



C A L I F O R N I A

DEPARTMENT of JUSTICE

D I V I S I O N O F C R I M I N A L L A W

RACE-BLIND CHARGING GUIDELINES

Penal Code Section 741

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GUIDELINES FOR RACE-BLIND CHARGING PURSUANT TO PENAL CODE SECTION 741

The California Department of Justice is issuing the following Race-Blind Charging Guidelines in accordance with Penal Code section 741, subdivision (a). These Guidelines address the specific statutory requirements listed in Penal Code section 741, as well as provide practical guidance as to how to implement those requirements.¹ Studies have shown that unconscious bias may infect decisions within the criminal justice system, despite the best intentions of the actors involved.² These Guidelines are intended to operate in accordance with the spirit, goal, and legislative intent behind Penal Code section 741, which is namely to reduce the potential for unconscious bias to influence the initial charging decision in a case.

I. Redaction of Cases Received from Law Enforcement Agencies and Suspect Criminal History Documentation; General Statement of Purpose and Scope

- (a) Redaction Requirement: Effective January 1, 2025, Penal Code section 741, subdivision (b) (1) requires prosecution agencies to redact all case materials received from law enforcement agencies, including police reports and suspect criminal history documentation, to remove direct means of identifying the suspect(s)', victim(s)', and witness(es)' race in order to be used for a race-blind initial charging evaluation, which shall precede the ordinary charging evaluation.
- (b) Method of Redaction: The redaction process may occur in a separate version of the documents and may be done mechanically, by hand, by personnel not associated with the charging of the case, or by automation using computer software. The method used for redaction must reasonably ensure correct redaction. The redaction may be applied to the entire report or only to the "narrative" portion of the report, so long as the portion submitted for initial review is sufficient for that review and the unredacted portions are not part of the initial charging evaluation. (§ 741, subd. (b)(1).)
- (c) Research supports the notion that implicit bias is most likely to occur in situations where prosecutors are making a high volume of quick decisions.³ Accordingly, when implementing race-blind charging procedures, prosecution agencies should be especially mindful of these Guidelines when handling these routine cases.

1 The Department of Justice contemplates these Guidelines applying, at a minimum, to all criminal cases. The language of Penal Code section 741 does not appear to apply to juvenile cases.

2 Assem. Bill No. 2778 (Stats. 2022, ch. 806, § 1), citing Baughman et al., *Blinding Prosecutors to Defendants' Race: A Policy Proposal to Reduce Unconscious Bias in the Criminal Justice System* (Dec. 2015) *Behavioral Science & Policy*, 70.

3 See Smith, Robert J., and Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion* (2011) *Seattle UL Rev.* 35, 795; Singh, Balbir, et al., *When Practice Fails to Reduce Racial Bias in the Decision to Shoot: The Case of Cognitive Load* (2020) *Social Cognition* 38.6, 555-570; Kleider-Offutt, Heather M., Amanda M. Clevinger, and Alesha D. Bond, *Working Memory and Cognitive Load in the Legal System: Influences on Police Shooting Decisions, Interrogation and Jury Decisions* (2016) *Journal of Applied Research in Memory and Cognition* 5.4, 426-433.

II. Race-Blind Initial Charging Evaluation; Purpose and Scope

- (a) (1) Penal Code section 741, subdivision (b) requires a two-step process for charging cases—
(1) a “race-blind initial charging evaluation” based only on redacted reports, and then (2) the “ordinary charging evaluation” based on unredacted reports and all available evidence. The initial charging evaluation is intended to perform a gate-keeping and recording function prior to the actual charging process, rather than the more thorough second review to determine individual charges or decide charges with certainty. Accordingly, the initial charging evaluation shall determine only whether a case should be charged or not be charged against a particular defendant and shall not determine individual charges. (§ 741, subd. (b)(2).)
- (2) A case “should be charged” for purposes of this section if the reviewing prosecutor determines, based on redacted material, that a charge, of any type, should be alleged in the case. A case “should not be charged” for the purposes of this section if the reviewing prosecutor determines that no charge, of any type, should be alleged in the case.
- (3) A “case” for these purposes means the collection of charges as they would appear in a single criminal complaint. Other evidence may be considered as part of this initial charging evaluation, so long as the other evidence does not reveal redacted facts. (§ 741, subd. (b)(2).) The initial charging evaluation shall be performed by a prosecutor who does not have knowledge of the redacted facts for that case. (§ 741, subd. (b)(2).)
- (4) The prosecutor performing the initial charging evaluation shall use some means, handwritten or electronic, to record the decision of the initial charging evaluation for each case (i.e., “should be charged” or “should not be charged” or words to that effect).
- (b) (1) The initial charging evaluation shall be based solely on redacted information, including redacted reports, criminal histories, and narratives. (§ 741, subd. (b)(2).)
- (2) At a minimum, for the initial charging evaluation, the prosecution agency must rely on the redacted narrative portion of the police reports received by the prosecution agency from a law enforcement agency. (§ 741, subd. (b)(1).) The prosecution agency may, at its option, consider for the initial charging evaluation all materials received, including the entire police report(s) and the criminal history of the suspect, so long as all materials have been redacted to remove direct means of identifying the race of the suspect(s), victim(s), and witness(es). (§ 741, subds. (b)(1) & (2).) Subsequent “supplemental” reports, received after an initial charging evaluation for a case has already been made, need not be redacted and no second or subsequent race-blind review is required.
- (3) Only the materials used by the prosecution agency to make the initial charging evaluation must be redacted as provided below.

III. Redaction Process for Initial Charging Evaluation

- (a) Each prosecution agency must create a redaction process for the materials used for the initial charging evaluation to ensure that the “direct means” of identifying the race of the suspect(s), victim(s), and/or witness(es) have been removed or redacted, as required by Penal Code section 741, subdivision (a). Personnel not associated with evaluating or charging the case shall perform the redaction, either manually or through automation, so long as the method used reasonably ensures correct redaction. (§ 741, subd. (b)(1).)

- (b) For purposes of this section, the “direct means” for identifying the race of the suspect(s), victim(s) and witness(es) are (1) the stated race or ethnicity, (2) the first or last name, and (3) the skin color or complexion. In addition, the prosecution agency may redact other information that provides an indirect means for identifying the race of the suspect(s), victim(s), and/or witness(es).
- (c) For purposes of this section, “redaction” means that, by way of removal or obliteration, the prosecutor performing the initial charging evaluation would not be privy to facts revealing race as they would have been contained in the materials reviewed for the initial charging evaluation. The charging prosecutor, at the initial charging evaluation stage, should also not be privy to any other evidence that could reveal the race of any suspect, victim or witness including, but not limited to, photographs, recordings, surveillance videos, or cell phone data.
- (d) A prosecution agency may use any appropriate means to effectively and efficiently locate the direct means for identifying race within a document, to redact that information, and to produce the resulting material for review by the prosecutor performing the initial charging evaluation. The method used must reasonably ensure correct redaction. (§ 741, subd. (b)(1).) Examples of redaction processes that would satisfy the statute include, but are not limited to the following:
 - (1) The police reports from the investigating agency are received by the prosecution agency, and the narrative portions of the reports are separated from the complete reports and the criminal history information. Those narrative portions are then reviewed by staff, and the direct means of identifying race are redacted by hand. The redacted narrative portions are then provided to the prosecutor performing the initial charging evaluation for review. The decision from the initial charging evaluation is hand recorded in a log for later comparison to the second review.
 - (2) The police reports from the investigating agency are received by the prosecution agency as scanned files (e.g., a PDF) which may be opened using a standard commercial computer program for reviewing scanned files (e.g., Adobe Acrobat). The narrative is then separated from the complete file and redacted using that same program. After the narrative is separated and redacted, it is provided to the prosecutor performing the initial charging evaluation for review. The decision from the initial charging evaluation is recorded in a spreadsheet on a computer.
 - (3) The police reports from the investigating agency are received by the prosecution agency as scanned files to which Optical Character Recognition (OCR) is performed on the narrative portion of the police reports using a commercial document image program (e.g., Adobe Acrobat). An application, which may or may not be incorporated into the prosecution agency’s case management system, is then applied to the OCR’d narrative which locates (using a predetermined list) and automatically redacts the direct means of identifying race, producing a redacted version of the document. The redacted narrative is then provided to the prosecutor performing the initial charging evaluation. The decision from the initial charging evaluation is recorded in the office’s case management system.
 - (4) The prosecution agency, either internally or working with a third-party vendor, develops a “batched” process to replicate each of the steps in example (3) above automatically upon receipt of scanned police reports from investigating agencies. The decision from the initial charging evaluation is recorded in the office’s case management system.

- (e) The method of redaction used should reasonably ensure correct redaction. (§ 741, subd. (b) (1).) Where software is used, it should be validated before implementation. The software selected should also have appropriate safeguards to prevent unauthorized access to the sensitive information.
- (f) Software appropriate for review and redaction of materials includes, but is not limited to, the following:
 - (1) Adobe Acrobat Pro DC: Adobe Acrobat Pro DC allows users to redact sensitive information from PDF documents by permanently removing the selected text, images, or metadata. To use this software, the document is opened in Acrobat Pro DC and the user employs the “Redact” tool from the “Protect” tab. The user then highlights the sensitive information to be redacted, and the software will replace the selected information with a black box.
 - (2) Foxit PhantomPDF: Foxit PhantomPDF is a PDF editor that allows users to redact sensitive information from PDF documents. To use this software, the document is opened in Foxit PhantomPDF and then the user employs the “Redaction” tool from the “Protect” tab. The user then highlights the sensitive information to be redacted, and the software will replace the selected information with a black box.
 - (3) PDFsam Basic: PDFsam Basic is a free, open-source PDF editor that allows users to redact sensitive information from PDF documents. To use this software, the document is opened in PDFsam Basic, the user then employs the “Redact” tool. The user then highlights the sensitive information to be redacted, and the software will replace the selected information with a black box.
 - (4) ABBYY FlexiCapture: ABBYY FlexiCapture is a data capture and document processing software that can be used to redact sensitive information from documents. To use this software, the document is uploaded into ABBYY FlexiCapture, the user then employs the “Redaction” tool. The user then highlights the sensitive information to be redacted, and the software will replace the selected information with a black box.
- (g) When redacting case materials describing multiple suspects, victims or witnesses, multiple names or other descriptors should be replaced with a generic term that allows the reviewing prosecutor to distinguish between multiple suspects, victims, or witnesses. For example, replace “John Doe” with “Person 1,” or replace “dark complexion” with “complexion 1.”
 - (1) As a further example, an original version of a narrative would read as follows: “John Smith, who was robbed, identified his attacker as a Black male wearing jeans shorts and a red tank top. Joe Doe, a Black male, was later detained by police wearing jean shorts and a red tank top and Joe Doe is a male with dark complexion and long black hair. Later, John Smith was brought to the scene of Joe Doe’s detention and identified Joe Doe as his robber.”
 - (2) The redacted version could read as follows: “[Person 1], who was robbed, identified his attacker as a [race] male wearing jeans shorts and a red tank top. [Person 2] was later detained by police wearing jean shorts and a red tank top and [Person 2] is a male with [complexion 1] and long black hair. Later, [Person 1] was brought to the scene of [Person 2’s] detention and identified [Person 2] as his robber.”

IV. Use of Artificial Intelligence (AI) Tools for Redaction

- (a) Incorporating AI tools for redaction can greatly improve the efficiency and accuracy of the redaction process. However, it is important to ensure that the AI system used is validated before implementation and that appropriate safeguards are in place to prevent unauthorized access to sensitive information.
- (b) AI tools can use natural language processing (NLP) algorithms to identify sensitive information in the document. The AI system can be trained on a large set of examples to recognize specific types of information, such as names or complexion, that need to be redacted.
- (c) Once the information to be redacted has been identified, the AI system can automatically redact the information by removing it or replacing it with generic terms discussed in these guidelines. The AI system may be trained on a set of examples to know the preferred method of redaction for specific types of information.
- (d) The AI system's performance should be monitored to ensure the accuracy of the redaction. In cases where the AI system creates an error, a human reviewer can manually review the document and make any necessary corrections.

V. Second Review for Charging

- (a) After completion of the race-blind initial charging evaluation, the case shall proceed to a second, complete review for charging using unredacted reports and all available evidence, i.e., whatever available evidence the charging prosecutor deems appropriate in the normal course of charging a case. (§ 741, subd. (b)(3).) During the second review, the prosecutor may consider and charge in a criminal complaint any applicable charges and enhancements, or the case may be submitted to a grand jury. (§ 741, subd. (b)(3).)
- (b) The second review is intended to be the ordinary charging process for the prosecution agency without limitation on the information or evidence that a charging prosecutor may consider, the methodologies used, or the timeframe in which this charging consideration is performed.
- (c) The prosecutor performing the second review for charging must be the same prosecutor who performed the initial charging review. If the prosecutor who performed the initial charging review is no longer available, the race-blind initial charging review must be performed anew by a different prosecutor, who will then also ultimately perform the second review for charging.
- (d) It is expected that the second complete review using all available evidence will sometimes result in prosecutors changing their determination from the initial charging evaluation.

VI. Documentation of Charging Decision

- (a) The prosecution agency should document all charging decisions—both the initial charging evaluation and the second, complete review. This includes documenting either of the following circumstances as part of the case record for a case:
 - (1) The initial charging evaluation determined that the case should not be charged, and the second review determined that a charge, of any type, shall be filed, or
 - (2) the initial charging evaluation determined that the case should be charged, and the second review determined that no charge, of any type, would be filed (§ 741, subd. (b)(4)(A)(i)-(ii).

- (b) The prosecution agency shall also document the explanation for an occurrence of either of the above two circumstances as part of the case record or within the case management system. (§ 741, subd. (b)(4)(B).) The charging prosecutor should specifically explain why the change described in (a)(1) or (a)(2) occurred.
- (c) If this explanation is being documented within a case management system or captured using a form, each prosecution agency may develop and utilize any number of predefined explanations (e.g., review of video revealed a legal defense; awaiting additional evidence/rejected for follow-up; important evidence not collected (e.g., third-party statements); suspect eligible for pre-filing diversion; suspect provided proof of status (e.g., driver's license, program completion); suspect's custody status/existing sentence affected charging decision; suspects probation or parole status affected charging decision; victim's concerns or requests affected charging decision; race redaction made mistake(s) that affected charging decision), so long as an "other" category (with space for explanation) also exists for any explanation not covered by the predefined choices.
- (d) The documented change between the result of the initial charging evaluation and the second review, as well as the explanation for the change, must be disclosed, upon request, after sentencing in the case or dismissal of all charges comprising the case, subject to Penal Code section 1054.6 or any other applicable law. Responses to such requests shall be governed by the terms of the California Public Records Act (Government Code section 7920, et seq.). (§ 741, subd. (b)(4)(C).)

VII. Inability to Conduct Race-Blind Initial Charging Evaluation

- (a) If a prosecution agency was unable to put a case through a race-blind initial charging evaluation, the reason for that inability must be documented and retained by the agency. (§ 741, subd. (b)(5).)
- (b) If such an explanation is being documented within a case management system, or captured using a form, each prosecution agency may develop any number of predefined explanations (e.g., redaction process failed to account for term revealing race), so long as an "other" category (with space for explanation) also exists for any explanation not covered by the predefined choices.
- (c) A list of cases in which the race-blind initial charging evaluation was unable to be performed, and the explanation for why the evaluations were not able to be performed shall be made available to the public upon request. (§ 741, subd. (b)(5).) The information may be redacted to the extent necessary to protect core attorney work product under Penal Code section 1054.6. Responses to such requests shall be governed by the terms of the California Public Records Act (Government Code section 7920 et seq.).

VIII. Collection of Data and Availability for Research Purposes

- (a) Each county in which a prosecution agency resides must, on an annual basis, collect the data resulting from the race-blind initial charging evaluation process as described in these guidelines (§ 741, subd. (b)(6)), except as such information is protected by privilege including, but not limited to, that found in Penal Code section 1054.6. Each county must ensure that the data is collected, stored and transmitted in a way appropriate to protect sensitive information.

- (b) The collected data must be made available for research purposes to bona fide accredited public or private nonprofit educational institutions, or to any other nonprofit bona fide research institution accredited by the United States Department of Education or the Council for Higher Education, for bona fide research purposes.
- (c) Responses to requests for research data shall be governed by the terms of the California Public Records Act (Government Code section 7920 et seq.).
- (d) Only the raw data generated by the process, rendered anonymous for privacy, shall be provided for research; the underlying materials, reports, or criminal history information are not required to be produced by these Guidelines. The raw data would include crimes the prosecution agency included in the race-blind process and crimes the prosecution agency excepted from the race-blind process, statistics regarding both changes and consistent charging decisions between the two stages, information regarding failed attempts to use the race-blind system, and the race information data of the suspects connected to those changes or failures.

IX. Exceptions to the Race-Blind Process

- (a) Prosecution agencies may exclude the crimes listed at Penal Code section 741, subdivision (c) from the race-blind charging process.
- (b) Each prosecution agency may further remove or exclude certain classes of crimes or factual circumstances from a race-blind initial charging evaluation. (§ 741, subd. (c).) “Classes of crimes” refers to subdivisions within particular sections of the Penal Code describing different crimes, e.g., section 368 describes different types of elder abuse, or a generic description that could be subsumed under multiple Penal Code sections, e.g., fraud.
- (c) Prosecuting agencies shall keep a list of crimes or classes of crimes that they do not include in race-blind review and the reasons for their exclusion from that review. This list of exclusions and the reasons for exclusion shall be available upon request to the Department of Justice and members of the public. (§ 741, subd. (c).) Requests for this data shall be governed by the terms of the California Public Records Act (Government Code section 7920 et seq.).

X. Glossary of Terms

- (a) **Race-Blind Initial Charging Evaluation:** The first step discussed in Penal Code section 741 for charging a criminal case, in which the case information and suspect criminal history documentation are redacted to remove the direct means for identifying the race of the suspect(s), victim(s) and witness(es) and used to determine whether, as a general matter, the case should be charged. This evaluation is performed by a prosecutor who does not have knowledge of the redacted information.
- (b) **Redacted:** To censor or conceal specific information in a document or record. In the context of the race-blind process for charging a criminal case as required by Penal Code section 741, the redaction is applied to the case information and suspect criminal history documentation in order to perform the race-blind initial charging evaluation. For purposes of race-blind charging, “redaction” does not require the “black box” style for concealing information. Rather, it encompasses any means of removal or obliteration of the direct means for identifying race, such that the prosecutor performing the initial charging evaluation would not be privy to facts revealing race as they would have been contained in the materials reviewed for the initial charging evaluation.

- (c) **Narrative:** A description or account of an event or situation, often in chronological order. In the context of the race-blind process for charging a criminal case required by Penal Code section 741, the narrative refers to the portion of the report that may be redacted for the purpose of the race-blind initial charging evaluation.
- (d) **Second Review for Charging:** The second step in the race-blind process required by Penal Code section 741 for charging a criminal case, in which the case information and suspect criminal history documentation are reviewed using the unredacted information, along with all available evidence. This review mimics the ordinary criminal charging process that pre-existed the race-blind process, and is used to determine the most applicable individual charges and enhancements.
- (e) **Criminal Complaint:** A written accusation or formal charge made by a prosecutor against a person suspected of committing a crime.
- (f) **Reasonably ensure correct redaction:** This refers to the level of confidence that the redaction process will accurately identify and remove sensitive information from the document without causing harm to the rest of the information contained in the document. The redaction process should have a low error rate and should not cause unintended consequences, such as removing information that should not have been redacted or altering the meaning of the document. Methods employed by prosecution agencies to ensure correct redaction may also include the following:
 - (1) Regularly reviewing a random sample of the redacted documents to ensure that sensitive information has been accurately removed;
 - (2) Conducting user testing to ensure that the redaction process is user-friendly and easy to use;
 - (3) Monitoring the redaction process to ensure that there are no unintended consequences, such as removing information that should not have been redacted or altering the meaning of the document;
 - (4) Keeping a record of the redaction process and documenting any issues or concerns that arise during the process.
- (g) **Validated:** This refers to the process of testing and verifying that the software used for redaction is accurate, reliable, and suitable for the intended purpose. This includes testing the software on a representative set of documents to ensure that it correctly identifies and redacts sensitive information. Methods employed by prosecution agencies to ensure validation of software include the following:
 - (1) Conducting a thorough evaluation of the software's accuracy, reliability, and suitability for the intended purpose;
 - (2) Testing the software on a representative set of documents to ensure that it correctly identifies and redacts sensitive information;
 - (3) Monitoring the software's performance over time to ensure that it remains accurate and reliable;
 - (4) Keeping a record of the software validation process and documenting any issues or concerns that arise during the process;
 - (5) Regularly updating the software to ensure that it remains accurate and up- to-date.