**7.7 Alien—Deported Alien Reentering United States**

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

The defendant is charged in [Count \_\_\_\_\_\_\_ of]] the indictment with being an alien who, after [removal] [deportation], attempted reentry into the United States in violation of Section 1326 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, the defendant had the specific intent to enter the United States free from official restraint;

Third, the defendant was an alien at the time of the defendant’s attempted reentry into the United States;

Fourth, the defendant had not 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

Fifth, the defendant did something that was a substantial step toward committing the crime.

A “substantial step” is conduct that strongly corroborates a defendant’s intent to commit the crime. To constitute a substantial step, a defendant’s act or actions must unequivocally demonstrate that the crime will take place unless interrupted by independent circumstances. Mere preparation is not a substantial step toward committing the crime.

Jurors do not need to agree unanimously as to which particular act or actions constituted a substantial step toward the commission of a crime.

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

**Comment**

An alien has not reentered the United States for purposes of the crime of reentry of a 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) (en banc) (citing *United States v. Pacheco-Medina*, 212 F.3d 1162, 1166 (9th Cir. 2000)).

The crime of attempted illegal reentry is a specific intent offense. *United States v. Castillo-Mendez*, 868 F.3d 830, 836 (9th Cir. 2017); *see also Gracidas-Ulibarry,* 231 F.3d at 1190 (discussing elements of offense where defendant claimed he was asleep when he entered United States). In an attempt case, the government must prove that the alien had a specific intent to enter the country free from official restraint.  *Castillo-Mendez*, 868 F.3d at 836; *United States v. Vazquez-Hernandez*, 849 F.3d 1219, 1225 (9th Cir. 2017). “Official restraint” means restraint by any government official, and thus an alien who enters the United States with the sole intent to go to jail lacks specific intent to enter the country free from official restraint. *United States v. Lombera-Valdovinos*, 429 F.3d 927, 929-30 (9th Cir. 2005); *see also United States v. Argueta-Rosales*, 819 F.3d 1149, 1156 (9th Cir. 2016) (stating that if the alien’s sole “intent was to be taken into custody,” then “no rational trier of fact could conclude [he] was guilty of the specific intent crime of attempted illegal reentry” (internal quotation marks and citation omitted)). “Official restraint” does not make substantial steps toward entry impossible, and thus an alien who was under official restraint so as to preclude a conviction for illegal reentry may still be guilty of attempted reentry. *United States v. Leos-Maldonado*, 302 F.3d 1061, 1063 (9th Cir. 2002).

The government “need not prove that entry free from official restraint was the defendant’s *sole* intent,” only “*a* specific intent.” *Argueta-Rosales*, 819 F.3d at 1157; *accord United States v. Cabrera*, 83 F.4th 729, 737 (9th Cir. 2023) (upholding instruction that included “language indicating that the government need not prove a defendant’s intent to evade authorities was his *sole* intent in entering the United States”). If there is conflicting evidence as to whether the defendant possessed any specific intent to remain free of restraint, the jury should decide the issue. *See Argueta-Rosales*, 819 F.3d at 1156.

For an attempt to commit the crime, jurors do not need to agree unanimously as to which particular act or actions constituted a substantial step toward the commission of a crime. *United States v. Hofus*, 598 F.3d 1171, 1176 (9th Cir. 2010). The attempt coupled with the specification of the time and place of the attempted illegal reentry may provide the requisite overt act that constitutes a substantial step toward completing the offense. *United States v. Resendiz-Ponce*, 549 U.S. 102, 107-08 (2007).

Regarding sentencing, *see* the Comment to 7.6 (Alien—Deported Alien Reentering United States Without Consent) for a discussion of *Almendarez-Torres v. United States*, 523 U.S. 224 (1998).

The “strongly corroborates” language comes from *United States v. Snell*, 627 F.2d 186, 187 (9th Cir. 1980) (per curiam) (“A conviction for attempt requires proof of culpable intent and conduct constituting a substantial step toward commission of the crime that strongly corroborates that intent.”) and *United States v. Darby*, 857 F.2d 623, 625 (9th Cir. 1988) (same).

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