**7.8 Alien—Deported Alien Found in United States (8 U.S.C. § 1326(a))**

 The defendant is charged in [Count \_\_\_\_\_\_\_ of] the indictment with being an alien who, after [removal] [deportation], was found in 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 voluntarily entered the United States;

 Third, [at the time of entry the defendant knew [he] [she] was entering the United States] [after entering the United States the defendant knew that [he] [she] was in the United States and knowingly remained];

 Fourth, the defendant was found in 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;

 Fifth, the defendant was an alien at the time of the defendant’s entry into the United States; and

 Sixth, the defendant was free from official restraint at the time [he][she] entered the United States.

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

**Comment**

“Found in” the United States is a general intent crime. *United States v. Castillo-Mendez*, 868 F.3d 830, 836 (9th Cir. 2017). In *United States v. Salazar-Gonzalez*,458 F.3d 851, 856 (9th Cir. 2006), *overruled on other grounds by* *United States v. Orozco-Acosta*, 607 F.3d 1156 (9th Cir. 2010), the court clarified “an area of confusion in our § 1326 jurisprudence” by holding “that for a defendant to be convicted of a § 1326 ‘found in’ offense, the government must prove beyond a reasonable doubt that he entered voluntarily *and* had knowledge that he was committing the underlying act that made his conduct illegal—entering or remaining in the United States.”

 In *United States v. Martinez*, 850 F.3d 1097 (9th Cir. 2017), the court reiterated that the jury is required to make a finding regarding the defendant’s removal date and that the government is required to prove that date beyond a reasonable doubt. *See id.* at 1099, 1105. This finding may be made by a special jury verdict form.

 Mere physical presence is inadequate to support a conviction for being found in the United States. *See United States v. Ruiz-Lopez*, 234 F.3d 445, 448 (9th Cir. 2000) (holding proof that border patrol encountered the defendant at the port of entry does not constitute adequate proof that the defendant was found in the United States free from official restraint). “The burden is on the government to establish lack of official restraint.” *United States v. Bello–Bahena*, 411 F.3d 1083, 1087 (9th Cir. 2005); *see also Castillo-Mendez*, 868 F.3d at 838 (“In ‘found in’ cases, on the other hand, the government must prove that at the time a defendant entered, he was free from official restraint as a matter of fact, irrespective of his knowledge or intent to avoid that restraint.”). 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).

 Whether an alien crosses the border at a designated point of entry or elsewhere weighs on the question of official restraint. *Cruz-Escoto*, 476 F.3d at 1085. When an alien crosses the border at a designated point of entry and proceeds directly in the manner designated by the government where he is stopped when he presents himself to the authorities, he has not yet entered and cannot be found in the United States. *Id.* (citing *United States v. Zavala-Mendez*, 411 F.3d 1116, 1121 (9th Cir. 2005)). Aliens who sneak across the border are under official restraint only if they are under constant governmental observation from the moment they set foot in this country until the moment of their arrest. *Id.* (citing *United States v. Castellanos-Garcia*, 270 F.3d 773, 775 (9th Cir. 2001)).

 An alien is under official restraint if he is “‘deprived of his liberty and prevented from going at large within the United States.’” *Cruz-Escoto*, 476 F.3d at 1085 (citations omitted). An alien need not be in physical custody to be officially restrained. *Id*. (citing *Ruiz-Lopez*, 234 F.3d at 448). “‘[R]estraint may take the form of surveillance, unbeknownst to the alien.’” *Id*. (quoting *United States v. Pacheco-Medina*, 212 F.3d 1162, 1164 (9th Cir. 2000)). 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. *Castellanos-Garcia*, 270 F.3d at 777. When there is some evidentiary support for it, the court might consider instructing the jury on the defense of constant official restraint as follows:

THEORY OF DEFENSE

In this case when deciding whether the defendant is guilty or not guilty of the crime of being a deported alien found in the United States, the government must prove beyond a reasonable doubt that the defendant was not under constant official restraint when [he] [she] entered the United States. If the defendant was under constant official restraint, [he] [she] cannot be found guilty of being found in the United States.

“Under constant official restraint” means the defendant was under constant, continuous observation by a United States officer, either directly or by camera surveillance, from the moment [he] [she] first crossed the border and entered the territory of the United States up until the time of [his] [her] apprehension. If the individual was first observed after [he] [she] had physically crossed the border of the United States, then [he] [she] is not under constant official restraint.

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

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