Right to Bear Arms...and Use Them, Upheld

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ABSTRACT: After a 70-year hiatus, the U.S. Supreme Court recently issued its first of likely many decisions regarding the right to bear arms pursuant to the 2nd Amendment. However, if an arm may be kept might not be as difficult and important as determining when it may be used.

It came as no great surprise to United States Supreme Court scholars that the Court, in a 5-4 decision last June, found a constitutional right to bear arms within the 2nd Amendment.

While not foreclosing various forms of regulation on the myriad types of firearms, the Court’s majority declared that the Amendment’s preface, “a well regulated Militia being necessary to the security of a free State,” did not make gun ownership contingent upon belonging to a militia.

But while the Court’s decision was predictable considering its makeup and how the issue had been framed, a recent grand jury verdict in Texas may give pause.

On November 14, 2007, two men were fleeing a home they had just burgled with jewelry and around $2,000 in cash. Joe Horn, a 62-year-old retiree, called 911 to report the crime and told the police dispatcher that he was going to shoot the suspects.

Mr. Horn was urged by the dispatcher not to fire. Mr. Horn disregarded the plea out of a concern that the burglars “would get away with it.”

The dispatcher once again implored Mr. Horn not to confront the suspects and warned that Mr. Horn was “going to get himself shot.” Mr. Horn responded, “want to make a bet? I’m going to kill them.”

Soon thereafter the audio recording of Mr. Horn and the dispatcher’s conversation has Mr. Horn’s voice stating, “move, you’re dead.” Three 00 12-gauge shotgun blasts are then heard. The two men reportedly ran a short distance after being struck in their backs before collapsing and dying.

Also heard on the recording of Mr. Horn’s 911 call is Mr. Horn mentioning a recent modification to the state of Texas’ “castle doctrine,” which concerns the right to self-defense in one’s home.

In many states an individual may only use deadly force as a last recourse to a perceived threat of deadly force, including after the option of fleeing is implausible.

Texas takes a different approach.

Effective as of September 1, 2007, Tex.PenCode Ann §9.31, defining self-defense, states that an individual may use force when he reasonably believes that someone is trying to
“unlawfully enter his occupied home with force, or if he witnesses an aggravated kidnapping, murder, sexual assault, aggravated sexual assault, robbery, or aggravated robbery or an attempt thereof.”

Also relevant is §9.31(e), which states that a person is not required to retreat before using force.

Whether or not the burglars posed a threat to Mr. Horn is doubtful considering that they were unarmed, although Mr. Horn would have had difficulty in deciphering that in the heat of the moment.

What is more troublesome about Mr. Horn’s invocation of self-defense, however, is that the burglars were not in his castle—Mr. Horn had just witnessed them burgling his neighbor’s home.

Moreover, although under Texas law Mr. Horn had no duty to flee, he actually left the safety of his own home to go outside to confront the burglars—not robbers—who did end up passing across his lawn while attempting to escape before he shot them in their backs.

Even with Texas’ generous extension of the right to defend one’s self, Mr. Horn’s brazen behavior would seem to be too zealous to be lawfully justified.

However, there is another statute in Texas that is even more permissive in its allowance of the use of deadly force.

Tex.PenCode Ann §9.43 states that a person may use deadly force to protect property of a third person if the actor reasonably believes that he is witnessing an unlawful taking of property and the force is necessary to prevent the taking of the property.

Mr. Horn may have justified his actions to the dispatcher under his conception of the Texas self-defense doctrine but his winning argument in front of a trial jury would likely be that he killed two men because they had just burgled his neighbor.

Mr. Horn will never know for sure which defense would have worked for him in front of a trial jury because a Harris County grand jury—the body that decides whether to indict a suspect for criminal culpability—refused this past July to charge Mr. Horn with any crime.

We will not know the rationale behind the grand jury’s refusal to indict either. They are given the facts of a particular case and told to apply the law as given but they are not required to follow it, nor are they required to explain their decisions.

All we do know is that Mr. Horn stepped out of the safety of his own home to kill two unarmed suspects that had taken $2,000 and some jewelry from his neighbor’s house.

And the laws in Texas may even justify it.