

1 **38.11 Prohibited Substances and Items in Correctional or Civil Commitment Facility**
2 **Generally**

3
4 **Comment**

5 **Comprehensive Offense.** Tex. Penal Code § 38.11 is designed to prevent the possession of
6 numerous items in correctional facilities, civil commitment facilities, or on property owned, used,
7 or controlled by either. It prohibits the possession of such items within these properties (Tex. Penal
8 Code § 38.11(d), (j), (j-1)), the taking of such items into these properties (Tex. Penal Code §
9 38.11(b), (c)), the providing of such items to someone within them (Tex. Penal Code § 38.11(a)),
10 and activities done outside these properties with the intent to provide such items to someone inside
11 (Tex. Penal Code § 38.11(a), (k)). Although most of this conduct can be committed by anyone,
12 some provisions apply only to confinees/residents. *See, e.g.*, Tex. Penal Code § 38.11(j)
13 (prohibiting possession of cellular phones by those confined). Importantly, the legislature treats all
14 of this conduct equally; every offense is a third-degree felony. Tex. Penal Code § 38.11(g).
15 Moreover, the legislature overrode the normal “one category lower” rule for attempt so that, for
16 the most common manners of violating section 38.11, an attempt is also a third-degree felony. Tex.
17 Penal Code § 38.11(h).

18 **Lack of Mental State.** Despite this comprehensive regulation of acts related to items in
19 these facilities, the legislature provided attendant mental states in very few instances. Subsection
20 (a) prohibits *inter alia* “possess[ion] with the intent to provide” commonly prohibited items, and
21 subsection (k) prohibits enumerated activity “with the intent to provide or make . . . available” a
22 wireless communication device. Tex. Penal Code § 38.11(a), (k). But nothing else in section 38.11
23 has a mental state attached. This includes (1) the acts of providing, taking, and possessing; (2) any
24 awareness of the nature of the thing itself; or (3) awareness of the nature of the place. These gaps
25 create potential problems for multiple reasons.

1 First, many of the prohibited items are not inherently unlawful to possess or provide, like cellular
2 phones and money. Others, like deadly weapons, alcohol, and cigarettes, are subject to some
3 restriction in the free world, but most adults can readily purchase or possess them. Offenses that
4 make commonplace activities illegal only because of a surrounding circumstance—the literal
5 surroundings, in this case—typically require at least recklessness that the circumstance exists. *See*
6 *McQueen v. State*, 781 S.W.2d 600, 603 (Tex. Crim. App. 1989) (“[W]here otherwise innocent
7 behavior becomes criminal because of the circumstances under which it is done, a culpable mental
8 state is required as to those surrounding circumstances.”). Although presence in a facility should
9 not surprise anyone, that may not be the case for presence on property owned, used, or controlled
10 by a facility.

11 Second, even criminalizing the possession of items that are inherently contraband, like controlled
12 substances and dangerous drugs, usually requires proof that the actor knew or was reckless as to
13 the nature of the thing possessed. This offense does not.

14 Third, some members of the Committee were concerned that inadvertent provision of money or a
15 cellular phone by a forgetful, visiting defense attorney or facility employee could be punished.

16 **Multiple Approaches.** It could be that the legislature decided public policy favored placing
17 the onus on those entering sensitive, regulated facilities to ensure that they do not introduce items
18 with destabilizing potential. *See Celis v. State*, 416 S.W.3d 419, 425–26 (Tex. Crim. App. 2013)
19 (plurality) (declining to require additional mental states for falsely holding oneself out as a lawyer
20 because that field’s “regulation is intended to protect the public from untrained individuals, who
21 endanger the public’s personal and property rights, as well as the orderly administration of the
22 judicial system”). Although this rationale is typically applied to the actor’s status rather than
23 location, the underlying concern with the public’s wellbeing is no less present. Dispensing with

1 additional mental states would also remove the possibility that someone could avoid liability by
2 remaining willfully ignorant about the contents of a package he possesses or provides to someone
3 in a facility. At least as it pertains to manners of commission involving specific intent, “the lack
4 of express language requiring an additional *mens rea* with respect to other elements is a
5 ‘compelling’ indication that the Legislature did not intend an additional culpable mental state.”
6 *White v. State*, 509 S.W.3d 307, 311 (Tex. Crim. App. 2017).

7 For the sake of consistency, both internally and with other offenses, the Committee decided that a
8 mental state should be attached in all cases to (1) the surrounding circumstance, *i.e.*, location, (2)
9 the nature of the item, and (3) the conduct. It is probably unnecessary to do all three. This offense
10 is primarily a “circumstances” offense; any need to provide a mental state as per Tex. Penal Code
11 § 6.02(b) would be satisfied by requiring at least recklessness about whether a facility is involved.
12 Tex. Penal Code § 6.02(c). However, the fact that only select items are covered by the offense
13 militates in favor of requiring knowledge of the nature of thing possessed in all circumstances, not
14 just when it is contraband (as would be required in the free world). As for the acts themselves,
15 requiring that an actor be at least reckless about his provision, taking, or possession prevents claims
16 of unfairness from inadvertent actors. It would also avoid disparate treatment for “providing,”
17 which arguably entails a greater degree of intentionality. In practice, it will not always be necessary
18 to set out each of these three mental states individually. For example, providing a prohibited
19 substance will not require a separate element for knowledge because the definition for knowingly
20 providing a prohibited substance will require that the actor be aware he is providing that substance.
21 Possession, on the other hand, will require a separate element for knowledge or recklessness of the
22 nature of the thing possessed.

1 A minority of the Committee believed that this latter concern would be adequately addressed by
2 the requirement that these acts be done voluntarily—an admittedly low bar. *See Brown v. State*, 89
3 S.W.3d 630, 632–33 (Tex. Crim. App. 2002) (reviewing conviction under section 38.11(b) and
4 concluding that someone who admitted to knowingly possessing marijuana at the time he was
5 arrested and taken to jail voluntarily possessed it in a correctional facility).

6

1 **38.12 Prohibited Substances and Items in Correctional or Civil Commitment Facility—**
2 **Statutory Definitions**

3
4 Section 38.11 of the Texas Penal Code furnishes definitions or refers to other statutory
5 definitions for several of the terms included in the statute. The Committee incorporated these
6 definitions into the appropriate instructions.

7 The statute itself defines the term “component” of a cellular telephone or other wireless
8 communications device.

9 The statute refers to other statutory definitions for the terms “cigarette” (Tex. Tax Code §
10 154.001); “correctional facility” (Tex. Penal Code §1.07(a)(14)(A), (B), or (C), and Tex. Fam.
11 Code § 51.02); “practitioner” (Tex. Health & Safety Code § 481.002); “prescription” (Tex.
12 Health & Safety Code §481.002); and “tobacco product” (Tex. Tax Code § 155.001).

13 The Committee incorporated the definition of “custody” from Tex. Penal Code § 38.01(1)(A).

14 The Committee also incorporated definitions from Tex. Penal Code § 1.07(a), including
15 “alcoholic beverage,” “civil commitment facility,” “deadly weapon,” and “possession.”

16 The terms “controlled substance” and “dangerous drug” are statutorily defined (Tex. Penal Code
17 § 1.07(a)(12) and (16), respectively, refer to definitions of these terms in Tex. Health& Safety
18 Code §§ 481.002, 483.001), generally by reference to schedules and/or penalty groups.

19 Therefore, consistent with the manner in which a court instructs the jury regarding a controlled-
20 substance offense, if the state presents evidence that the defendant possessed a certain controlled
21 substance or dangerous drug, the trial court should instruct the jury that the substance in question
22 “is a [controlled substance/dangerous drug].” This is not a fact issue for a jury to decide because
23 these substances, as a matter of law, are controlled substances or dangerous drugs. *See Black v.*
24 *State*, 491 S.W.2d 428, 431 (Tex. Crim. App. 1973), *overruled on other grounds by Faulkner v.*
25 *State*, 549 S.W.2d 1, 4 (Tex. Crim. App. 1976); *Cleveland v. State*, No. 05-19-00515-CR, 2020

1 WL 2059912, at *1 (Tex. App.—Dallas Apr. 29, 2020, no pet.). Rather, the fact issues for the
2 jury to decide are whether the defendant possessed the substance with the requisite culpable
3 mental state. Accordingly, each of the relevant instructions in this chapter includes a definition to
4 be used if the evidence raises the possession of a controlled substance or dangerous drug.

5

6

1 **38.13 Instruction—Providing Prohibited Substance or Item to Person in Custody of**
2 **Correctional Facility**

3 **LAW SPECIFIC TO THIS CASE**

4 The state accuses the defendant of having committed the offense of prohibited substance or item
5 in a correctional facility.

6 **Relevant Statutes**

7 A person commits the offense of prohibited substance or item in a correctional facility if the
8 person intentionally or knowingly provides [*prohibited substance or item, e.g., an alcoholic*
9 *beverage/a deadly weapon/a cellular telephone or other wireless communications device or a*
10 *component of one of those devices*] to a person in the custody of a correctional facility.

11 [*Include the following if applicable.*]

12 [*Substance*] is a [controlled substance/dangerous drug].

13 [*Substance*] and [*substance*] are [controlled substances/dangerous drugs].

14 **Definitions**

15 [*Include applicable definitions of prohibited substance or item and prohibited location.*]

16 *Alcoholic Beverage*

17 “Alcoholic beverage” means alcohol, or any beverage containing more than one-half of one
18 percent of alcohol by volume, which is capable of use for beverage purposes, either alone or
19 when diluted.

20 *Component*

21 “Component” means any item necessary for the current, ongoing, or future operation of a cellular
22 telephone or other wireless communications device, including a subscriber identity module card
23 or functionally equivalent portable memory chip, a battery or battery charger, and any number of

1 minutes that have been purchased or for which a contract has been entered into and during which
2 a cellular telephone or other wireless communications device is capable of transmitting or
3 receiving communications.

4 *Deadly Weapon*

5 “Deadly weapon” means—

6 1. a firearm; or

7 2. anything manifestly designed, made, or adapted for the purpose of inflicting death or
8 serious bodily injury; or

9 3. anything actually used in a manner making it capable of causing death or serious
10 bodily injury; or

11 4. anything that the defendant intended to be used in a manner that if so used would make
12 it capable of causing death or serious bodily injury.

13 *Correctional Facility*

14 “Correctional facility” means a place designated by law for the confinement of a person arrested
15 for, charged with, or convicted of a criminal offense, including [*applicable facility, e.g., a*
16 *municipal or county jail/a confinement facility operated by the Texas Department of Criminal*
17 *Justice/a confinement facility operated under contract with any division of the Texas Department*
18 *of Criminal Justice/a community corrections facility operated by a community supervision and*
19 *corrections department*].

20 *Custody*

21 “Custody” means under arrest by a peace officer or under restraint by a public servant pursuant
22 to an order of a court of this state or another state of the United States.

23 *Intentionally Providing Something*

1 A person intentionally provides something to another person if it is his conscious objective or
2 desire to provide that thing to the other person.

3 *Knowingly Providing Something*

4 A person knowingly provides something to another person if he is aware that he is providing that
5 thing to the other person.

6 *Knowledge of [Prohibited Substance or Item]*

7 A person knows that something is [*prohibited substance or item*] if he is aware that the thing is a
8 [*prohibited substance or item*].

9 *Recklessness About [Prohibited Substance or Item]*

10 A person is reckless about whether something is [*prohibited substance or item*] if he is aware of
11 but consciously disregards a substantial and unjustifiable risk that the thing is [*prohibited*
12 *substance or item*]. The risk must be of such a nature and degree that its disregard constitutes a
13 gross deviation from the standard of care that an ordinary person would exercise under all the
14 circumstances as viewed from the actor's standpoint.

15 *Knows Another Person Is in Custody*

16 A person knows another person is in the custody of a correctional facility if he is aware that the
17 other person is in the custody of a correctional facility.

18 *Recklessness About Whether Another Person Is in Custody*

19 A person is reckless about whether another person is in the custody of a correctional facility if he
20 is aware of but consciously disregards a substantial and unjustifiable risk that the other person is
21 in the custody of a correctional facility. The risk must be of such a nature and degree that its
22 disregard constitutes a gross deviation from the standard of care that an ordinary person would
23 exercise under all the circumstances as viewed from the actor's standpoint.

1 As discussed in the general commentary (CPJC 38.11), the legislature failed to require a
2 particular mental state for this offense. The Committee chose to use only intent and knowledge
3 for the conduct aspect of the offense, namely, providing the prohibited substance or item to
4 another person because the definition of recklessness in Tex. Penal Code § 6.03(c) contains no
5 provision for prohibited conduct. The Committee chose to use only knowledge and recklessness
6 for the circumstances aspects of the offense, namely, the nature of the thing provided and the
7 location of the offense, because the definition of intent in Tex. Penal Code § 6.03(a) contains no
8 provision for circumstances surrounding commission of the offense.

9 The majority of the instructions provided for offenses under section 38.11 are written for adult
10 correctional facilities. They may each be easily converted for cases involving juvenile
11 correctional facilities by substituting the appropriate definition of the correctional facility at
12 issue. An example of an instruction for a juvenile correctional facility is provided at CPJC 38.22.

13

1 **38.14 Instruction—Possessing Prohibited Substance or Item with Intent to Provide to**
2 **Person in Custody of Correctional Facility**

3 **LAW SPECIFIC TO THIS CASE**

4 The state accuses the defendant of having committed the offense of prohibited substance or item
5 in a correctional facility.

6 **Relevant Statutes**

7 A person commits the offense of prohibited substance or item in a correctional facility if the
8 person intentionally or knowingly possesses [*prohibited substance or item, e.g., an alcoholic*
9 *beverage, controlled substance, or dangerous drug/a deadly weapon/a cellular telephone or other*
10 *wireless communications device or a component of one of those devices*] with intent to provide
11 [*prohibited substance or item*] to a person in the custody of a correctional facility.

12 [*Include the following if applicable.*]

13 [*Substance*] is a [controlled substance/dangerous drug].

14 [*Substance*] and [*substance*] are [controlled substances/dangerous drugs].

15 **Definitions**

16 [*Include applicable definitions of prohibited substance or item and prohibited location.*]

17 *Alcoholic Beverage*

18 “Alcoholic beverage” means alcohol, or any beverage containing more than one-half of one
19 percent of alcohol by volume, which is capable of use for beverage purposes, either alone or
20 when diluted.

21 *Component*

22 “Component” means any item necessary for the current, ongoing, or future operation of a cellular
23 telephone or other wireless communications device, including a subscriber identity module card

1 or functionally equivalent portable memory chip, a battery or battery charger, and any number of
2 minutes that have been purchased or for which a contract has been entered into and during which
3 a cellular telephone or other wireless communications device is capable of transmitting or
4 receiving communications.

5 *Deadly Weapon*

6 “Deadly weapon” means—

7 1. a firearm; or

8 2. anything manifestly designed, made, or adapted for the purpose of inflicting death or
9 serious bodily injury; or

10 3. anything actually used in a manner making it capable of causing death or serious
11 bodily injury; or

12 4. anything that the defendant intended to be used in a manner that if so used would make
13 it capable of causing death or serious bodily injury.

14 *Correctional Facility*

15 “Correctional facility” means a place designated by law for the confinement of a person arrested
16 for, charged with, or convicted of a criminal offense, including [*applicable facility, e.g., a*
17 *municipal or county jail/a confinement facility operated by the Texas Department of Criminal*
18 *Justice/a confinement facility operated under contract with any division of the Texas Department*
19 *of Criminal Justice/a community corrections facility operated by a community supervision and*
20 *corrections department*].

21 *Custody*

22 “Custody” means under arrest by a peace officer or under restraint by a public servant pursuant
23 to an order of a court of this state or another state of the United States.

1 *Possession*

2 “Possession” means actual care, custody, control, or management. [*Include if raised by the*
3 *evidence: Possession is a voluntary act if the possessor knowingly obtains or receives the thing*
4 *possessed or is aware of his control of the thing for a sufficient time to permit him to terminate*
5 *his control.*]

6 *Intentionally Possessing Something*

7 A person intentionally possesses something if it is his conscious objective or desire to possess
8 that thing.

9 *Knowingly Possessing Something*

10 A person knowingly possesses something if he is aware that he is possessing that thing.

11 *Knowledge of [Prohibited Substance or Item]*

12 A person knows that something is [*prohibited substance or item*] if he is aware that the thing is
13 [*prohibited substance or item*].

14 *Recklessness About [Prohibited Substance or Item]*

15 A person is reckless about whether something is [*prohibited substance or item*] if he is aware of
16 but consciously disregards a substantial and unjustifiable risk that the thing is [*prohibited*
17 *substance or item*]. The risk must be of such a nature and degree that its disregard constitutes a
18 gross deviation from the standard of care that an ordinary person would exercise under all the
19 circumstances as viewed from the actor’s standpoint.

20 *Intent to Provide Prohibited Substance or Item to Person in Custody*

21 A person acts with intent to provide [*prohibited substance or item*] to a person in the custody of a
22 correctional facility if it is his conscious objective or desire to provide [*prohibited substance or*
23 *item*] to a person in the custody of a correctional facility.

24 **Application of Law to Facts**

1 You must decide whether the state has proved, beyond a reasonable doubt, three elements. The
2 elements are that—

3 1. the defendant, on or about *[date]*, in *[county]* County, Texas, intentionally or
4 knowingly possessed *[prohibited substance or item]*; and

5 2. the defendant knew or was reckless about whether the thing possessed was *[prohibited*
6 *substance or item]*; and

7 3. the defendant did this with the intent to provide *[prohibited substance or item]* to
8 *[name of intended recipient]*, a person in the custody of *[name of correctional facility]*, a
9 correctional facility.

10 You must all agree on elements 1, 2, and 3 listed above.

11 If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of elements
12 1, 2, and 3 listed above, you must find the defendant “not guilty.”

13 If you all agree the state has proved all three of the elements listed above, you must find the
14 defendant “guilty.”

15 *[Insert any other instructions raised by the evidence. Then continue with the verdict form found*
16 *in CPJC 2.1, the general charge.]*

17 **Comment**

18 Possessing a prohibited substance or item with the intent to provide it to a person in the custody
19 of a correctional facility is prohibited by and defined in Tex. Penal Code § 38.11(a). See CPJC
20 38.12 for information on statutory definitions.

21 This is one of the few instances when the legislature provided a culpable mental state for an
22 offense included in section 38.11. The Committee discussed whether this should be the sole
23 culpable mental state necessary to establish the offense as it is with indecency with a child. *See*
24 *Clark v. State*, 558 S.W.2d 887, 890–91 (Tex. Crim. App. 1977). However, for consistency, the

- 1 Committee felt it made more sense to require intent and knowledge for the nature of the conduct
- 2 and knowledge and recklessness for the circumstance aspect regarding the nature of the thing
- 3 possessed.

1 **38.15 Instruction—Providing Cigarette or Tobacco Product to Person Confined in**
2 **Correctional Facility Other than Local Jail**

3 **LAW SPECIFIC TO THIS CASE**

4 The state accuses the defendant of having committed the offense of prohibited substance or item
5 in a correctional facility.

6 **Relevant Statutes**

7 A person commits the offense of prohibited substance or item in a correctional facility if the
8 person intentionally or knowingly provides a [cigarette/tobacco product] to a person confined in
9 a correctional facility.

10 **Definitions**

11 *[Include applicable definitions of “cigarette” and/or “tobacco product.”]*

12 *Cigarette*

13 “Cigarette” means a roll for smoking that is (1) made of tobacco or tobacco mixed with another
14 ingredient and wrapped or covered with a material other than tobacco, and (2) not a cigar.

15 *Tobacco Product*

16 “Tobacco product” means—

- 17 1. a cigar;
- 18 2. smoking tobacco, including granulated, plug-cut, crimp-cut, ready-rubbed, and any
19 form of tobacco suitable for smoking in a pipe or as a cigarette;
- 20 3. chewing tobacco, including Cavendish, Twist, plug, scrap, and any kind of tobacco
21 suitable for chewing;
- 22 4. snuff or other preparations of pulverized tobacco; or

1 5. an article or product that is made of tobacco or a tobacco substitute and that is not a
2 cigarette or an e-cigarette.

3 *Correctional Facility*

4 “Correctional facility” means a place designated by law for the confinement of a person arrested
5 for, charged with, or convicted of a criminal offense, including [*applicable facility, e.g., a*
6 confinement facility operated by the Texas Department of Criminal Justice/a confinement
7 facility operated under contract with any division of the Texas Department of Criminal Justice/a
8 community corrections facility operated by a community supervision and corrections
9 department].

10 *Intentionally Providing Something*

11 A person intentionally provides something to another person if it is his conscious objective or
12 desire to provide that thing to the other person.

13 *Knowingly Providing Something*

14 A person knowingly provides something to another person if he is aware that he is providing that
15 thing to the other person.

16 *Knowledge of [Cigarette/Tobacco Product]*

17 A person knows that something is a [cigarette/tobacco product] if he is aware that the thing is a
18 [cigarette/tobacco product].

19 *Recklessness About [Cigarette/Tobacco Product]*

20 A person is reckless about whether something is a [cigarette/tobacco product] if he is aware of
21 but consciously disregards a substantial and unjustifiable risk that the thing is a
22 [cigarette/tobacco product]. The risk must be of such a nature and degree that its disregard
23 constitutes a gross deviation from the standard of care that an ordinary person would exercise
24 under all the circumstances as viewed from the actor’s standpoint.

1 *Knows Another Person Is Confined*

2 A person knows another person is confined in a correctional facility if he is aware that the other
3 person is confined in a correctional facility.

4 *Recklessness About Whether Another Person Is Confined*

5 A person is reckless about whether another person is confined in a correctional facility if he is
6 aware of but consciously disregards a substantial and unjustifiable risk that the other person is
7 confined in a correctional facility. The risk must be of such a nature and degree that its disregard
8 constitutes a gross deviation from the standard of care that an ordinary person would exercise
9 under all the circumstances as viewed from the actor’s standpoint.

10 **Application of Law to Facts**

11 You must decide whether the state has proved, beyond a reasonable doubt, four elements. The
12 elements are that—

13 1. the defendant, on or about [*date*], in [*county*] County, Texas, intentionally or
14 knowingly provided a [cigarette/tobacco product] to [*name of recipient*]; and

15 2. the defendant knew or was reckless about whether the thing provided was a
16 [cigarette/tobacco product]; and

17 3. [*name of recipient*] was a person confined in [*name of correctional facility*], a
18 correctional facility; and

19 4. the defendant knew or was reckless about whether [*name of recipient*] was a person
20 confined in a correctional facility.

21 You must all agree on elements 1 through 4 listed above.

22 If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of elements
23 1 through 4 listed above, you must find the defendant “not guilty.”

1 If you all agree the state has proved each of the four elements listed above, you must find the
2 defendant “guilty.”

3 *[Insert any other instructions raised by the evidence. Then continue with the verdict form found*
4 *in CPJC 2.1, the general charge.]*

5 **Comment**

6 Providing a cigarette or tobacco product to a person confined in a correctional facility is
7 prohibited by and defined in Tex. Penal Code § 38.11(a)(5). See CPJC 38.12 for information on
8 statutory definitions.

9 Tex. Penal Code § 38.11(a)(5) defines the recipient of a cigarette or tobacco product as a person
10 “confined in a correctional facility.” This is different than subsections (a)(1)–(3), which define
11 the recipient as a person “in the custody of a correctional facility.”

12 Tex. Penal Code § 38.11(a)(4) also uses the phrase “confined in a correctional facility” to define
13 the recipient of money. Accordingly, this instruction may also be used for an offense charged
14 under Tex. Penal Code § 38.11(a)(4) by substituting “money” as the prohibited item.

15 The elements are different for a recipient confined in a local jail. See CPJC 38.16.

1 **38.16 Instruction—Providing Cigarette or Tobacco Product to Person Confined in Local**
2 **Jail**

3 **LAW SPECIFIC TO THIS CASE**

4 The state accuses the defendant of having committed the offense of prohibited substance or item
5 in a correctional facility.

6 **Relevant Statutes**

7 A person commits the offense of prohibited substance or item in a correctional facility if the
8 person intentionally or knowingly provides a [cigarette/tobacco product] to a person confined in
9 a local jail regulated by the Commission on Jail Standards in violation of a rule or regulation
10 adopted by the sheriff or jail administrator.

11 **Definitions**

12 *[Include applicable definitions of “cigarette” and/or “tobacco product.”]*

13 *Cigarette*

14 “Cigarette” means a roll for smoking that is (1) made of tobacco or tobacco mixed with another
15 ingredient and wrapped or covered with a material other than tobacco and (2) not a cigar.

16 *Tobacco Product*

17 “Tobacco product” means—

- 18 1. a cigar;
- 19 2. smoking tobacco, including granulated, plug-cut, crimp-cut, ready-rubbed, and any
20 form of tobacco suitable for smoking in a pipe or as a cigarette;
- 21 3. chewing tobacco, including Cavendish, Twist, plug, scrap, and any kind of tobacco
22 suitable for chewing;
- 23 4. snuff or other preparations of pulverized tobacco; or

1 5. an article or product that is made of tobacco or a tobacco substitute and that is not a
2 cigarette or an e-cigarette.

3 *Local Jail*

4 “Local jail” means a municipal or county jail.

5 *Rule or Regulation Adopted by Sheriff or Jail Administrator*

6 “Rule or regulation adopted by the sheriff or jail administrator” means a rule or regulation that—

7 1. prohibits the possession of a cigarette or tobacco product by a person confined in
8 the jail; or

9 2. places restrictions on:

10 a. the possession of a cigarette or tobacco product by a person confined in the
11 jail; or

12 b. the manner in which a cigarette or tobacco product may be provided to a person
13 confined in the jail.

14 *Intentionally Providing Something*

15 A person intentionally provides something to another person if it is his conscious objective or
16 desire to provide that thing to the other person.

17 *Knowingly Providing Something*

18 A person knowingly provides something to another person if he is aware that he is providing that
19 thing to the other person.

20 *Knowledge of [Cigarette/Tobacco Product]*

21 A person knows that something is a [cigarette/tobacco product] if he is aware that the thing is a
22 [cigarette/tobacco product].

23 *Recklessness About [Cigarette/Tobacco Product]*

1 A person is reckless about whether something is a [cigarette/tobacco product] if he is aware of
2 but consciously disregards a substantial and unjustifiable risk that the thing is a
3 [cigarette/tobacco product]. The risk must be of such a nature and degree that its disregard
4 constitutes a gross deviation from the standard of care that an ordinary person would exercise
5 under all the circumstances as viewed from the actor's standpoint.

6 *Knows Another Person Is Confined in a Local Jail*

7 A person knows another person is confined in a local jail if he is aware that the other person is
8 confined in a local jail.

9 *Recklessness About Whether Another Person Is Confined in a Local Jail*

10 A person is reckless about whether another person is confined in a local jail if he is aware of but
11 consciously disregards a substantial and unjustifiable risk that the other person is confined in a
12 local jail. The risk must be of such a nature and degree that its disregard constitutes a gross
13 deviation from the standard of care that an ordinary person would exercise under all the
14 circumstances as viewed from the actor's standpoint.

15 *Knowingly Violating a Jail Rule or Regulation*

16 The phrase "knowingly providing a [cigarette/tobacco product] in violation of a rule or
17 regulation adopted by the sheriff or jail administrator" means a person is aware that providing a
18 [cigarette/tobacco product] to a person confined in the jail violates a rule or regulation adopted
19 by the sheriff or jail administrator.

20 *Recklessly Violating a Jail Rule or Regulation*

21 The phrase "recklessly providing a [cigarette/tobacco product] in violation of a rule or regulation
22 adopted by the sheriff or jail administrator" means a person is aware of but consciously
23 disregards a substantial and unjustifiable risk that providing a [cigarette/tobacco product] to a

1 person confined in the jail violates a rule or regulation adopted by the sheriff or jail
2 administrator. The risk must be of such a nature and degree that its disregard constitutes a gross
3 deviation from the standard of care that an ordinary person would exercise under all the
4 circumstances as viewed from the actor’s standpoint.

5 **Application of Law to Facts**

6 You must decide whether the state has proved, beyond a reasonable doubt, five elements. The
7 elements are that—

8 1. the defendant, on or about [*date*], in [*county*] County, Texas, intentionally or
9 knowingly provided a [cigarette/tobacco product] to [*name of recipient*] in violation of a rule or
10 regulation adopted by the sheriff or jail administrator;

11 2. the defendant knew or was reckless about whether the thing provided was a
12 [cigarette/tobacco product];

13 3. [*name of recipient*] was a person confined in [*name of jail*], a local jail;

14 4. the defendant knew or was reckless about whether [*name of recipient*] was a person
15 confined in a local jail; and

16 5. the defendant knew or was reckless about whether providing the [cigarette/tobacco
17 product] to a person confined in the jail violated a rule or regulation adopted by the sheriff or jail
18 administrator.

19 You must all agree on the five elements listed above.

20 If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of the five
21 elements listed above, you must find the defendant “not guilty.”

22 If you all agree the state has proved each of the five elements listed above, you must find the
23 defendant “guilty.”

1 *[Insert any other instructions raised by the evidence. Then continue with the verdict form found*
2 *in CPJC 2.1, the general charge.]*

3 **Comment**

4
5 Providing a cigarette or tobacco product to a person confined in a local jail is prohibited by and
6 defined in Tex. Penal Code § 38.11(a)(5). See CPJC 38.12 for information on statutory
7 definitions.

8
9 **Violating Rule or Regulation Adopted by Sheriff or Jail Administrator:** Like the
10 prohibited location, the provision of a cigarette or tobacco product to an inmate in a local jail in
11 violation of a duly adopted rule or regulation is a circumstance that differentiates lawful conduct
12 (providing such item to an inmate in compliance with the applicable rules and regulations) and
13 unlawful conduct (providing such item in violation of applicable rules and regulations).

14 Therefore, applying the reasoning of *McQueen v. State*, 781 S.W.2d 600, 604 (Tex. Crim. App.
15 1989), the Committee concluded that the requisite culpable mental state also applies to the
16 surrounding circumstance that the person’s conduct violated a rule or regulation adopted by a
17 sheriff or jail administrator.

18 Tex. Penal Code § 38.11(a)(5) prohibits providing cigarettes or tobacco products to inmates of a
19 municipal or county jail regulated by the Commission on Jail Standards. According to Tex.
20 Gov’t Code § 511.0094, the Commission on Jail Standards regulates all local jails except those
21 that contract to house only federal prisoners. Tex. Penal Code § 38.11(a)(5), by definition, does
22 not apply to this narrow class of local jails.

1 **38.17 Instruction—Taking Prohibited Substance or Item into Correctional Facility**

2 **LAW SPECIFIC TO THIS CASE**

3 The state accuses the defendant of having committed the offense of prohibited substance or item
4 in a correctional facility.

5 **Relevant Statutes**

6 A person commits the offense of prohibited substance or item in a correctional facility if the
7 person intentionally or knowingly takes [*prohibited substance or item, e.g. an alcoholic*
8 beverage/a controlled substance/a dangerous drug] into a correctional facility.

9 [*Include the following if applicable.*]

10 [*Substance*] is a [controlled substance/dangerous drug].

11 [*Substance*] and [*substance*] are [controlled substances/dangerous drugs].

12 **Definitions**

13 [*Include applicable definitions of prohibited substance or item and prohibited location.*]

14 *Alcoholic Beverage*

15 “Alcoholic beverage” means alcohol, or any beverage containing more than one-half of one
16 percent of alcohol by volume, which is capable of use for beverage purposes, either alone or
17 when diluted.

18 *Correctional Facility*

19 “Correctional facility” means a place designated by law for the confinement of a person arrested
20 for, charged with, or convicted of a criminal offense, including [*applicable facility, e.g., a*
21 municipal or county jail/a confinement facility operated by the Texas Department of Criminal
22 Justice/a confinement facility operated under contract with any division of the Texas Department

1 of Criminal Justice/a community corrections facility operated by a community supervision and
2 corrections department].

3 *Intentionally Taking Something*

4 A person intentionally takes something into a place if it is his conscious objective or desire to
5 take that thing into that place.

6 *Knowingly Taking Something*

7 A person knowingly takes something into a place if he is aware that he is taking that thing into
8 that place.

9 *Knowledge of [Prohibited Substance or Item]*

10 A person knows that something is [*prohibited substance or item*] if he is aware that the thing is
11 [*prohibited substance or item*].

12 *Recklessness About [Prohibited Substance or Item]*

13 A person is reckless about whether something is [*prohibited substance or item*] if he is aware of
14 but consciously disregards a substantial and unjustifiable risk that the thing is [*prohibited*
15 *substance or item*]. The risk must be of such a nature and degree that its disregard constitutes a
16 gross deviation from the standard of care that an ordinary person would exercise under all the
17 circumstances as viewed from the actor's standpoint.

18 *Knowledge of Correctional Facility*

19 A person knows that a location is a correctional facility if he is aware that the location is a
20 correctional facility.

21 *Recklessness About Correctional Facility*

22 A person is reckless about whether a location is a correctional facility if he is aware of but
23 consciously disregards a substantial and unjustifiable risk that the location is a correctional
24 facility. The risk must be of such a nature and degree that its disregard constitutes a gross

1 deviation from the standard of care that an ordinary person would exercise under all the
2 circumstances as viewed from the actor’s standpoint.

3 **Application of Law to Facts**

4 You must decide whether the state has proved, beyond a reasonable doubt, three elements. The
5 elements are that—

6 1. the defendant, on or about [*date*], in [*county*] County, Texas, intentionally or
7 knowingly took [*prohibited substance or item*] into [*name of correctional facility*], a correctional
8 facility; and

9 2. the defendant knew or was reckless about whether the thing taken into the correctional
10 facility was [*prohibited substance or item*]; and

11 3. the defendant knew or was reckless about whether the facility was a correctional
12 facility.

13 You must all agree on elements 1, 2, and 3 listed above.

14 If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of elements
15 1, 2, and 3 listed above, you must find the defendant “not guilty.”

16 If you all agree the state has proved all three elements listed above, you must find the defendant
17 “guilty.”

18 [*Insert any other instructions raised by the evidence. Then continue with the verdict form found*
19 *in CPJC 2.1, the general charge.*]

20 **Comment**

21 Taking a prohibited substance or item into a correctional facility is prohibited by and defined in

22 Tex. Penal Code § 38.11(b). See CPJC 38.12 for information on statutory definitions.
23

1 **38.18 Instruction—Possessing Prohibited Substance or Item While in Correctional Facility**

2 **LAW SPECIFIC TO THIS CASE**

3 The state accuses the defendant of having committed the offense of prohibited substance or item
4 in a correctional facility.

5 **Relevant Statutes**

6 A person commits the offense of prohibited substance or item in a correctional facility if the
7 person intentionally or knowingly possesses [*prohibited substance or item, e.g., an alcoholic*
8 *beverage/a controlled substance/a dangerous drug/a deadly weapon*] while in a correctional
9 facility.

10 [*Include the following if applicable.*]

11 [*Substance*] is a [controlled substance/dangerous drug].

12 [*Substance*] and [*substance*] are [controlled substances/dangerous drugs].

13 **Definitions**

14 [*Include applicable definitions of prohibited substance or item and prohibited location.*]

15 *Alcoholic Beverage*

16 “Alcoholic beverage” means alcohol, or any beverage containing more than one-half of one
17 percent of alcohol by volume, which is capable of use for beverage purposes, either alone or
18 when diluted.

19 *Deadly Weapon*

20 “Deadly weapon” means—

21 1. a firearm; or

22 2. anything manifestly designed, made, or adapted for the purpose of inflicting death or

23 serious bodily injury; or

1 3. anything actually used in a manner making it capable of causing death or serious
2 bodily injury; or

3 4. anything that the defendant intended to be used in a manner that if so used would make
4 it capable of causing death or serious bodily injury.

5 *Correctional Facility*

6 “Correctional facility” means a place designated by law for the confinement of a person arrested
7 for, charged with, or convicted of a criminal offense, including [*applicable facility, e.g., a*
8 municipal or county jail/a confinement facility operated by the Texas Department of Criminal
9 Justice/a confinement facility operated under contract with any division of the Texas Department
10 of Criminal Justice/a community corrections facility operated by a community supervision and
11 corrections department].

12 *Possession*

13 “Possession” means actual care, custody, control, or management. [*Include if raised by the*
14 *evidence: Possession is a voluntary act if the possessor knowingly obtains or receives the thing*
15 *possessed or is aware of his control of the thing for a sufficient time to permit him to terminate*
16 *his control.*]

17 *Intentionally Possessing Something*

18 A person intentionally possesses something if it is his conscious objective or desire to possess
19 that thing.

20

21 *Knowingly Possessing Something*

22 A person knowingly possesses something if he is aware that he is possessing that thing.

23 *Knowledge of [Prohibited Substance or Item]*

1 A person knows that something is [*prohibited substance or item*] if he is aware that the thing is
2 [*prohibited substance or item*].

3 *Recklessness About [Prohibited Substance or Item]*

4 A person is reckless about whether something is [*prohibited substance or item*] if he is aware of
5 but consciously disregards a substantial and unjustifiable risk that the thing is [*prohibited*
6 *substance or item*]. The risk must be of such a nature and degree that its disregard constitutes a
7 gross deviation from the standard of care that an ordinary person would exercise under all the
8 circumstances as viewed from the actor's standpoint.

9 *Knows That He is in a Correctional Facility*

10 A person knows that he is in a correctional facility if he is aware that he is in a correctional
11 facility.

12 *Recklessness About Whether He is in a Correctional Facility*

13 A person is reckless about whether he is in a correctional facility if he is aware of but
14 consciously disregards a substantial and unjustifiable risk that he is in a correctional facility. The
15 risk must be of such a nature and degree that its disregard constitutes a gross deviation from the
16 standard of care that an ordinary person would exercise under all the circumstances as viewed
17 from the actor's standpoint.

18 **Application of Law to Facts**

19 You must decide whether the state has proved, beyond a reasonable doubt, three elements. The
20 elements are that—

- 21 1. the defendant, on or about [*date*], in [*county*] County, Texas, intentionally or
22 knowingly possessed [*prohibited substance or item*] in [*name of correctional facility*], a
23 correctional facility; and

1 **38.19 Instruction—Possessing Prohibited Substance on Property Owned, Used, or**
2 **Controlled by Correctional Facility**

3 **LAW SPECIFIC TO THIS CASE**

4 The state accuses the defendant of having committed the offense of prohibited substance or item
5 in a correctional facility.

6 **Relevant Statutes**

7 A person commits the offense of prohibited substance or item in a correctional facility if the
8 person intentionally or knowingly possesses [*prohibited substance or item, e.g., an alcoholic*
9 *beverage/a controlled substance/a dangerous drug*] while on property owned, used, or controlled
10 by a correctional facility.

11 [*Include the following if applicable.*]

12 [*Substance*] is a [controlled substance/dangerous drug].

13 [*Substance*] and [*substance*] are [controlled substances/dangerous drugs].

14 **Definitions**

15 [Statutory definitions currently omitted aside from possession and culpable mental states]

16 *Possession*

17 “Possession” means actual care, custody, control, or management. [*Include if raised by the*
18 *evidence: Possession is a voluntary act if the possessor knowingly obtains or receives the thing*
19 *possessed or is aware of his control of the thing for a sufficient time to permit him to terminate*
20 *his control.*]

21 *Intentionally Possessing Something*

22 A person intentionally possesses something if it is his conscious objective or desire to possess
23 that thing.

24

1 *Knowingly Possessing Something*

2 A person knowingly possesses something if he is aware that he is possessing that thing.

3 *Knowledge of [Prohibited Substance or Item]*

4 A person knows that something is [*prohibited substance or item*] if he is aware that the thing is
5 [*prohibited substance or item*].

6 *Recklessness About [Prohibited Substance or Item]*

7 A person is reckless about whether something is [*prohibited substance or item*] if he is aware of
8 but consciously disregards a substantial and unjustifiable risk that the thing is [*prohibited*
9 *substance or item*]. The risk must be of such a nature and degree that its disregard constitutes a
10 gross deviation from the standard of care that an ordinary person would exercise under all the
11 circumstances as viewed from the actor's standpoint.

12 *Knows That He Is on Property Owned, Used, or Controlled by a Correctional Facility*

13 A person knows that he is on property owned, used, or controlled by a correctional facility if he
14 is aware that he is on property owned, used, or controlled by a correctional facility.

15 *Recklessness About Whether He Is on Property Owned, Used, or Controlled by a Correctional*
16 *Facility*

17 A person is reckless about whether he is on property owned, used, or controlled by a correctional
18 facility if he is aware of but consciously disregards a substantial and unjustifiable risk that he is
19 on property owned, used, or controlled by a correctional facility. The risk must be of such a
20 nature and degree that its disregard constitutes a gross deviation from the standard of care that an
21 ordinary person would exercise under all the circumstances as viewed from the actor's
22 standpoint.

23

24

1 38.11(d)(1) does not prohibit a person from possessing a deadly weapon while on property
2 owned, used, or controlled by a correctional facility or civil commitment facility.

3

1 **38.20 Instruction—Possessing Cellular Telephone While Confined in Correctional Facility**

2 **LAW SPECIFIC TO THIS CASE**

3 The state accuses the defendant of having committed the offense of prohibited substance or item
4 in a correctional facility.

5 **Relevant Statutes**

6 A person commits the offense of prohibited substance or item in a correctional facility if the
7 person intentionally or knowingly possesses a cellular telephone while confined in a correctional
8 facility.

9 **Definitions**

10 *Correctional Facility*

11 “Correctional facility” means a place designated by law for the confinement of a person arrested
12 for, charged with, or convicted of a criminal offense, including [*applicable facility, e.g., a*
13 *municipal or county jail/a confinement facility operated by the Texas Department of Criminal*
14 *Justice/a confinement facility operated under contract with any division of the Texas Department*
15 *of Criminal Justice/a community corrections facility operated by a community supervision and*
16 *corrections department*].

17 *Possession*

18 “Possession” means actual care, custody, control, or management. [*Include if raised by the*
19 *evidence: Possession is a voluntary act if the possessor knowingly obtains or receives the thing*
20 *possessed or is aware of his control of the thing for a sufficient time to permit him to terminate*
21 *his control.*]

22 *Intentionally Possessing Something*

23 A person intentionally possesses something if it is his conscious objective or desire to possess
24 that thing.

1 *Knowingly Possessing Something*

2 A person knowingly possesses something if he is aware that he is possessing that thing.

3 *Knowledge of Cellular Telephone*

4 A person knows that something is a cellular telephone if he is aware that the thing is a cellular
5 telephone.

6 *Recklessness About Cellular Telephone*

7 A person is reckless about whether something is a cellular telephone if he is aware of but
8 consciously disregards a substantial and unjustifiable risk that the thing is a cellular telephone.

9 The risk must be of such a nature and degree that its disregard constitutes a gross deviation from
10 the standard of care that an ordinary person would exercise under all the circumstances as
11 viewed from the actor's standpoint.

12 *Knows That He Is Confined in a Correctional Facility*

13 A person knows that he is confined in a correctional facility if he is aware that he is in a
14 correctional facility.

15 *Recklessness About Whether He Is Confined in a Correctional Facility*

16 A person is reckless about whether he is confined in a correctional facility if he is aware of but
17 consciously disregards a substantial and unjustifiable risk that he is confined in a correctional
18 facility. The risk must be of such a nature and degree that its disregard constitutes a gross
19 deviation from the standard of care that an ordinary person would exercise under all the
20 circumstances as viewed from the actor's standpoint.

21 **Application of Law to Facts**

22 You must decide whether the state has proved, beyond a reasonable doubt, three elements. The
23 elements are that—

1 **38.21 Instruction—Possessing Prohibited Substance or Item While in Civil Commitment**

2 **Facility**

3 **LAW SPECIFIC TO THIS CASE**

4 The state accuses the defendant of having committed the offense of prohibited substance or item
5 in a civil commitment facility.

6 **Relevant Statutes**

7 A person commits the offense of prohibited substance or item in a civil commitment facility if
8 the person intentionally, knowingly, or recklessly possesses [*prohibited substance or item, e.g.,*
9 *an alcoholic beverage/a controlled substance/a dangerous drug/a deadly weapon*] while in a civil
10 commitment facility.

11 *[Include the following if applicable.]*

12 [*Substance*] is a [controlled substance/dangerous drug].

13 [*Substance*] and [*substance*] are [controlled substances/dangerous drugs].

14 **Definitions**

15 *[Include applicable definitions of prohibited substance or item and prohibited location.]*

16 *Alcoholic Beverage*

17 “Alcoholic beverage” means alcohol, or any beverage containing more than one-half of one
18 percent of alcohol by volume, which is capable of use for beverage purposes, either alone or
19 when diluted.

20 *Component*

21 “Component” means any item necessary for the current, ongoing, or future operation of a cellular
22 telephone or other wireless communications device, including a subscriber identity module card
23 or functionally equivalent portable memory chip, a battery or battery charger, and any number of

1 minutes that have been purchased or for which a contract has been entered into and during which
2 a cellular telephone or other wireless communications device is capable of transmitting or
3 receiving communications.

4 *Deadly Weapon*

5 “Deadly weapon” means—

6 1. a firearm; or

7 2. anything manifestly designed, made, or adapted for the purpose of inflicting death or
8 serious bodily injury; or

9 3. anything actually used in a manner making it capable of causing death or serious
10 bodily injury; or

11 4. anything that the defendant intended to be used in a manner that if so used would make
12 it capable of causing death or serious bodily injury.

13 *Civil Commitment Facility*

14 “Civil commitment facility” means a facility owned, leased, or operated by the state,
15 or by a vendor under contract with the state, that houses only persons who have been
16 civilly committed as sexually violent predators under chapter 841 of the Health and Safety Code.

17 *Possession*

18 “Possession” means actual care, custody, control, or management. [*Include if raised by the*
19 *evidence:* Possession is a voluntary act if the possessor knowingly obtains or receives the thing
20 possessed or is aware of his control of the thing for a sufficient time to permit him to terminate
21 his control.]

22 *Intentionally Possessing Something*

23 A person intentionally possesses something if it is his conscious objective or desire to possess
24 that thing.

1 *Knowingly Possessing Something*

2 A person knowingly possesses something if he is aware that he is possessing that thing.

3 *Knowledge of [Prohibited Substance or Item]*

4 A person knows that something is [*prohibited substance or item*] if he is aware that the thing is
5 [*prohibited substance or item*].

6 *Recklessness About [Prohibited Substance or Item]*

7 A person is reckless about whether something is [*prohibited substance or item*] if he is aware of
8 but consciously disregards a substantial and unjustifiable risk that the thing is [*prohibited*
9 *substance or item*]. The risk must be of such a nature and degree that its disregard constitutes a
10 gross deviation from the standard of care that an ordinary person would exercise under all the
11 circumstances as viewed from the actor's standpoint.

12 *Knows That He Is in a Civil Commitment Facility*

13 A person knows that he is in a civil commitment facility if he is aware that he is in a civil
14 commitment facility.

15 *Recklessness About Whether He Is in a Civil Commitment Facility*

16 A person is reckless about whether he is in a civil commitment facility if he is aware of but
17 consciously disregards a substantial and unjustifiable risk that he is in a civil commitment
18 facility. The risk must be of such a nature and degree that its disregard constitutes a gross
19 deviation from the standard of care that an ordinary person would exercise under all the
20 circumstances as viewed from the actor's standpoint.

21

22 **Application of Law to Facts**

23 You must decide whether the state has proved, beyond a reasonable doubt, three elements. The
24 elements are that—

1 1. the defendant, on or about [*date*], in [*county*] County, Texas, intentionally or
2 knowingly possessed [*prohibited substance or item*] in [*name of civil commitment facility*], a
3 civil commitment facility; and

4 2. the defendant knew or was reckless about whether the thing possessed was [*prohibited*
5 *substance or item*]; and

6 3. the defendant knew or was reckless about whether he was in a civil commitment
7 facility.

8 You must all agree on the three elements listed above.

9 If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of the three
10 elements listed above, you must find the defendant “not guilty.”

11 If you all agree the state has proved each of the three elements listed above, you must find the
12 defendant “guilty.”

13 [*Insert any other instructions raised by the evidence. Then continue with the verdict form found*
14 *in CPJC 2.1, the general charge.*]

15 **Comment**

16 Possessing a prohibited substance or item while in a civil commitment facility is prohibited by
17 and defined in Tex. Penal Code § 38.11(d). See CPJC 38.12 for information on statutory
18 definitions.

19 The Committee has provided a suggested instruction for an offense committed in a civil
20 commitment facility under Tex. Penal Code § 38.11(d). Subsections (a)(1) and (2) and (b) and
21 (c) also define offenses involving prohibited substances or items in civil commitment facilities.

22 Courts and practitioners may use the suggested instructions provided for these offenses
23 committed in correctional facilities as a guide for such an offense committed in a civil
24 commitment facility.

1 **38.22 Instruction—Possessing Prohibited Substance or Item While in Juvenile Facility**

2 **LAW SPECIFIC TO THIS CASE**

3 The state accuses the defendant of having committed the offense of prohibited substance or item
4 in a correctional facility.

5 **Relevant Statutes**

6 A person commits the offense of prohibited substance or item in a correctional facility if the
7 person intentionally, knowingly, or recklessly possesses [*prohibited substance or item, e.g., an*
8 *alcoholic beverage/a controlled substance/a dangerous drug/a deadly weapon*] while in a
9 correctional facility.

10 [*Include the following if applicable.*]

11 [*Substance*] is a [controlled substance/dangerous drug].

12 [*Substance*] and [*substance*] are [controlled substances/dangerous drugs].

13 **Definitions**

14 [*Include applicable definitions of prohibited substance or item and prohibited location.*]

15 *Alcoholic Beverage*

16 “Alcoholic beverage” means alcohol, or any beverage containing more than one-half of one
17 percent of alcohol by volume, which is capable of use for beverage purposes, either alone or
18 when diluted.

19 *Component*

20 “Component” means any item necessary for the current, ongoing, or future operation of a cellular
21 telephone or other wireless communications device, including a subscriber identity module card
22 or functionally equivalent portable memory chip, a battery or battery charger, and any number of
23 minutes that have been purchased or for which a contract has been entered into and during which

1 a cellular telephone or other wireless communications device is capable of transmitting or
2 receiving communications.

3 *Deadly Weapon*

4 “Deadly weapon” means—

5 1. a firearm; or

6 2. anything manifestly designed, made, or adapted for the purpose of inflicting death or
7 serious bodily injury; or

8 3. anything actually used in a manner making it capable of causing death or serious
9 bodily injury; or

10 4. anything that the defendant intended to be used in a manner that if so used would make
11 it capable of causing death or serious bodily injury.

12 *Correctional Facility*

13 *[Choose appropriate definition.]*

14 “Correctional facility” means any public or private residential facility, including an alcohol or
15 other drug treatment facility, that (1) includes construction fixtures designed to physically restrict
16 the movements and activities of juveniles or other individuals held in lawful custody in the
17 facility and (2) is used for the placement of any juvenile who has been adjudicated as having
18 committed an offense, any nonoffender, or any other individual convicted of a criminal offense.

19 *[Or]*

20 “Correctional facility” means any public or private residential facility that (1) includes
21 construction fixtures designed to physically restrict the movements and activities of juveniles or
22 other individuals held in lawful custody in the facility and (2) is used for the temporary
23 placement of any juvenile who is accused of having committed an offense, any nonoffender, or
24 any other individual accused of having committed a criminal offense.

1 *Possession*

2 “Possession” means actual care, custody, control, or management. [*Include if raised by the*
3 *evidence:* Possession is a voluntary act if the possessor knowingly obtains or receives the thing
4 possessed or is aware of his control of the thing for a sufficient time to permit him to terminate
5 his control.]

6 *Intentionally Possessing Something*

7 A person intentionally possesses something if it is his conscious objective or desire to possess
8 that thing.

9 *Knowingly Possessing Something*

10 A person knowingly possesses something if he is aware that he is possessing that thing.

11 *Knowledge of [Prohibited Substance or Item]*

12 A person knows that something is [*prohibited substance or item*] if he is aware that the thing is
13 [*prohibited substance or item*].

14 *Recklessness About [Prohibited Substance or Item]*

15 A person is reckless about whether something is [*prohibited substance or item*] if he is aware of
16 but consciously disregards a substantial and unjustifiable risk that the thing is [*prohibited*
17 *substance or item*]. The risk must be of such a nature and degree that its disregard constitutes a
18 gross deviation from the standard of care that an ordinary person would exercise under all the
19 circumstances as viewed from the actor’s standpoint.

20 *Knows That He Is in a Correctional Facility*

21 A person knows that he is in a correctional facility if he is aware that he is in a correctional
22 facility.

23 *Recklessness About Whether He Is in a Correctional Facility*

1 A person is reckless about whether he is in a correctional facility if he is aware of but
2 consciously disregards a substantial and unjustifiable risk that he is in a correctional facility. The
3 risk must be of such a nature and degree that its disregard constitutes a gross deviation from the
4 standard of care that an ordinary person would exercise under all the circumstances as viewed
5 from the actor’s standpoint.

6 **Application of Law to Facts**

7 You must decide whether the state has proved, beyond a reasonable doubt, three elements. The
8 elements are that—

9 1. the defendant, on or about [date], in [county] County, Texas, intentionally or
10 knowingly possessed [prohibited substance or item] in [name of correctional facility], a
11 correctional facility; and

12 2. the defendant knew or was reckless about whether the thing possessed was [prohibited
13 substance or item]; and

14 3. the defendant knew or was reckless about whether he was in a correctional facility.

15 You must all agree on the three elements listed above.

16 If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of the three
17 elements listed above, you must find the defendant “not guilty.”

18 If you all agree the state has proved each of the three elements listed above, you must find the
19 defendant “guilty.”

20 *[Insert any other instructions raised by the evidence. Then continue with the verdict form found*
21 *in CPJC 2.1, the general charge.]*

22 **Comment**

23 Possessing a prohibited substance or item while in a juvenile facility is prohibited by and defined
24 in Tex. Penal Code § 38.11(d). See CPJC 38.12 for information on statutory definitions.

