

# The Boston Globe

## Analysts divided over Phillipos's marijuana defense

By Evan Allen

| GLOBE STAFF | OCTOBER 11, 2014

Robel Phillipos says he didn't lie. He just cannot remember because he was "high out of his mind."

Federal prosecutors say that on April 18, 2013, Phillipos, then 19, accompanied two friends to the dorm room of the accused Boston Marathon bomber and watched one of them take evidence, then lied to investigators about his actions that day.



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Phillipos's lawyers say he smoked marijuana about a half-dozen times that day, and was simply unable to reconstruct his actions during a series of high-pressure interviews with federal agents.

While a marijuana defense is not unheard of, legal analysts are divided on whether it is a winnable strategy in the case against Phillipos.

"While, on its face, it may not sound like a strong defense, saying 'I forget because of marijuana,' the combination of his age, together with the fact that [investigators] failed to record the interviews could

rise to the level of reasonable doubt,” said James Budreau, a veteran defense lawyer who is not involved in the Phillipos case.

But other legal analysts say the defense might not sit well with jurors, who could view marijuana use as an excuse.

“I don’t think people see marijuana like they see heroin and cocaine and seriously mind-altering substances,” said former state and federal prosecutor Gerard T. Leone Jr., who is a partner at Nixon Peabody. “If you offer the excuse defense and the excuse doesn’t fly, [jurors] can get judgmental and they can be less forgiving.”

Court history is rife with defendants who invoke intoxication as a mitigating factor for their crimes.

In March, the lawyer for a New Mexico woman charged with first-degree murder for running her fiance over with her truck argued successfully that she was too drunk to deliberately kill, and the woman was convicted of involuntary manslaughter and drunken driving, according to media reports.

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Gerard T. Leone, former Middlesex  
DA, on Robel Phillipos’s marijuana  
defense

A Wayland man, Nathaniel Fujita, who was convicted last year of murdering his ex-girlfriend, argued unsuccessfully during his trial that marijuana use — in addition to mental illness and sports injuries — contributed to a “brief psychotic episode” he said he entered during the killing.

Phillipos, of Cambridge, is not charged with removing evidence from accused bomber Dzhokhar Tsarnaev’s UMass Dartmouth dorm room but faces two counts of lying to federal investigators about whether he went to the room, and about what he saw there.

The interviews were not recorded.

Each lying charge carries a maximum sentence of eight years. Prosecutors allege Phillipos accompanied his friends Azamat Tazhayakov and Dias Kadyrbayev to Tsarnaev’s room on April 18, 2013, where a backpack containing fireworks was removed and later thrown into a dumpster. Prosecutors say Phillipos knew of the backpack and its disposal.

Initially, authorities say, Phillipos told investigators he did not remember going to the dorm room, then said he went to the door but found it locked. Days later, he signed a confession admitting he was inside.

Prosecutors say his alleged lies deprived them of critical information.

Tazhayakov was found guilty of obstruction of justice in July and Kadyrbayev pleaded guilty to the same charges in August.

During opening statements during Phillipos’s trial Monday, his lawyer, Derege Demissie, said his client was profoundly impaired on the night in question.

Martin G. Weinberg, a prominent criminal defense lawyer in Boston, said there are three possible defenses for a lying charge: It is not a lie; it's ambiguous whether it is a lie; or the lie was not deliberate. The marijuana assertion, he said, cuts across multiple defenses.

“It sounds like they’re saying he was equivalent to a sleepwalker,” Weinberg said. “Smoking marijuana is not a defense to most crimes. But if you’re unconscious, it is a defense. And this defense seems closer to the latter.”

Not everyone thinks the defense will be effective.

“It’s a novel approach, but I don’t think it really holds a lot of weight,” said Philip A. Tracy Jr., a local lawyer with 40 years experience who has prosecuted cases at the state level and defended at the federal level. “When you’re talking about the effects of marijuana causing a complete lack of knowledge of events that occurred not far in the past, I just don’t see it.”

If the intoxicant were alcohol, Tracy said, Phillipos might have argued that he blacked out. But being too high to remember?

“The jury is just going to think he lied out of panic, and now they’re coming up with this,” he said.

Still, others say the memory-sapping effects of marijuana are well known.

“You know the typical cliché about people who smoke marijuana — stoners, they can’t remember, they don’t recall,” said Stephen J. Weymouth, a Boston defense lawyer. “Well, he was in fact smoking marijuana. I think there may be something there.”