that.

WOODS: That's just — again, I don't know what to tell you, but you are — I don't know how strong a person you'd have to be to endure this, but it's unbelievable. And all I can say is, like all civilized people in the world, I hope you finally get closure and peace and resolution in this. It's unspeakable what you've had to endure.

AITKEN: I've tried to stay positive. I think about all the good that can come from a situation like this.

WOODS: Sure.

AITKEN: Like people who have been pardoned by Governor Christie that probably wouldn't have taken the route of going public with their story had I not gone public with mine a couple years earlier. I helped make a difference in people's lives, tangible differences where they haven't had to lose their kids. They haven't had to go to prison.

WOODS: Yeah, absolutely. Absolutely. And you've been able to highlight important issues. Let's by all means emphasize the good that can come out of this very unfortunate situation. Well, tell me: I mean, you had been involved in libertarian work of one kind or another in the past, and where has your life taken you in that area of your life, if you don't mind my asking?

AITKEN: Yeah, that's an interesting story. I always considered myself — Well, I never considered myself a neocon, because I didn't know the phrase, but in retrospect I grew up relatively neocon war-hawkish, and when I was arrested and indicted, I was like, How are they doing this to me? This doesn't make any sense. And that's when I started seeking out the works of Ron Paul and the Foundation for Economic Education, and I just started Googling like crazy about the ideals and principles of a free society.

And that's what led me to apply for one of the weeklong summer seminars at FEE, and the first one that I attended was Liberty University, and I was so engrossed with the content — I mean, I was just consuming it like crazy, reading Bastiat's *The Law*, and being exposed to Hayek and Mises and Hazlitt, that I went up to Larry Reed and asked him personally, "I know that I'm probably not qualified to take the Advanced Austrian Economics seminar, but it would mean the world to me if you would let me attend so that I could just learn more." And he did, and Israel Kirzner was a lecturer, and it was a fantastic experience and the catalyst for getting me on Judge Napolitano's show.

And immediately after Governor Christie commuted my sentence on December 20th, 2010, Larry Reed, president of the Foundation for Economic Education, hired me as the Director of New Media, and he used to go around telling people, "We don't leave one of our own on the battlefield."

WOODS: Yeah, and man, that is tremendous. I've had Larry on the show several times. That is great. That's such a great line. I'm so — It makes me feel good to hear about that. Well, how interesting that this — it sounds like you and I had a similar upbringing ideologically — that this would have been the moment that you made a bit of a shift in your thinking. Well, the book is *The Blue Tent Sky: How the Left's War on Guns Cost Me My Son and My Freedom*. I'm linking to it at TomWoods.com/809, but Brian, tell me, if people want to — I believe you have a site, and what is that?

AITKEN: Yeah, so it's just TheBlueTentSky.com, and that'll take you directly to the Amazon page. It's available in eBook, Kindle, hardback, and paperback. We're thinking about doing an audiobook as well. But it's been up for two years now, and it still sells. Typically whenever I bring on a new client or start working with somebody new, they inevitably Google me and find out my interesting story.

WOODS: Man, is it ever. And as I'm sitting here, let's see — I guess you do use Twitter fairly regularly. Okay, I'm going to follow you on Twitter too. We'll link to your Twitter also at TomWoods.com/809. Well, thanks so much for coming on here. We could talk forever about this, but I really, really want people to read — There's so much fiction

people read, but this book is as absorbing and 50 million times more important, so people really should check it out, *The Blue Tent Sky*, TomWoods.com/809. Thanks again, Brian.

AITKEN: Absolutely, Tom. Thanks for having me on.