**7.6 Alien—Deported Alien Reentering United States**

**Without Consent (8 U.S.C. § 1326(a))**

 The defendant is charged in [Count \_\_\_\_\_\_\_ of] the indictment with being an alien who, after [removal] [deportation], reentered the United States in violation of Section 1326(a) of Title 8 of the United States Code. For the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

 First, [the defendant was [removed] [deported] from the United States] [the defendant departed the United States while an order of [removal] [deportation] was outstanding];

 Second, thereafter, the defendant knowingly and voluntarily reentered the United States without having obtained the consent of the Attorney General or the Secretary of the Department of Homeland Security, to reapply for admission into the United States; and

 Third, the defendant was an alien at the time of reentry.

 An alien is a person who is not a natural-born or naturalized citizen of the United States.

**Comment**

 Section 1326 provides three separate offenses for a deported alien: to enter, to attempt to enter, and to be found in the United States without permission. *United States v. Castillo-Mendez*, 868 F.3d 830, 835 (9th Cir. 2017); *United States v. Parga-Rosas*, 238 F.3d 1209, 1213 (9th Cir. 2001). Entry and being “found in” are general intent crimes; attempting reentry is a specific intent crime.  *Castillo-Mendez*, 868 F.3d at 835-36. Use this instruction for “entered,” Instruction 7.7 (Alien—Deported Alien Reentering United States Without Consent—Attempt) for “attempted reentry,” and Instruction 7.8 (Alien—Deported Alien Found in United States) for “found in.”

 As to the second element of this instruction, it should be noted that although 8 U.S.C. § 1326(a) provides that the statute is violated by an alien who “enters, attempts to enter, or is at any time found in, the United States, unless . . . prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented” to the alien’s reapplying for admission, it is common for the charging indictment in such prosecutions to refer to the lack of consent by the Secretary of the Department of Homeland Security.

 “[T]he Attorney General’s consent to reapply must come after the most recent deportation.” *United States v. Hernandez-Quintania*, 874 F.3d 1123, 1126 (9th Cir. 2017). If there is any evidence presented that the defendant obtained such consent, the second element should be supplemented to clarify that the government must only prove that the defendant did not obtain consent since the defendant’s most recent deportation.

 An alien has not reentered the United States for purposes of the crime of reentry of deported alien “until he or she is physically present in the country and free from official restraint.” *United States v. Gracidas-Ulibarry*, 231 F.3d 1188, 1191 n.3 (9th Cir. 2000) (citing *United States v. Pacheco-Medina*, 212 F.3d 1162, 1166 (9th Cir. 2000)). An alien is under official restraint if, after crossing the border, he is “‘deprived of his liberty and prevented from going at large within the United States.’” *United States v. Cruz-Escoto*, 476 F.3d 1081, 1185 (9th Cir. 2007) (citations omitted). An alien need not be in physical custody to be officially restrained. *Id.* (citing *United States v. Ruiz-Lopez*, 234 F.3d 445, 448 (9th Cir. 2000)). “‘[R]estraint may take the form of surveillance, unbeknownst to the alien.’” *Id.* (quoting *Pacheco-Medina*, 212 F.3d at 1164). The government has the burden of proving the defendant was free from official restraint but need not respond to a defendant’s free floating speculation that he might have been observed the whole time. *United States v. Castellanos-Garcia*, 270 F.3d 773, 777 (9th Cir. 2001).

 In *Almendarez-Torres v. United States*,523 U.S. 224, 244 (1998), the Supreme Court held that in a prosecution for illegal re-entry after deportation in violation of 8 U.S.C. § 1326(a), the existence of a prior aggravated felony conviction need not be alleged in the indictment and presented to the jury because the conviction constitutes a sentencing enhancement pursuant to 8 U.S.C. § 1326(b)(2) and “[a] prior felony conviction is not an element of the offense described in 8 U.S.C. § 1326(a).” *United States v. Alviso*, 152 F.3d 1195, 1199 (9th Cir. 1998). The Supreme Court’s opinion in *Apprendi v. New Jersey*, 530 U.S. 466 (2002) expressed doubt concerning the correctness of *Almendarez-Torres*; however, the Ninth Circuit has stated that “until the Supreme Court expressly overrules it, *Almendarez-Torres* controls.” *United States v. Pacheco-Zepeda*, 234 F.3d 411, 414-415 (9th Cir. 2000).

 To trigger an increase in the statutory maximum sentence under § 1326(b)(1)-(2), the

aggravating fact of the removal being subsequent to the predicate conviction must be submitted to the jury and proved beyond a reasonable doubt. *See United States v. Martinez*, 850 F.3d 1097,

1105 (9th Cir. 2017); *United States v. Salazar-Lopez*, 506 F.3d 748, 751-52 (9th Cir. 2007); *United States v. Covian-Sandoval*, 462 F.3d 1090, 1097-98 (9th Cir. 2006). However, if the temporal sequence of events is necessarily established by the evidence and jury verdict, then the absence of a special jury finding may not constitute reversible error. *Compare United States v. Calderon-Segura*, 512 F.3d 1104, 1110-11 (9th Cir. 2008) (holding that, because all evidence of prior removal related only to one removal in 1999, jury necessarily found beyond reasonable doubt not only fact of prior removal but also that removal occurred subsequent to 1997 conviction), *with* *Martinez*, 850 F.3d at 1108-09 (holding that jury’s finding of fact of prior removal could not be construed as finding that removal occurred subsequent to conviction where immigration documents submitted to jury contained mistakes).

 The third element, alienage, is an element of the offense that the government must prove. *United States v. Sandoval-Gonzalez*, 642 F.3d 717, 722 (9th Cir. 2011). A defendant who contends that his or her citizenship derives from the citizenship of a parent is not raising an affirmative defense. *Id*. at 721-24. The burden remains on the government to prove the defendant is an alien. *Id*. Alienage cannot be proven either by a prior deportation order alone or a defendant’s admission of noncitizenship alone without corroborating evidence. *United States v. Gonzalez-Corn*, 807 F.3d 989, 996 (9th Cir. 2015). These two facts taken together, however, may establish alienage. *See* *id*. at 992, 996 (providing example of instruction addressing alienage).

 A person who meets any of the qualifications set out in 8 U.S.C §1401 is a national or a citizen at birth.

 In the typical case the third element will turn on whether the defendant is a citizen, but in rare cases the issue could be whether the defendant is a national of the United States. *See* 8 U.S.C. §1101(a)(22) for a definition of national of the United States. *See* *also Perdomo-Padilla v. Ashcroft*, 333 F.3d 964, 967-68 (9th Cir. 2003).

*Revised Apr. 2019*