

Life Without Parole and Felony Murder Sentencing in California

A report of the **Special Circumstances Conviction Project**
In collaboration with the **Felony Murder Elimination Project**
And the UCLA Center for the **Study of Women|Streisand Center**

UCLA College Social Sciences

CSW

CENTER FOR THE STUDY OF WOMEN

B A R B R A
STREISAND
C E N T E R

SPECIAL
CIRCUMSTANCES
CONVICTION
PROJECT



Life Without Parole and Felony Murder Sentencing in California

**A report of the Special Circumstances Conviction Project
In collaboration with the Felony Murder Elimination Project
And the UCLA Center for the Study of Women|Streisand Center**

With generous support from UCLA Office of Research and Creative Activities

Written by Daniel Trautfield

In collaboration with Grace Kyungwon Hong and Joanne Scheer
With thanks to Randall Akee and Angela Lee

Designed by Kaya Napachoti

Recommended citation:

Special Circumstances Conviction Project. "Life Without Parole and Felony Murder Sentencing in California." Written by Daniel Trautfield. UCLA Center for the Study of Women|Streisand Center, 2023.

About the Organizations

The **Special Circumstances Conviction Project** is a research collaboration between community-based organizers, faculty, students, and staff that collects and analyzes never before seen conviction data from state and local institutions to understand California's criminal justice system. Of particular importance to the project is the prevalence and impact of California's special circumstance law, which delineates the conditions under which people can be sentenced to life without the possibility of parole (LWOP).

The **Felony Murder Elimination Project (FMEP)** is a grassroots policy organization dedicated to eliminating the felony murder rule. FMEP believes in an equitable and proportionate justice system and strives not only to bring an end to this draconian law, but to bring relief to those who are serving severe and manifestly disproportionate sentences by its use. FMEP is committed to eliminating extreme sentencing in California, particularly the death penalty and life without the possibility of parole, through community outreach and organization, public awareness, comprehensive and accessible data, and legislative and political action.

The **UCLA Center for the Study of Women|Streisand Center** works towards a world in which education and scholarship are tools for social justice feminism, improving the lives of people of all genders. The UCLA Center for the Study of Women is an internationally recognized center for research on gender, sexuality, and women's issues and the first organized research unit of its kind in the University of California system.

Introduction

Over 5000 people in California are currently serving life without the possibility of parole (LWOP). Despite the magnitude of this sentence and its implications for California's communities, no comprehensive compilation or analysis exists of the specific convictions leading to the imprisonment of those serving LWOP or how factors such as race, age, and gender affect sentencing outcomes. In 2020, Felony Murder Elimination Project and the UCLA Center for the Study of Women|Streisand Center established the Special Circumstances Conviction Project (SCCP) to address this gap in knowledge. This initiative aims to conduct the first thorough quantitative investigation into California's history of LWOP sentencing. SCCP has collected thousands of conviction records from various statewide institutions, focusing on the prevalence and impact of California's special circumstance law, which outlines the conditions under which individuals may be sentenced to LWOP and the death penalty. The ultimate objective is to enhance public knowledge and encourage academic research on the criminal legal system.

Background

Life Without Parole and Special Circumstances

LWOP was initiated in California in the late 19th century¹ but was rarely used for much of its existence.² After the death penalty was ruled unconstitutional in 1976, the California legislature approved a new set of laws whose purpose was to set guidelines for which individuals could be eligible for death sentences and reduce the arbitrary (and racist) method by which individuals had been previously chosen. These guidelines are referred to as California's special circumstance law and are delineated in Penal Code 190.2. While these special circumstances were designed with the death penalty in mind, they also initiated California's modern LWOP statute - any individual who is determined to have committed first degree murder with a special circumstance becomes eligible for the death penalty and faces a mandatory minimum of LWOP. One year after the creation of the special circumstances by the legislature, California voters approved Proposition 7 which greatly expanded the list of special circumstances, thereby increasing

the breadth of circumstances for which one can face a mandatory life in prison sentence. Post Proposition 7, California continued to add to this list of special circumstances through various voter approved initiatives. Today, Penal Code 190.2 includes 22 special circumstances of vastly disparate nature including intentional murder by use of an explosive device and unintentional murder by an associate during a burglary (otherwise known as felony murder).³

The expanded nature of the special circumstances penal code reinstates the arbitrariness that its creators sought to eliminate.

Despite the intention to narrow eligibility for the death penalty, California's existing special circumstances overlap almost entirely with the category of first-degree murder, meaning that the vast majority of first-degree murder convictions are eligible for a death or LWOP sentence. A 2008 study found that, in California, "95 percent of all first-degree murder convictions and 59 percent of all second-degree murder and voluntary manslaughter convictions were death eligible"

1. Bancroft & Co. 1874. 1873-74 Amendments to the Codes of Calif. Penal Code, 314. 187. In 1850 California's penal code was amended to include life in prison as an option apart from death for first degree murder convictions. After amendment, Section 190 read as follows: "Every person guilty of murder in the first degree, shall suffer death or confinement in the State Prison for life, at the discretion of the jury, trying the same; or upon a plea of guilty, the Court shall determine the same; and every person guilty of murder in the second degree, is punishable by imprisonment in the State Prison not less than ten years."

2. California Law Revision Commission. 2021. "2021 Annual Report." Accessed June 2, 2023. http://www.clrc.ca.gov/CRPC/Pub/Reports/CRPC_AR2021.pdf.

3. Cal. Penal Code § 190.2 (West 2021).

and as a result, eligible for LWOP.⁴ The expanded nature of the special circumstances penal code reinstates the arbitrariness that its creators sought to eliminate. Given the wide range of behavior made eligible for death penalty and LWOP sentences, district attorneys have much more discretion in determining who to charge with special circumstances. This increased arbitrariness and expanded discretion for district attorneys allows for the potential of increased racial disparities within sentencing outcomes.

Felony Murder

The most widely used special circumstance is felony murder which “imposes sentences associated with murder on people who neither intended to kill nor anticipated a death, and even on those who did not participate in the killing.”⁵ In California, an individual can be sentenced to LWOP by exhibiting “reckless indifference to human life” and for their role as a “major participant” in certain felonies: robbery, kidnapping, burglary, rape, sodomy, lewd or lascivious acts upon a child, oral copulation, arson, train wrecking, mayhem, or carjacking. The most common underlying felonies for felony murder convictions are robbery and burglary.⁶ The felony murder rule does not mandate a mens rea requirement, or in other words, a requirement for proof of intentional wrongdoing, in order to convict an individual of first degree murder and thereby impose LWOP or death penalty sentence.

The felony murder rule has been consistently critiqued for its lack of theoretical integrity and for the way in which it presents an “opportunity for implicit and explicit bias to thrive.”

Felony murder, therefore, associates a range of actions and mental states with the culpability of intentional first degree murder. The felony murder rule has been consistently critiqued for its lack of theoretical integrity and for the way in which it presents an “opportunity for implicit and explicit bias to thrive”.⁷

4. Baldus, D. C., Woodworth, G., Grosso, C. M., Laurence, M., Fagan, J. A., & Newell, R. (2019). “Furman at 45: Constitutional Challenges from California’s Failure to (Again) Narrow Death Eligibility.” *Journal of Empirical Legal Studies* 16, no. 4. (2019): 693-730. <https://doi.org/10.1111/jels.12254>.

5. The Sentencing Project. “Felony Murder: An On-Ramp to Extreme Sentencing.” The Sentencing Project, August 12, 2020. Accessed June 2, 2023. [sentencingproject.org/publications/felony-murder-an-on-ramp-to-extreme-sentencing/](https://www.sentencingproject.org/publications/felony-murder-an-on-ramp-to-extreme-sentencing/).

6. Shatz, Steven F., and Nina Rivkind. “The California Death Penalty Scheme: Requiem for Furman.” *New York University Law Review* 72, no. 6 (December 1997).

7. Cohen, G. Ben, Justin D. Levinson, and Koichi Hioki. “Racial Bias, Accomplice Liability, and the Felony Murder Rule: A National Empirical Study,” *Denver Law Review*, forthcoming (February 6, 2023). Accessed June 2, 2023. SSRN: <https://ssrn.com/abstract=4411658>.

Methodology

SCCP gathered charging and conviction data on special circumstances convictions dating from 1978 (when Proposition 7 wrote the full range of special circumstances into California law) and 2021 (when the initial PRA process began). We utilized three data collection methods:

1. Public Records Act (PRA) requests to the California Department of Corrections and Rehabilitation (CDCR) and county district attorney offices;
2. California Rules of Court 10.500 administrative record requests to Superior Courts; and
3. searches of legal databases and news publications.

SCCP then merged datasets utilizing available unique identifiers such as name and date of birth, court case number, or CDCR number. The final data set contains conviction records for 4581 incarcerated individuals sentenced to LWOP, which we estimate to be 89% of the approximately 5100 individuals currently serving this sentence.⁸ These records include information pertaining to county of conviction, race, current age, offense date, sentencing

date, and certain conviction information.⁹ In addition, we determined specific special circumstance charging and sentencing information for 3,229 individuals, comprising 63% of those estimated to be serving LWOP.

8. We do not have an exact number of people serving LWOP because in its response to our PRA, CDCR stated that transmitted data excludes "offenders under the age of eighteen and offenders where CDCR has determined that release of their information may pose a safety and security issue to themselves or to CDCR." The department declined our request to provide information relating to the criteria that establishes whether release of information poses a safety or security issue. As of 12/31/2019, CDCR reports a population of 5,134 people serving LWOP. California Department of Corrections and Rehabilitation. 2019. "Life Without Parole: A Data Snapshot." Accessed June 2, 2023. https://www.cdcr.ca.gov/research/wp-content/uploads/sites/174/2021/11/201912_DataPoints.pdf

9. CDCR records provide information pertaining to penal code violations, including PC 187 violations, but do not provide the special circumstance information relevant to this report.

Findings

The results of this work provides a new perspective on the population of individuals serving LWOP. Of note:

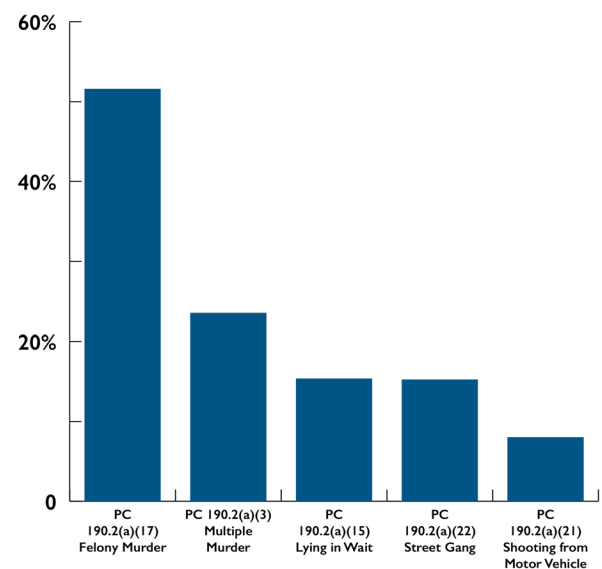
1. Five of the twenty-two special circumstances were found not to have been charged or convicted. These are the special circumstances pertaining to the murder pertaining to the murder of 1) a federal law enforcement officer; 2) an elected official; 3) a judge or juror; 4) a firefighter; or 5) by means of a hidden destructive device.
2. Eight special circumstances were used in less than one percent of cases. These are 1) murder of a peace officer or 2) prosecutor; 3) murder by the administration of poison; 4) through a mailed or 5) delivered destructive device; 6) murder to prevent lawful arrest; 7) murder that was especially heinous or cruel; and 8) murder of an individual based on their race, color, religion, nationality, or country of origin.
3. The special circumstance that was most often used pertains to felony murder; used in 52% of all cases resulting in an LWOP sentence. Unlike the majority of other special circumstances, felony murder does not require any proof that a person caused a death or intended to cause a death, only that they were a major participant in a felony where a death occurred, and that they acted recklessly.¹⁰

4. After felony murder, the most often used special circumstances are 1) multiple murder convictions; 2) murder committed while lying in wait; and 3) murder as a part of a “criminal street gang.”

Rates of Conviction for Five of the Most Used Special Circumstances

51.59%

190.2(a)(17) — Felony Murder



Given the high rate of felony murder special circumstance sentencing, SCCP performed an in-depth analysis of felony murder sentencing trends related to race, age at offense, and county of conviction.

10. See Appendix A.

Black individuals make up 5% of the state's population - yet account for 42.7% of individuals convicted of felony murder

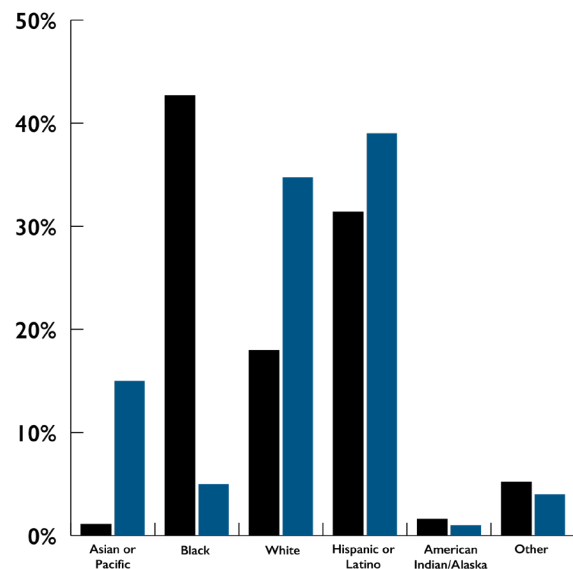
SCCP found significant racial disparities among the population sentenced to LWOP through felony murder. While Black individuals account for 37.2% of California's overall LWOP population, 42.7% of Black people are convicted and sentenced with a felony murder special circumstance.¹¹ This means that the felony murder special circumstance greatly contributes to the overall racial disparities observed in LWOP sentencing. In contrast, Black individuals account for a statistically smaller portion of individuals sentenced through other special circumstances. For example, for the special circumstance pertaining to torture, 26.2% of people who received this special circumstance are Black, while 30.4% of people who received this special circumstance are White.

Disparities in felony murder sentencing are more extreme when compared to California population demographics: Black individuals make up 5% of the state's population - yet account for 42.7% of individuals convicted

of felony murder. In some counties, the rate of conviction is more extreme. For example, as of the 2020 census, Black people make up 10.7% of Alameda's total population but 71.6% of Alameda's LWOP through felony murder are Black.¹² (See appendix B for a comparison of California's felony murder LWOP population and the state census.)

Individuals Sentenced through Felony Murder Special Circumstances Compared to California Population Demographics by Race

■ = Individuals Sentenced through Felony Murder Special Circumstances
■ = California Population in 2020



The most common age at offense for individuals convicted through felony murder and sentenced to LWOP is 18.

11. Data collected through Public Record Act requests contained various nomenclatures for racial categories; this report utilizes the word "Black" to refer to individuals identified and self-identified as "Black" or "African American."

12. Public Policy Institute of California. 2021. "California's Population." Accessed May 4, 2023. <https://www.ppic.org/publication/californias-population/>. Race and ethnicity data analyzed for the purposes of this report was provided by the California Department of Corrections and Rehabilitation. Race and ethnicity identifiers are self-reported.

Age and Felony Murder Sentencing

Conviction data also shows that felony murder LWOP sentences disproportionately harm youth.¹³ 66% of people currently serving LWOP through felony murder were under the age of 26 at the time of their offense, 51% were under 23 years of age, and 36% were under the age of 21. The most common age at offense for individuals convicted through felony murder and sentenced to LWOP is 18.

The disproportionate impact of felony murder on young people is particularly significant given the characteristics of adolescent brain development and the lack of a mens rea requirement in felony murder theory. The application of the felony murder rule to young people is widely criticized because it has the effect of holding young people to a standard of strict liability for outcomes that they cannot foresee and imposing the most punitive sentences available within the criminal sentencing code.¹⁴ In California, young people serving life sentences are able to present youthful factors as mitigating circumstances during what's known as a Franklin hearing.¹⁵ They can also seek earlier parole through a youth offender parole hearing.¹⁶ But young people sentenced to LWOP through felony murder are excluded from these proceedings due to their sentence, even though it is

well documented that youthful factors are vital context for culpability in felony murder sentences.¹⁷

In fact, almost half of people who were sentenced to LWOP through felony murder for offenses that took place when they were under the age of 21 are Black.

Rates of felony murder special circumstance convictions also vary by the intersection of race and age. As seen in Appendix C, Black individuals sentenced to LWOP for felony murder are much more likely to be younger at the time of offense than their White counterparts. In fact, almost half of people who were sentenced to LWOP through felony murder for offenses that took place when they were under the age of 21 are Black. Many factors have been documented to explain the increased criminalization of young people of color, including: increased policing,

13. For the purposes of this report, we define youth to mean those 25 years old and younger, since legislative and judicial policy has tended to follow the consensus in brain development science which maintains that the human brain is not fully mature until the age of 26.

14. For critiques of the application of felony murder to youth, see The Sentencing Project. "Felony Murder: An On-Ramp to Extreme Sentencing." The Sentencing Project, August 12, 2020. Accessed June 2, 2023. sentencingproject.org/publications/felony-murder-an-on-ramp-to-extreme-sentencing/. For a discussion of how felony murder holds youth accountable, see Teasdale, Raychel. "Accounting for Adolescents' Twice Diminished Culpability in California's Felony Murder Rule." *Loyola of Los Angeles Law Review* 53, no. 1 (2019): 307-342.

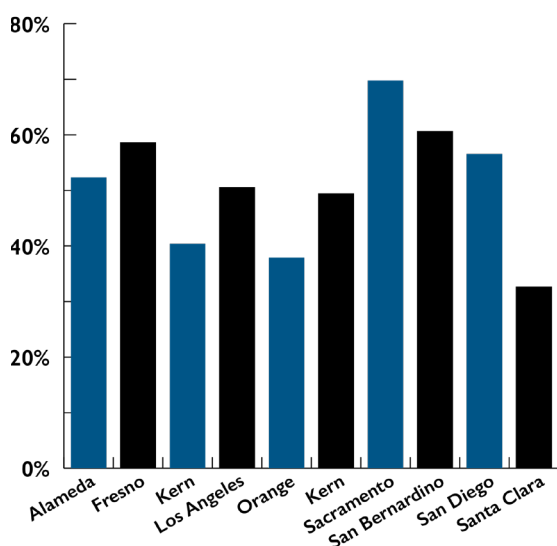
15. These hearings are so named because of *People v. Franklin* (63 Cal. 4th 261), the case that allows defendants to submit mitigating evidence related to youth.

16. A series of legislative acts established and expanded youth offender parole, a special parole hearing process for those convicted as youth to long-term sentences.

17. *People v. Montelongo*, S265597 (Cal. Jan. 27, 2021), *People v. Hardin*, B315434 (Cal. Oct. 18, 2022)

increased penalties for youthful misbehavior as compared to similar misbehavior by White peers, racialized exclusion from adequate education, employment, housing, credit, and health care.¹⁸ This also, unfortunately, results in people of color serving more years in prison (on average) as a result of an LWOP sentence than White people, given that they are sentenced earlier in their lives than their White counterparts.

Life Without Parole Sentencing through Felony Murder by County



In Orange county, 37.9% of individuals sentenced to LWOP received a felony murder special circumstance while in Sacramento county, 69.8% received a felony murder special circumstance.

While the statewide average for individuals sentenced to LWOP who receive a felony murder special circumstance is 52%, rates of

felony murder sentencing between counties vary widely. For example, in Orange county, 37.9% of individuals sentenced to LWOP received a felony murder special circumstance while in Sacramento county, 69.8% received a felony murder special circumstance. There are also stark racial disparities between counties as well. For example, 10.6% of individuals sentenced to life without parole in Orange County are Black, whereas 46.3% of individuals sentenced to LWOP from Sacramento are Black. Special circumstance charging is at the complete discretion of each county district attorney office. Some district attorney's offices utilize special circumstance committees which approve whether or not an individual prosecutor can pursue special circumstance charging in a particular case. The decisions of these committees, along with internal office policies, may be factors of why certain counties have higher rates of felony murder special circumstance convictions than others.

18. Supreme Judicial Court for the Commonwealth of Massachusetts. No. SJC-13340. Commonwealth, Appellee, v. Derrell L. Fisher, Appellant. Middlesex Superior Court. Brief of Amici Curiae in Support of Appellant Derrell L. Fisher. Caitlin Glass, BBO #707957. Boston University Center for Antiracist Research.

Conclusion

While the mainstream media, conservative politicians, and the public at large categorize individuals serving LWOP as the “worst,” this rhetoric does not survive a review of the data.

This report is one step towards understanding the population of people currently serving an LWOP sentence. While the mainstream media, conservative politicians, and the public at large categorize individuals serving LWOP as the “worst,” this rhetoric does not survive a review of the data. Statistical evidence clearly demonstrates that the most common special circumstance used as a sentencing enhancement is the one that requires the lowest degree of culpability: felony murder.¹⁹ Given the stark racial and age-at-offense disparities in LWOP sentencing, this report raises serious questions about the way in which California’s special circumstances penal code fulfills its purpose of narrowing the number of individuals who are eligible for either the death penalty or life in prison without the possibility of parole.

19. Washington Examiner: “California considers letting its worst murderers serve just 20 years in prison.” Restoring America, August 31, 2021. Accessed June 2, 2023. Washington Examiner: “California considers letting its worst murderers serve just 20 years in prison.” Restoring America, August 31, 2021. Accessed June 2, 2023. <https://www.washingtonexaminer.com/restoring-america/fairness-justice/california-considers-letting-its-worst-murderers-serve-just-20-years-in-prison>

Appendix A: Special Circumstances		
<div> <div></div> = No recorded observations of usage <div></div> = less than 1% recorded observations of usage </div>		
Penal Code Section	Special Circumstance Description	Percentage Convictions
190.2(a)(1)	The murder was intentional and carried out for financial gain.	6.66%
190.2(a)(2)	The defendant was convicted previously of murder in the first or second degree.	1.61%
190.2(a)(3)	The defendant, in this proceeding, has been convicted of more than one offense of murder in the first or second degree.	23.57%
190.2(a)(4)	The murder was committed by means of a planted, hidden, or concealed destructive device, bomb, or explosive.	0.03%
190.2(a)(5)	The murder was committed for the purpose of avoiding or preventing a lawful arrest, or perfecting or attempting to perfect, an escape from lawful custody.	0.50%
190.2(a)(6)	The murder was committed by means of a destructive device, bomb, or explosive that the defendant mailed or delivered.	0.06%
190.2(a)(7)	The victim was a peace officer while engaged in the course of the performance of his or her duties.	0.81%
190.2(a)(8)	The victim was a federal law enforcement officer or agent.	0.00%
190.2(a)(9)	The victim was a firefighter while engaged in the course of the performance of his or her duties.	0.00%
190.2(a)(10)	The victim was a witness to a crime who was intentionally killed for the purpose of preventing his or her testimony.	2.45%
190.2(a)(11)	The victim was a prosecutor or assistant prosecutor.	0.03%
190.2(a)(12)	The victim was a judge or former judge of any court of record in the local, state, or federal system in this or any other state.	0.00%
190.2(a)(13)	The victim was an elected or appointed official of the federal government.	0.00%
190.2(a)(14)	The murder was especially heinous, atrocious, or cruel, manifesting exceptional depravity.	0.06%
190.2(a)(15)	The defendant intentionally killed the victim by means of lying in wait.	15.36%
190.2(a)(16)	The victim was intentionally killed because of his or her race, color, religion, nationality, or country of origin.	0.50%
190.2(a)(17)	A murder was committed while the defendant was engaged in certain felonies including robbery, kidnapping, rape, sodomy, lewd or lascivious acts upon a child, oral copulation, burglary, arson, train wrecking, mayhem, rape or carjacking	51.59%
190.2(a)(18)	The murder was intentional and involved the infliction of torture.	4.27%
190.2(a)(19)	The defendant intentionally killed the victim by the administration of poison.	0.25%
190.2(a)(20)	The victim was a juror in any court of record in the local, state, or federal system.	0.00%
190.2(a)(21)	Intentional murder perpetrated by means of discharging a firearm from a motor vehicle.	8.05%
190.2(a)(22)	The defendant intentionally killed the victim while a participant in a criminal street gang.	15.24%

Appendix B - Race - Felony Murder Special Circumstances Compared to California Statewide Population Demographics

Defendant Race	Individuals Sentenced through Felony Murder Special Circumstances	California Population in 2020
American Indian/Alaskan Native	1.6%	1%
Asian or Pacific Islander	1.1%	15%
Black	42.7%	5%
Hispanic or Latino	31.4%	39%
Other	5.2%	4%
White	17.97%	35% ²⁰

Appendix C - Age at Offense and Race - Felony Murder Special Circumstances

Defendant Race	CA Population in 2020	under 18	under 21	under 23	under 26	26 and above
American Indian/Alaskan Native	1%	3.23%	1.99%	1.76%	1.73%	1.25%
Asian or Pacific Islander	15.0%	0.00%	0.33%	0.35%	.82%	1.78%
Black	5%	51.61%	48.76%	47.94%	47.09%	
Hispanic or Latino	39.00%	26.45%	31.51%	32.67%	32.51%	29.00%
Other	4.00%	4.52%	4.15%	4.47%	4.74%	6.23%
White	35%	14.19%	13.10%	12.69%	13.02%	27.40%
All Races		9.34%	36.33%	51.27%	66.14%	33.86%

20. PPIC (Public Policy Institute of California). (2021). "California's Population". Retrieved May 4, 2023, from <https://www.ppic.org/publication/californias-population/>