



**AUDIT OF THE NATIONAL INSTITUTE OF JUSTICE  
COOPERATIVE AGREEMENT AWARDS UNDER THE  
SOLVING COLD CASES WITH DNA PROGRAM TO THE  
JACKSON COUNTY, MISSOURI PROSECUTOR'S OFFICE,  
KANSAS CITY, MISSOURI**

U.S. Department of Justice  
Office of the Inspector General  
Audit Division

Audit Report GR-60-14-008  
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**EXECUTIVE SUMMARY\***

The U.S. Department of Justice, Office of the Inspector General, Audit Division, has completed an audit of the Solving Cold Cases with DNA program cooperative agreements totaling \$920,353, awarded by the Office of Justice Programs (OJP), National Institute of Justice (NIJ) to the Jackson County, Missouri Prosecutor's Office (Jackson County), as shown in Exhibit 1.

**EXHIBIT 1: COOPERATIVE AGREEMENTS AWARDED TO THE JACKSON COUNTY, MISSOURI PROSECUTOR'S OFFICE**

<b>AWARD NUMBER</b>	<b>COOPERATIVE AGREEMENT PROGRAM</b>	<b>AWARD DATE</b>	<b>PROJECT START DATE</b>	<b>PROJECT END DATE</b>	<b>AWARD AMOUNT</b>
2010-DN-BX-K008	Solving Cold Cases With DNA	08/24/10	12/01/10	09/30/13	\$504,524
2012-DN-BX-K031	Solving Cold Cases With DNA	08/23/12	10/01/12	10/31/14	\$415,829
<b>Total:</b>					<b>\$920,353</b>

Source: Office of Justice Programs' (OJP) Grants Management System (GMS)

The purpose of NIJ's Solving Cold Cases with DNA Program is to provide assistance to states and units of local government to identify, review, and investigate Uniform Crime Reporting (UCR) Part 1 violent crime cold cases that have the potential to be solved through DNA analysis and to locate and analyze biological evidence associated with these cases.<sup>1</sup> For the purposes of this program, the NIJ defines a violent crime cold case as any unsolved UCR Part 1 violent crime case for which all significant investigative leads have been exhausted.

The purpose of the audit was to determine whether reimbursements claimed for costs under the cooperative agreements were allowable, reasonable, and in accordance with applicable laws, regulations, guidelines, and terms and conditions of the cooperative agreements, and to determine program performance and

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\* The Office of the Inspector General redacted Appendix III of this report because it contains information that may be protected by the Privacy Act of 1974, 5 U.S.C. §552(a) or may implicate the privacy rights of identified individuals.

<sup>1</sup> In the Federal Bureau of Investigation's UCR Program, Part 1 Violent Crime is composed of four offenses: murder and non-negligent manslaughter, forcible rape, robbery, and aggravated assault. Violent crimes are defined in the UCR Program as those offenses which involve force or threat of force.

accomplishments. The objective of our audit was to assess risks and review performance in the following areas: (1) internal control environment, (2) drawdowns, (3) expenditures, (4) budget management and control, (5) financial and progress reports, and (6) program performance and accomplishments. We determined that monitoring of contractors and subrecipients, property management, indirect costs, program income, and matching were not applicable to these awards.

We tested compliance with what we consider to be the most important conditions of the cooperative agreements. Unless otherwise stated in our report, the criteria we audit against are contained in the *OJP Financial Guide* and the cooperative agreement award documents.

We examined Jackson County's accounting records, financial and progress reports, and operating policies and procedures and found:

- \$504,524 in unallowable costs associated with the review of ineligible cases;
- \$415,829 in funds to better use associated with the review of ineligible cases;
- performance metrics reported to NIJ were not accurate; and
- Jackson County did not meet its program goals.

The report contains three recommendations, which are detailed in the Findings and Recommendations section of the report. Our audit objectives, scope, and methodology are discussed in Appendix I. Our Schedule of Dollar-Related Findings appears in Appendix II.

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**INTRODUCTION**

The U.S. Department of Justice (DOJ), Office of the Inspector General (OIG), Audit Division, has completed an audit of the Solving Cold Cases with DNA program cooperative agreements totaling \$920,353, awarded by the Office of Justice Programs (OJP), National Institute of Justice (NIJ) to the Jackson County, Missouri Prosecutor's Office (Jackson County), as shown in Exhibit 1.

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2010-DN-BX-K008	Solving Cold Cases With DNA	08/24/10	12/01/10	09/30/13	\$504,524
2012-DN-BX-K031	Solving Cold Cases With DNA	08/23/12	10/01/12	10/31/14	\$415,829
<b>Total:</b>					<b>\$920,353</b>

Source: Office of Justice Programs' (OJP) Grants Management System (GMS)

The purpose of NIJ's Solving Cold Cases with DNA Program is to provide assistance to states and units of local government to identify, review, and investigate Uniform Crime Reporting (UCR) Part 1 violent crime cold cases that have the potential to be solved through DNA analysis and to locate and analyze biological evidence associated with these cases.<sup>1</sup> For the purposes of this program, the NIJ defines a violent crime cold case as any unsolved UCR Part 1 violent crime case for which all significant investigative leads have been exhausted.

According to its application, Jackson County intended to use Cooperative Agreement 2010-DN-BX-K008 to review the county's remaining large number of unsolved violent crime cold cases with evidence amenable to DNA testing. This included conducting complete legal and factual reviews of each case, in order to determine which cases would be approved for DNA testing. In instances where a DNA match was obtained, Jackson County intended to provide legal and investigative assistance to the police prior to the suspect's arrest. The budget included full-time salaries and fringe benefits for three cold case analysts, one cold

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<sup>1</sup> In the Federal Bureau of Investigation's UCR Program, Part 1 Violent Crime is composed of four offenses: murder and non-negligent manslaughter, forcible rape, robbery, and aggravated assault. Violent crimes are defined in the UCR Program as those offenses which involve force or threat of force.

case investigator, and one cold case paralegal. According to its application, Jackson County intended to use Cooperative Agreement 2012-DN-BX-K031 to continue to identify, evaluate, and investigate violent crime cold cases in the county. The intended activities were the same as the 2010 award. The budget included full-time salaries and fringe benefits for two cold case analysts, one cold case investigator, and one cold case paralegal, and computer equipment for the staff.

## Background

OJP's mission is to increase public safety and improve the fair administration of justice across America through innovative leadership and programs. OJP seeks to disseminate state-of-the-art knowledge and practices across America and to provide grants for the implementation of these crime fighting strategies. NIJ, a program office of OJP, is the research, development, and evaluation agency of DOJ. The NIJ's mission is to provide objective and independent knowledge and tools to reduce crime and promote justice, particularly at the state and local levels. The NIJ's Office of Investigative and Forensic Sciences provides direct support to crime laboratories and law enforcement agencies to improve the quality and practice of forensic science. The office oversees a number of programs aimed at expanding the information that can be extracted from forensic evidence, including DNA.

Jackson County includes 604 square miles and includes a major metropolitan area, Kansas City, Missouri. The Jackson County Prosecuting Attorney is a county elected official. The Prosecutor's Office Cold Case Unit is part of the Jackson County Prosecuting Attorney's Office. Jackson County has partnered with the Kansas City Police Department (Kansas City) and its crime laboratory to investigate and prosecute cold cases.

## Our Audit Approach

We tested compliance with what we consider to be the most important conditions of the cooperative agreements. Unless otherwise stated in our report, the criteria we audit against are contained in the *OJP Financial Guide* and cooperative agreement award documents. We tested Jackson County's:

- **internal control environment** to determine whether the internal controls in place for the processing and payment of funds were adequate to safeguard cooperative agreement funds and ensure compliance with the terms and conditions of the cooperative agreements;
- **drawdowns** to determine whether cooperative agreement drawdowns were adequately supported and if Jackson County was managing cooperative agreement receipts in accordance with federal requirements;
- **expenditures** to determine whether the costs charged to the cooperative agreements were accurate and allowable;

- **budget management and control** to determine Jackson County's compliance with the costs approved in the cooperative agreement budgets;
- **reporting** to determine if the required financial and programmatic reports were submitted on time and accurately reflected award activities; and
- **performance and accomplishments** to determine whether Jackson County met the cooperative agreement objectives.

The findings and recommendations are detailed in the Findings and Recommendations section of this report. Our audit objectives, scope, and methodology appear in Appendix I. Our Schedule of Dollar-Related Findings appears in Appendix II.

## FINDINGS AND RECOMMENDATIONS

We found that Jackson County did not comply with essential award conditions in the areas of expenditures, reporting, and performance. Specifically, 34 percent of the cases reviewed by Jackson County using award funded positions were not eligible under the program; as a result, the award expenditures related to these positions totaling \$504,524 are unallowable. We also have concerns regarding the use of funds moving forward; as a result, we identified award funds that have not been drawn down totaling \$415,829 as funds to better use. Further, we found that Jackson County's program performance data reported to the NIJ in the semi-annual progress reports was not accurate. Finally, since 34 percent of the cases reviewed under the program were ineligible, Jackson County did not meet the program goals. Based on our audit results, we make two recommendations to address dollar-related findings and one recommendation to improve the management of DOJ cooperative agreements.

### Internal Control Environment

We reviewed Jackson County's Single Audit Report, other prior audits, and the financial management system to assess the organization's risk of non-compliance with laws, regulations, guidelines, and terms and conditions of the cooperative agreements. We also interviewed management and key personnel, and inspected documents and records in order to further assess risk.

#### *Single Audit*

The *Office of Management and Budget (OMB) Circular A-133* requires that non-federal entities that expend \$500,000 or more per year in federal awards have a single audit performed annually. The most recent Single Audit for Jackson County that was available for review was for the year ended December 31, 2011. We reviewed this audit report and did not identify any findings related to Jackson County or Cooperative Agreements 2010-DN-BX-K008 and 2012-DN-BX-K031 that were significant within the context of our audit.

#### *Financial Management System*

We reviewed Jackson County's financial management system, interviewed Jackson County officials, and inspected cooperative agreement documents. Internal control procedures for payroll included tracking employee hours using timesheets that are approved and signed by a unit supervisor and then entered into an electronic system. The finance department compiled timesheets to create labor reports, in order to charge payroll to the designated fund. We did not review internal control procedures for equipment purchases, because as of the start of our fieldwork there were no expenditures for Cooperative Agreement 2012-DN-BX-K031, which was the only award that included equipment as part of



the budget. We did not identify any control weaknesses within the context of our audit.

## **Drawdowns**

Jackson County officials stated that drawdowns were requested on a reimbursement basis. According to the *OJP Financial Guide*, the grant recipient should time drawdown requests to ensure that federal cash on hand is the minimum needed for disbursements to be made immediately or within 10 days. We analyzed the cooperative agreement to determine if the total expenditures recorded in Jackson County's accounting records were equal to, or in excess of, the cumulative drawdowns. For Cooperative Agreement 2010-DN-BX-K008, we determined that Jackson County complied with this requirement, as total expenditures were greater than cumulative drawdowns as of April 18, 2013, the most recent drawdown date we reviewed as part of our audit. For Cooperative Agreement 2012-DN-BX-K031, Jackson County had not expended or drawn down any funds as of the start of our fieldwork.

## **Expenditures**

According to Jackson County's accounting records as of August 2, 2013, expenditures for Cooperative Agreement 2010-DN-BX-K008 totaled \$483,761. We selected a judgmental sample of 35 transactions totaling \$49,232 for review, in order to determine if cooperative agreement expenditures were allowable, reasonable, and in compliance with the terms and conditions of the award. For Cooperative Agreement 2012-DN-BX-K031, Jackson County had not expended any funds as of the start of our fieldwork.

### *Personnel and Fringe Benefits*

The sample for Cooperative Agreement 2010-DN-BX-K008 included payroll transactions from two non-consecutive months. For the two selected months, we determined that salaries and fringe benefits charged to the cooperative agreement were computed correctly, properly authorized, and accurately recorded. However, we found that the activities performed by the award funded employees were not eligible under the program. As a result, we found that all personnel and fringe benefits costs charged to the cooperative agreement were unallowable.

The FY 2010 Solving Cold Cases with DNA program solicitation outlines allowable and unallowable uses of funds. Permissible uses of the funds included activities directly related to the three program goals, also known as funding purposes: cold case review, location of evidence, and DNA analysis of biological evidence. Funds could also be used for certain investigative activities provided they directly related to the funding purposes. Costs for general cold case investigations – those that do not have the potential to be solved through DNA analysis – are not allowed. Funds are also not to be used for general casework backlog reduction.

According to NIJ officials, the general concept behind the program was to take advantage of the advent of DNA technology and subsequent advances to solve cold cases that occurred at a time when the technology was not available or advanced enough to process the biological evidence. This statement is in line with the 2010 program solicitation, which stated that advances in DNA technology have increased the successful analysis of aged, degraded, limited, or otherwise compromised biological evidence. Biological samples once thought to be unsuitable for testing or that generated inconclusive results may now be analyzed. These statements point to the fact that the funds are meant for cases where limits in DNA technology at the time the crime was committed prevented the investigation from moving forward.

NIJ officials also stated that the program was not meant to cover cases with biological evidence that was obtained during a time when the DNA technology was available but a decision was made by the agency to inactivate the case without processing the biological evidence. This corresponds to NIJ's definition of a cold case; that is any unsolved case for which all significant investigative leads have been exhausted. If suitable DNA technology was available at the time the crime was committed and biological evidence was collected, the biological evidence represents a significant investigative lead. If the biological evidence was not analyzed, all investigative leads have not been exhausted and the case does not qualify under this program. This stipulation underscores the fact that the review and investigation of certain cases cannot be funded using program funds.

We found that Jackson County was using award funds to review relatively recent sex crime cases, for which biological evidence had been collected during a time when DNA technology was readily available, including crimes committed between 2006 through 2011. Of the 1,233 cases that Jackson County reviewed under the program as of the end of July 2013, 424, or 34 percent, of the cases were from crimes committed between 2006 and 2011. In our opinion, cases from more recent years are not eligible for inclusion in the program, because DNA technologies were not a limiting factor for processing biological evidence during the investigation, since they occurred at a time when the technology was readily available.

We looked at a sample of eight case files from 2008, 2009, and 2010, which were reviewed by award funded employees. The sample revealed that not only were the crimes committed during a time when DNA technology was readily available, the cases either did not meet NIJ's definition of a cold case because all significant investigative leads related to the biological evidence had not been exhausted or a DNA profile had already been developed. Specifically, we found that: (1) for four of the cases, the biological evidence – a rape kit – was collected at the time the crime was committed and Kansas City, the partnering agency, chose not to develop DNA profiles related to the evidence before inactivating the case; as a result, the agency did not fully pursue all investigative leads related to the biological evidence; and (2) for four of the cases, the biological evidence had already been processed and uploaded to the Combined DNA Index System (CODIS) as part of the original investigation, which was prior to the case being reviewed as

part of this award. These cases are problematic because according to the FY 2010 program solicitation: (1) this funding is to be used to review cases for which all significant investigative leads have been exhausted, and (2) activities under this program are only permissible until all samples with potential DNA evidence have been recovered and analyzed.

We also noted that according to Jackson County's FY 2010 award application, its primary goal was to review 1,748 cold cases for crimes committed between 1972 and 2005 that were known to have biological evidence amenable to DNA testing. According to the *OJP Financial Guide*, you must initiate a Grant Adjustment Notice (GAN) for changes in scope, duration, activities, or other significant areas. These changes include altering programmatic activities or changing the purpose of the project. Jackson County did not file a GAN outlining the changes in scope. Therefore, in addition to reviewing cases that were not eligible under NIJ's program, Jackson County's review of cases from 2006 through 2011 was also inconsistent with the primary goal stated in its application. We used the original timeframe established by Jackson County – 1972 through 2005 – to differentiate cold cases that were eligible to be reviewed and more recent cases that were not eligible.

Jackson County also received Solving Cold Cases with DNA program funds in FY 2008. According to Jackson County's FY 2010 application, the funds from the 2008 award were used to conduct legal and factual reviews of approximately 1,000 investigative files with testable evidence for the years 1979 through 1990. The application proposed looking at 1,748 cases from 1981 through 2005 that still needed to be reviewed. However, we found that one-third of the cases actually reviewed were from 2006 through 2011. We asked Jackson County officials why these cases were reviewed, despite the existence of cases from the earlier period that had not been reviewed. Jackson County officials stated that Kansas City, the partnering agency, expanded the cases reviewed to include more recent years (i.e., 2006 through 2011). Kansas City and Jackson County received separate Solving Cold Cases with DNA awards to conduct "dual reviews" of unsolved sex crimes cases. The general approach was described by both agencies as follows: (1) Kansas City's Sex Crimes Cold Case Squad conducted an investigative review of the case file to make an initial determination regarding whether the case should be pursued and (2) the case was then forwarded to Jackson County for a legal and factual review to determine if the case had prosecution potential and should be approved for DNA testing. Jackson County officials stated that Kansas City was responsible for determining which cases qualified as cold cases. When Kansas City opted to review cases from more recent years, it resulted in Jackson County also reviewing the cases from more recent years.

In addition to being the secondary reviewer, Jackson County officials provided additional reasons why they used program funds to review more recent cases. Jackson County officials stated that: (1) the definition of what constitutes a cold case – that is, exhausting all investigative leads, which includes analyzing biological evidence when suitable DNA technology exists at the time the crime occurred – is "cryptic," as the language related to biological evidence was not

explicitly included in the program solicitations or other program documentation; and (2) the FY 2010 application included language that allowed Jackson County to identify and complete work outside of the 1972 through 2005 timeframe. Jackson County officials felt that they were abiding by the requirements of the award as set forth in the solicitation in good faith.

While we acknowledge that NIJ's definition of a cold case does not refer specifically to biological evidence, the definition can be reasonably inferred, based on the solicitation as a whole. As far as Jackson County's assertion that its application provides flexibility regarding the timeframe, the stated goal in the application was to address cases from 1972 through 2005.

We are questioning all costs charged to the cooperative agreement, all of which was for personnel costs, because a significant number of the cases reviewed by the award-funded employees were not eligible under the program. Further, Jackson County officials stated that they did not have a formal system to track the number of hours award-funded employees spent on each case, which would allow us to determine the percentage of time award-funded employees spent on eligible cases. Subsequent to our fieldwork, Jackson County had drawn down all award funds for Cooperative Agreement 2010-DN-BX-K008; therefore, we are questioning the entire award totaling \$504,524 as unallowable.

Additionally, we have concerns regarding the use of Cooperative Agreement 2012-DN-BX-K031 funds totaling \$415,829, none of which were spent as of the conclusion of our audit. The FY 2012 award application expanded the case timeframe that would be subject to review, including 2,545 cases with evidence amenable to DNA testing from years 1979 through 2010. Despite the fact that Jackson County included more recent case years for review and investigation, the concerns we have regarding the eligibility of the more recent cases still exist. Jackson County's case load, at least in part, mirrors Kansas's City's case load, because of the dual review process.<sup>2</sup> Therefore, it is likely that the ineligible cases reviewed by Kansas City using FY 2011 award funds, which was 95 percent of what was reviewed, are in large part the same cases that will be reviewed by Jackson County using its FY 2012 award funds. Therefore, we identified the entire award totaling \$415,829 as funds to better use.

## **Budget Management and Control**

The NIJ approved a detailed budget for the cooperative agreements, which were organized by defined budget categories. According to the *OJP Financial Guide*, the cooperative agreement recipient must initiate a GAN for a budget modification that reallocates funds among budget categories, if the proposed cumulative change is greater than 10 percent of the total award amount. We compared cooperative agreement expenditures to the approved budgets to determine whether Jackson

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<sup>2</sup> According to the FY 2012 award application, Jackson County includes 18 law enforcement agencies in addition to Kansas City. A smaller number of cases reviewed under this program were to be pulled from these smaller, more rural agencies.

County transferred funds among direct cost categories in excess of 10 percent. For Cooperative Agreement 2010-DN-BX-K008, we determined that Jackson County complied with the requirement, as the cumulative difference between actual category expenditures and approved budget category totals was not greater than 10 percent. For Cooperative Agreement 2012-DN-BX-K031, Jackson County had not expended any funds as of the start of our fieldwork.

## **Reporting**

We reviewed the Federal Financial Reports (FFR) and Categorical Assistance Progress Reports (progress reports) to determine if the required reports were submitted on time and accurate.

### *Financial Reporting*

The *OJP Financial Guide* states that grant recipients must report expenditures online using the FFR no later than 30 days after the end of each calendar quarter. For Cooperative Agreement 2010-DN-BX-K008, we reviewed the submission dates for the four most recent FFRs as of the start of our fieldwork and determined that all four were submitted on time. For Cooperative Agreement 2012-DN-BX-K031, we reviewed the submission dates for the three FFRs submitted for this award as of the start of our fieldwork and determined that all three were submitted on time.

We also reviewed financial reporting for accuracy. According to the *OJP Financial Guide*, recipients shall report the actual expenditures and unliquidated obligations incurred for the reporting period on each financial report. For Cooperative Agreement 2010-DN-BX-K008, we compared the four FFRs to Jackson County's accounting records and determined that the reports were accurate. However, delays in posting correcting journal entries to the award fund resulted in temporary differences between what was included in Jackson County's accounting records and the reports. We confirmed that correcting entries were subsequently posted to the award fund and the totals matched what was reported in the FFRs. For Cooperative Agreement 2012-DN-BX-K031, Jackson County had not expended any funds as of the start of our fieldwork. The three FFRs reported \$0 in expenditures and unliquidated obligations, meaning the reports were accurate.

### *Categorical Assistance Progress Reports*

According to the *OJP Financial Guide*, progress reports are due semi-annually on January 30<sup>th</sup> and July 30<sup>th</sup> for the life of the award. For Cooperative Agreement 2010-DN-BX-K008, we reviewed the submission dates for the six progress reports submitted as of the start of our fieldwork and determined the first three reports were late. For Cooperative Agreement 2012-DN-BX-K031, we reviewed the submission dates for the two progress reports submitted for this award as of the start of our fieldwork and determined that the first report was late, as shown in Exhibit 2.

## EXHIBIT 2: PROGRESS REPORT HISTORY

REPORT NUMBER	REPORT PERIOD FROM - To DATES	DUE DATE	DATE SUBMITTED	DAYS LATE
<b>COOPERATIVE AGREEMENT 2010-DN-BX-K008</b>				
1	12/01/2010 - 12/31/2010	01/30/2011	02/01/2012	367
2	01/01/2011 - 06/30/2011	07/30/2011	02/01/2012	186
3	07/01/2011 - 12/31/2011	01/30/2012	02/01/2012	2
<b>COOPERATIVE AGREEMENT 2012-DN-BX-K031</b>				
1	10/01/2012 - 12/31/2012	01/30/2013	03/01/2013	30

Source: OJP's GMS

Jackson County officials attributed the late reports to a misunderstanding regarding the reporting requirements. There was no activity on either award during the early reporting periods and Jackson County did not know that award recipients were required to submit reports regardless of whether or not there was any activity. Jackson County submitted all subsequent reports for both cooperative agreements on time. For Cooperative Agreement 2010-DN-BX-K008, we also reviewed a GAN explaining that an incorrect start date was entered into GMS by OJP, which prevented Jackson County from being able to submit reports prior to the fix in September 2011. In our opinion, Jackson County now understands the requirement and addressed the issue; therefore, we offer no recommendation related to this issue.

We also reviewed the progress reports for accuracy. According to the *OJP Financial Guide*, the funding recipient agrees to collect data appropriate for facilitating reporting requirements established by Public Law 103-62 for the *Government Performance and Results Act*. The funding recipient should ensure that valid and auditable source documentation is available to support all data collected for each performance measure specified in the program solicitation. For Cooperative Agreement 2010-DN-BX-K008, we selected two recent progress reports for our audit review. These reports covered the reporting periods from January 2012 through June 2012 and July 2012 through December 2012. For Cooperative Agreement 2012-DN-BX-K031, the two progress reports indicated there was no activity under this award as of the start of our fieldwork.

The NIJ's Solving Cold Cases with DNA Progress Report Form includes a performance measure table, which captures six performance metrics for each reporting period over the course of the cooperative agreement. Performance metrics include: (1) number of violent crime cold cases reviewed, (2) number of violent crime cold cases reviewed in which biological evidence still existed, (3) number of violent crime cold cases with biological evidence that are subjected to DNA analysis, (4) number of violent crime cold cases that yielded a viable DNA profile, (5) number of DNA profiles entered into the Federal Bureau of Investigation's CODIS, and (6) number of CODIS hits.<sup>3</sup>

<sup>3</sup> Matches within the CODIS database are identified as "hits." A "hit" is when one or more DNA profiles from a crime scene are linked to a convicted offender (offender hit) or to evidence from another crime scene (forensic hit).

Jackson County officials informed us that the cold case paralegal funded under the cooperative agreement tracked performance using a database that included all cases reviewed as part of the program. At the end of each semi-annual reporting period, the period data was compiled and reported to the NIJ. Jackson County provided us with a copy of the database during our fieldwork, which included activity through the end of July 2013. Based on our review, we determined that the performance data reported to the NIJ did not match the supporting documentation maintained by Jackson County, as shown in Exhibit 3.

**EXHIBIT 3: COOPERATIVE AGREEMENT 2010-DN-BX-K008 PERFORMANCE METRIC ERRORS, CALENDAR YEAR 2012**

REPORTING PERIOD: REPORTED DATA, DATA IN SUPPORTING DOCUMENTS, AND THE DIFFERENCE	1. CASES REVIEWED	2. W/ BIOLOGICAL EVIDENCE	3. SUBJECTED TO DNA ANALYSIS	4. YIELDED VIABLE DNA PROFILE	5. ENTERED INTO CODIS	6. CODIS HIT
Jan–June 12 Reported	288	288	N/A	N/A	N/A	N/A
Supporting Documents	281	281	N/A	N/A	N/A	N/A
<b>Difference</b>	7	7				
Jul – Dec 12 Reported	255	255	N/A	N/A	N/A	N/A
Supporting Documents	257	257	N/A	N/A	N/A	N/A
<b>Difference</b>	(2)	(2)				

Source: OJP's GMS and Site-work

The differences for both periods were in part due to the fact that the spreadsheets included duplicate cases. For the January through June 2012 reporting period, we identified nine cases that appeared in the spreadsheets more than once for both the first and second metric. For the July through December 2012 reporting period, we identified two cases that appeared in the database more than once for both the first and second metric. Jackson County officials stated that other possible reasons for the differences were the way results were filtered or simple human error.

We also noted that Jackson County reported 61 violent crime cold cases with biological evidence that were subjected to DNA analysis in the July through December 2011 reporting period. According to NIJ's *Guidelines for Performance Measures and Progress Reports*, award recipients should not include this metric if the award does not include funding for DNA analysis. Therefore, this metric should have been reported as 'N/A' in that period. Jackson County officials stated that while the award did not fund the DNA analysis, the county included the metric to provide NIJ with additional information regarding the program's progress and this

was prior to the NIJ issuing formal performance measure guidelines.<sup>4</sup> Jackson County stopped reporting the figure, based on a request from NIJ. We confirmed the number was removed from Jackson County's final progress report.

We identified another form of duplication, which was the result of Jackson County's and Kansas City's dual review process. We found that both Kansas City and Jackson County were counting cases reviewed by both agencies as part of their performance metrics. According to NIJ's *Guidelines for Performance Measures and Progress Reports*, cases should only be counted as reviewed once, even if they are reviewed multiple times under an award or across multiple awards. This means that in order to avoid double-counting, only one agency should report a case reviewed as part of its performance metrics, regardless of the case being reviewed by both agencies. In total, we found that as of the end of July 2013 both agencies reported 485 of the same cases as being reviewed, 444 of which were reported by Kansas City first. This means that Jackson County should not have reported 444 cases, as they had already been counted as reviewed.

Jackson County officials stated that the plan to conduct dual case reviews with Kansas City was explicitly outlined in the award applications and NIJ encouraged collaboration among members of the criminal justice community. Jackson County officials went on to say that the guidelines did not prohibit case review metrics from being counted by two award recipients; rather the guidelines prohibited case review metrics from being counted by one award recipient multiple times. We are not taking exception to the dual review process itself, as it was reviewed and approved by NIJ. Rather, our concerns relate to the fact that when two agencies each count the same case as reviewed, it inflates the number of cases affected by federal funds. In our opinion, the guidelines apply to multiple awards administered by partnering agencies just as they apply to multiple awards administered by one agency. The number can be inflated whether one agency counts a case twice or two agencies each count the same case once. This does not prohibit either agency from detailing their efforts under the program in the progress reports, it simply limits what information can be included in the performance measure table.

Finally, we found that Jackson County's progress reports overstated the number of cases reviewed, based on our determination that 34 percent of cases were ineligible, as outlined in the Expenditure section of this report. For the progress report ending on June 30, 2013, Jackson County reported a cumulative total of 1,242 cases reviewed and 1,242 cases reviewed with biological evidence. According to Jackson County's database as of July 2013, there were 1,280 cases reviewed, all of which contained biological evidence. From those cases, we removed any cases listed in Jackson County's database more than once. We then

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<sup>4</sup> NIJ issued the *Guidelines for Performance Measures and Progress Reports* to award recipients in December 2012. The guidance was available to award recipients prior to the July through December 2012 progress report period due date on January 30, 2013. In addition to using the guidance to complete the performance measure table for that period and all periods moving forward, it is reasonable to conclude that award recipients could also use the guidance to revise metrics that were included as part of previous reporting periods, if necessary.



determined the number of eligible cases not previously counted by Kansas City. We found the actual number of eligible cases reviewed as of July 2013 to be 751, all of which contained biological evidence. At the time of our fieldwork, Jackson County's award was still in progress; therefore, we were unable to identify the total number of eligible cases reviewed under the award. However, it is clear that the actual number of eligible cases reviewed under the program is less than what was reported.

Based on the information outlined above, we determined that the performance metrics were not accurate. A final progress report was submitted in November 2013. The report includes the same information as the report ending on June 30, 2013, plus 123 additional cases in the July through September 2013 reporting period. It is possible that Jackson County counted additional duplicate cases between the end of July 2013 and the end of the award, September 30, 2013. It is also likely that a number of the cases reviewed between the end of July 2013 and September 30, 2013 were not eligible under the program. We recommend that the OJP obtain a final progress report, which includes the corrected performance data based on eligible cases under the program.

### **Program Performance and Accomplishments**

As previously mentioned in this report, the purpose of the program was to provide assistance to states and units of local government to identify, review, and investigate UCR Part 1 Violent Crime cold cases that have the potential to be solved through DNA analysis and to locate and analyze biological evidence associated with these cases. We reviewed the NIJ cooperative agreement solicitations, Jackson County documentation, and interviewed Jackson County officials to determine whether the program goals were implemented. The goals and the degree to which the cooperative agreements met those goals are detailed below.

For Cooperative Agreement 2010-DN-BX-K008, Jackson County had five goals. For its first goal, Jackson County proposed to review a minimum of 300 case files per reporting period or 900 cases over the life of the award. Again, Jackson County's FY 2010 award application primarily addressed reviewing cold cases for crimes committed between 1972 and 2005 that were known to have biological evidence. As previously mentioned, we found that 34 percent of the cases reviewed under the program were not eligible. We were not able to determine the amount of time spent on the ineligible cases as compared to eligible cases. However, in our opinion, the fact that 34 percent of the cases reviewed were ineligible likely represents that a significant portion of Jackson County's efforts and resources were not related to the goal of the program.

Jackson County's second goal was to follow and improve upon the 'Cold Hit/Cold Case Inter-agency Guidelines' and the 'Cold Case Investigation Guidelines.' The third goal was to work with Kansas City to improve a cold case investigative checklist. The fourth goal was to meet bi-monthly with Kansas City and the Kansas City Crime Laboratory to discuss CODIS hits, ongoing investigations, and case prioritization. The fifth goal was to maintain and update all databases that record

work completed by the cold case unit. We did not see any indications that Jackson County was not meeting these goals. Again, it was not possible for us to determine the amount of time that was spent on these activities that related to eligible cases versus ineligible cases, meaning we cannot make an assessment regarding what portion of efforts and resources the eligible cases represent.

For Cooperative Agreement 2012-DN-BX-K031, Jackson County had the same five goals as Cooperative Agreement 2010-DN-BX-K008. We did not evaluate whether the program goals were implemented, as there was no activity related to this award as of the start of our fieldwork.

Based on the information outlined above, we determined that the goals of the program were limited by Jackson County's review of ineligible cases. Therefore, in our judgment Jackson County did not achieve the program goals and overstated its program accomplishments. Because Cooperative Agreement 2010-DN-BX-K008 has ended, we are not making a recommendation related to this issue. However, the questioned costs related to Jackson County's review of ineligible cases are addressed in the Expenditures section of this report.

## **Conclusion**

The purpose of this audit was to determine whether reimbursements claimed for costs under the cooperative agreements were allowable, supported, and in accordance with applicable laws, regulations, guidelines, terms and conditions of the cooperative agreements, and to determine whether the program goals and objectives were implemented. We examined Jackson County's accounting records, budget documents, financial and progress reports, and operating policies and procedures. We found:

- \$504,524 in unallowable costs associated with the review of ineligible cases;
- \$415,829 in funds to better use associated with the review of ineligible cases;
- performance metrics reported to NIJ were not accurate; and
- Jackson County did not meet its program goals.

## **Recommendations**

We recommend that OJP:

1. Remedy the \$504,524 in unallowable questioned costs associated with the review of ineligible cases.
2. Remedy the \$415,829 in funds to better use associated with the review of ineligible cases.

3. Obtain a final progress report that includes the corrected performance metrics based on eligible cases under the program.

### OBJECTIVES, SCOPE, AND METHODOLOGY

The purpose of the audit was to determine whether reimbursements claimed for costs under the cooperative agreements were allowable, reasonable, and in accordance with applicable laws, regulations, guidelines, and terms and conditions of the cooperative agreements, and to determine program performance and accomplishments. The objective of our audit was to assess risks and review performance in the following areas: (1) internal control environment, (2) drawdowns, (3) expenditures, (4) budget management and control, (5) financial and progress reports, and (6) program performance and accomplishments. We determined that monitoring of contractors and subrecipients, property management, indirect costs, program income, and matching were not applicable to these awards.

We conducted this performance audit in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives. This was an audit of NIJ Cooperative Agreements 2010-DN-BX-K008 and 2012-DN-BX-K031 awarded to the Jackson County, Missouri Prosecutor's Office (Jackson County). Our audit concentrated on, but was not limited to August 24, 2010, the award date for Cooperative Agreement 2010-DN-BX-K008, through August 12, 2013. For Cooperative Agreement 2010-DN-BX-K008, Jackson County had drawn down a total of \$476,169 as of October 30, 2013. For Cooperative Agreement 2012-DN-BX-K031, Jackson County had not drawn down any funds as of the same date.

We tested compliance with what we consider to be the most important conditions of the cooperative agreements. Unless otherwise stated in our report, the criteria we audit against are contained in the *OJP Financial Guide* and the award documents.

In conducting our audit, we performed sample testing in three areas, which were cooperative agreement expenditures (including personnel expenditures), Federal Financial Reports, and Categorical Assistance Progress Reports. In this effort, we employed a judgmental sampling design to obtain broad exposure to numerous facets of the award reviewed, such as dollar amounts, expenditure category, or risk. However, this non-statistical sample design does not allow a projection of the test results for all cooperative agreement expenditures or metrics.

In addition, we evaluated internal control procedures, drawdowns, budget management and controls, and program performance and accomplishments.

However, we did not test the reliability of the financial management system as a whole. We analyzed computer based data provided by Jackson County to identify the number of cases reviewed using award funds and the number of ineligible cases reviewed. We also reviewed the computer based data for duplicates and errors, and made appropriate adjustments based on our review.

**APPENDIX II**

**SCHEDULE OF DOLLAR-RELATED FINDINGS**

<b><u>QUESTIONED COSTS</u></b> <sup>5</sup>	<b><u>AMOUNT</u></b>	<b><u>PAGE</u></b>
<b>Personnel and Fringe Benefits:</b>		
Unallowable Costs – Ineligible Cases	\$504,524	5-8
<b>TOTAL QUESTIONED COSTS</b>	<b>\$504,524</b>	
<b><u>FUNDS TO BETTER USE</u></b> <sup>6</sup>		
<b>Personnel and Fringe Benefits:</b>		
Funds to Better Use – Ineligible Cases	\$415,829	8
<b>TOTAL FUNDS TO BETTER USE</b>	<b>\$415,829</b>	
<b>TOTAL DOLLAR-RELATED FINDINGS</b>	<b>\$920,353</b>	

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<sup>5</sup> **Questioned Costs** are expenditures that do not comply with legal, regulatory, or contractual requirements, or are not supported by adequate documentation at the time of the audit, or are unnecessary or unreasonable. Questioned costs may be remedied by offset, waiver, recovery of funds, or the provision of supporting documentation.

<sup>6</sup> **Funds to Better Use** are requested expenditures that do not comply with legal, regulatory or contractual requirements, or are not supported by adequate documentation at the time of the audit, or are unnecessary or unreasonable. Funds to better use may be remedied by not approving or disallowing future payments or the provision of supporting documentation.

**JACKSON COUNTY, MISSOURI  
PROSECUTOR'S OFFICE RESPONSE**



Jean Peters Baker  
Jackson County Prosecuting Attorney

January 27, 2014

David M. Sheeren  
Regional Audit Manager  
Denver Regional Audit Office  
Office of the Inspector General  
U.S. Department of Justice  
1120 Lincoln Street, Suite 1500  
Denver, CO 80203

**RE: Office of Inspector General's (OIG) Audit of Jackson County, Missouri's Cooperative Agreement Numbers 2010-DN-BX-K008 and 2012-DN-BX-K031; Solving Cold Cases with DNA Grants Awarded by the National Institute of Justice (NIJ)**

Dear Mr. Sheeren:

This letter is in response to the Office of Inspector General's ("OIG") audit and Draft Audit Report concerning Jackson County Missouri's FY-2010, and FY-2012, Solving Cold Cases with DNA grant award by the National Institute of Justice ("NIJ").

On page fifteen (15) of the Draft Audit Report, OIG recommends that the Office of Justice Programs ("OJP") "Remedy the \$504,524 in *unallowable* questioned *costs* associated with the review of *ineligible* cases [under Jackson County's FY-2010 award]" (emphasis added). In Appendix II of the report, on page eighteen (18), "questioned costs" are defined. That definition states in full:

Questioned Costs are expenditures that do not comply with legal, regulatory, or contractual requirements, or are not supported by adequate documentation at the time of the audit, or are unnecessary or unreasonable. Questioned costs may be remedied by offset, waiver, recovery of funds, or the provision of supporting documentation.

One of OIG's principal allegations is that "34 percent of the cases reviewed by Jackson County using award funded positions were not eligible under the program . . ." (Findings and Recommendations, page 4). However, the reader will observe that OIG's Draft Audit Report is completely bereft of citation to a single "legal," "regulatory," or "contractual" requirement in support of its finding that any grant funding under our FY-2010 or FY-2012 awards constitute "questioned costs" pursuant to the above definition. Furthermore, our use of grant funding was supported by more than adequate documentation and was not unnecessary or unreasonable in any way. OIG's findings appear to be simply based on the personal fiat of the auditors involved, un-

tethered to the definition of "Questioned Costs," which is cited as the alleged basis for those findings.

### I. BACKGROUND

During the week of August 12, 2013, representatives from OIG audited Jackson County's Solving Cold Cases with DNA program as part of OIG's larger audit of NIJ's Solving Cold Cases with DNA grant program. On August 15, 2013, a preliminary on-site exit interview was conducted between OIG audit staff and Jackson County personnel.

At this meeting, some cursory preliminary findings were provided by the OIG auditors and were discussed. Among these discussions was the Solving Cold Cases with DNA programmatic definition of what constitutes a "cold case." During the exit interview, Auditor [REDACTED] stated that discussions between OIG and NIJ concerning that definition would continue after the Jackson County audit site visit had concluded.

On September 12, 2013, a phone conference was held during which Auditor [REDACTED] and her supervisor, [REDACTED], explained certain OIG findings and recommendations related to the audit. At the time this teleconference was held, the Jackson County Cold Case Project Manager had just returned from vacation and had not had an opportunity to review NIJ's FY-2010 Solving Cold Cases with DNA Solicitation, or our grant application pursuant to that document. After much discussion and disputation concerning OIG's findings, as well as OIG's proposed recommendation to NIJ regarding our unrelated FY-2012 cold case grant award, we requested that OIG's findings and recommendations be outlined in writing and provided to my office. After some initial hesitation, OIG agreed.

The reader should be aware that prior to the receipt of *any* input, explanation, or argument from our office regarding OIG's findings, OIG Supervisor [REDACTED], notified us during the call that OIG had decided that it would recommend that NIJ seek recovery of an undetermined portion of our FY-2010 grant award; and would further recommend that the entirety of our FY-2012 grant award be withdrawn and reallocated "for better use."

On November 15, 2015, our office sent an email to Auditor [REDACTED] notifying her that we had now had an opportunity to review NIJ's FY-2010 Solving Cold Cases with DNA solicitation and our related application. We requested a second opportunity to discuss OIG's findings in light of the information that we had learned during our review.

A second teleconference was scheduled for November 19, 2013. During that conference with Auditor [REDACTED] and Supervisor [REDACTED] we called their attention to certain facts that we believed had not been considered before OIG finalized its findings, conclusions, and recommendations. Again, OIG's decision on its findings and recommendations preceded *any* input, explanation, or argument from our office.

On November 19, 2013, after our conference call, Auditor [REDACTED] emailed us a document outlining OIG's findings and recommendations. The bullet points outlining those findings were as follows: "Duplication of performance metrics"; "Inaccurate performance metrics"; "Unallowable Costs"; and Funds to Better Use."

On December 2, 2013, Auditor [REDACTED] advised us by email that OIG had decided to allow us to provide an official response to the forthcoming Jackson County audit Draft Audit Report. She also advised us that Jackson County's response would be appended to the Final Audit Report.



We strongly and categorically disagree with each of the findings outlined in the Draft Audit Report and the Recommendations set forth on page 15. OIG's findings will be addressed in the order presented in the Draft Audit Report.

## **II. THE PROGRAMMATIC DEFINITION OF A "COLD CASE"**

OIG attempts to justify its finding that 34% of the cases reviewed by Jackson County during our FY-2010 Solving Cold Cases with DNA grant were "ineligible" based, in part, on the following:

According to NIJ officials, the *general concept* behind the program was to take advantage of the advent of DNA technology and subsequent advances to solve cold cases that occurred at a time when the technology was not available or advanced enough to process the biological evidence. This statement is *in line with* the 2010 program solicitation, which states that advances in DNA technology have increased the successful analysis of aged, degraded, limited, or otherwise compromised biological evidence. Biological samples once thought to be unsuitable for testing or that generated inconclusive results may now be analyzed. *These statements point to the fact that* the funds are meant for cases where limits in DNA technology at the time the crime was committed prevented the investigation from moving forward.

NIJ officials also stated that the program was *not meant* to cover cases with biological evidence that was obtained during a time when DNA technology was available but a decision was made by the agency to inactivate the case without processing the biological evidence. *This corresponds to* NIJ's definition of a cold case; that is any unsolved case for which all significant investigative leads have been exhausted. If suitable DNA technology was available at the time the crime was committed and biological evidence was collected, the biological evidence represents a significant investigative lead. If the biological evidence was not analyzed, all investigative leads have not been exhausted and the case does not qualify under the program. *This stipulation underscores the fact that* the review and investigation of certain cases cannot be funded using program funds.

(Draft Audit Report, p. 6; emphasis added).

The vague and intangible phraseology highlighted in the above two paragraphs reveals that OIG's interpretation of the definition of a "cold case" is a brand new agglomeration of supplemental verbiage and subjective inference that OIG force-feeds into the *actual* programmatic definition in order to accomplish its predetermined objectives.

Recognizing the extent of its reconstruction of the definition, OIG grudgingly concedes, "*While we acknowledge that NIJ's definition of a cold case does not refer specifically to biological evidence, the definition can be reasonably inferred, based on the solicitation as a whole*" (Draft Audit Report, p. 8).

Thus, OIG concedes—as it must—that the programmatic definition of a cold case fails to provide applicants with explicit notice that NIJ allegedly considered the existence of biological evidence an "investigative lead." Remarkably, however, OIG nevertheless claims that such a construction "can be reasonably inferred, based on the solicitation as a whole." That claim amounts to nothing more than the subjective fiat of the auditors. It is not grounded in explicit

“legal, regulatory, or contractual requirements” as dictated by the definition of “questioned costs” set forth on page eighteen (18) of the Draft Audit Report.

Furthermore, in contrast to OIG’s *post hoc*, 261-word, two-paragraph definition of a “cold case” set forth above, the FY-2010 and FY-2012 Solving Cold Cases with DNA grant solicitations define a “cold case” in a mere 29 words, to wit:

For the purposes of this announcement: “violent crime cold case” refers to any unsolved UCR Part 1 Violent Crime case for which all significant investigative leads have been exhausted.

#### **OIG’s Reconstructed and Retroactive Definition of a “Cold Case”**

During the exit interview held at our office on August 15, 2013, Auditor ██████ notified us that discussions with NIJ would “continue” about the “meaning” of the above programmatic definition of a “cold case.” During our September 12, 2013, conference call with OIG, Supervisor ██████ advised us that OIG had held discussions with NIJ about the meaning of this definition after our on-site audit had concluded. She stated that these discussions were with the NIJ Solving Cold Cases with DNA grant program managers and three (3) NIJ staff attorneys.

As an preliminary matter, it can’t escape notice that if the programmatic definition of a “cold case” was allegedly so clear, they *why* did OIG feel that it was necessary to further discuss and clarify this definition in a meeting with two (2) program managers and three (3) NIJ staff attorneys?! The simple answer is that—given OIG’s current position—no such discussion *should have been* necessary. The fact that further discussions were needed is clear evidence that the programmatic definition of a “cold case” set forth in NIJ’s 2010 and 2012 solicitations is vague, ambiguous, and comes nowhere near the contorted, *post hoc*, 261-word reconstruction asserted by OIG.

Additionally, the very fact that OIG’s interpretation of the programmatic definition of a “cold case” required the extensive—and substantively different—definitional verbiage set forth above, is further evidence that the programmatic definition failed to provide applicants with fair notice regarding its *newly constructed* parameters.

Furthermore, if the programmatic definition of a “cold case” was *truly* that which is asserted above by OIG, then *why didn’t NIJ simply define it that way in the numerous solicitations announced?!* The fact that nothing even close to OIG’s new definition was ever provided to grant applicants is additional evidence that OIG’s *post hoc* interpretation was *not* NIJ’s original intention.

*However, most fundamentally, if OIG’s interpretation of a “cold case” was in fact consistent NIJ’s original programmatic definition, then why did NIJ award Jackson County funding under the FY-2010 and FY-2012 solicitations after our application submitted in both years clearly and specifically advised NIJ that 1) STR technology had been available in our jurisdiction since 2000; and 2) that we planned to review cases up to the year 2005 (2010 application) and between 2006-2011 (2012 application)? Why was this never raised in response to any of our many progress reports, which described in great detail our case review, investigation, and charging activities for violent cold cases committed in Jackson County after 2000? Why was this never raised by NIJ as an issue in any of our programmatic audits?*

Tellingly, OIG wholly fails to address these inconvenient facts in its Draft Audit Report. The reason is simple: It completely undermines OIG's position regarding their new and revised programmatic definition of a "cold case."

**The "Solving Cold Cases with DNA" Solicitation Definition of a "Cold Case"**

For the purposes of this announcement: "violent crime cold case" refers to *any* unsolved UCR Part I Violent Crime case for which *all significant investigative leads* have been exhausted (emphasis added).

The above programmatic definition of a "cold case" appeared in the FY-2010 Solving Cold Cases with DNA solicitation offered by NIJ. The stated purpose of that grant was *to solve cold cases with DNA*. Thus, to assume that applicants knew that "all significant investigative leads have been exhausted" *included DNA leads* is completely counterintuitive and patently unreasonable. That is simply because the *stated purpose of the grant was to solve cases using leads made available through DNA testing!*

Additionally, the above definition utilized the modifier "*any*" to describe those UCR Part I Violent Crime cases on which work may be performed under the grant. Thus, contrary to OIG's assertion, there is absolutely *no* qualification, limitation, or restriction in the definition that arbitrates allowable grant-funded work based upon whether suitable DNA technology existed at the exact moment in time that a UCR Part I Violent Crime was committed.

The definitional phrase, "for which all significant investigative leads have been exhausted," *is not relative to any particular point in time*, and by its explicit terms it *fails to entail* evidence amenable to DNA testing *and* the temporal existence of DNA technology in a particular jurisdiction. Accordingly, the use of the modifier "*any*" in conjunction with a *non-relative time frame* and the fact that *the word "lead" specifically fails to entail evidence amenable to DNA testing*, would cause any reasonable applicant to conclude exactly what we—and countless other cold case grantees—reasonably believed (and currently believe): that a violent crime "cold case" is an unsolved violent crime for which all investigative leads (non-forensic leads known to investigators) had been exhausted, but still has the potential to be solved through DNA testing. OIG's claim to the contrary—that the definition provided applicants with notice that DNA technology *at the moment that the crime was committed* must have "prevented the investigation from moving forward"—is simply nowhere to be found in NIJ's solicitation document and is pure revisionist history.

Our understanding of the programmatic definition was—and is—consistent with both the plain and limited language set forth in the solicitation document, as well as the following directions provided on page nine (9) of the 2010 solicitation, under the heading of "Program Narrative": "Proposals must clearly define the *strategy and criteria* that will be used *to identify, prioritize, and select violent crime cold cases that have the potential to be solved through DNA analysis.*"

Our belief that our interpretation of the definition of a "cold case" was correct is also consistent with a document published by NIJ in July 2002, and cited in its 2008 Solving Cold Cases with DNA solicitation document (the first grant under which we applied), entitled, "Using DNA to Solve Cold Cases."<sup>1</sup>

Regarding the definition of a "cold case," the report advised:

<sup>1</sup> National Institute of Justice, *Using DNA to Solve Cold Cases*. July 2002.

*While the cases considered for this kind of review will vary from jurisdiction to jurisdiction, it is important to define minimum requirements that will benefit from this approach.* Issues such as statutes of limitation and solvability factors should be thoroughly examined in cooperation with a prosecutor and the forensic laboratory to establish guidelines for case selection. It will also be important to identify the ultimate goals of the program so that the selection criteria can be tailored to meet those specific goals.

(Page 17) (emphasis added).

It may be beneficial *for a jurisdiction to define cases* according to several solvability factors.

(Page 17) (emphasis added).

The clear language of the document states that cases considered for review will *vary in each jurisdiction*. There is *no* indication that only a particular category of cases, defined by time, technology, or the conjunction of both time *and* technology (as alleged by OIG), are the only permissible candidates for a "cold case" review process.

Our beliefs were further influenced by a document also referenced by NIJ in its 2008 Solving Cold Cases with DNA solicitation, entitled, "Cold Case Squads: Leaving No Stone Unturned."<sup>2</sup> This document was published by the Bureau of Justice Assistance in July 2003. In pertinent part, the document states on page four (4):

*The process by which cases are reviewed and considered for referral to the cold case squad varies. These cases are usually at least a year old* and cannot be addressed by the original homicide squad because of workload, time constraints, *or the lack of viable leads. . . In many instances, the supervisor, either with or without the input and consensus of the squad, decides which cases are referred to the cold case squad.* In some instances, prosecutors will reopen cold cases or initiate cold case investigations with state and local law enforcement agencies.

(Emphasis added).

In summary, this document advised that 1) the process for cold case review varies; 2) cold cases are those that are at least one (1) year old; 3) this is a category of cases in which viable leads are lacking; and 4) the unit supervisor should decide which cases will be pursued.

It is clear from this document that the Department of Justice believed that the definition of a "cold case" was *not* exclusively one that occurred at a time when DNA technology was not available. It is also clear from the document that "the lack of viable leads" is the exact reason *why* resort to DNA analysis is necessary. Accordingly, *under the definition of a "cold case" set forth in this document, evidence amenable to DNA analysis is not a category of evidence entailed within the definition of "viable leads."* However, that is in complete opposition to OIG's current position.

Furthermore, OIG's revised definition of a "cold case" would lead to completely absurd results. Under OIG's "all significant investigative leads have been exhausted" interpretation, *no* "cold

<sup>2</sup> U.S. Department of Justice, *Cold Case Squads: Leaving No Stone Unturned*, July 2003.

case" in any jurisdiction would be eligible for review under the Solving Cold Cases with DNA grant if STR technology had been online for *any amount of time* prior to an NIJ cold case award. This is because the evidence in question would have been available for *some* amount of time—in many cases for more than a decade—*after* STR technology had been available in a particular jurisdiction without DNA analysis having been performed. As such, that evidence would have constituted a "significant investigative lead" that had not been "exhausted" by DNA testing before the grant was awarded. As a result, pursuant to OIG's newly-minted definition, analysis of the evidence or review of the case would be impermissible.

Take, for example, a violent unsolved cold case committed in 1987, in which biological evidence was recovered. Thirteen (13) years later, in 2000, STR testing became available in the jurisdiction where the crime occurred. In 2010, authorities in that jurisdiction applied for and were awarded NIJ's FY-2010 Solving Cold Cases with DNA grant. Review of that 1987 case by grant-funded personnel would *unallowable* under OIG's definition of a "cold case." That is because the jurisdiction had a *full decade* during which the availability of STR DNA technology coincided with the existence of a "significant investigative lead," to wit: the biological evidence recovered in 1987. Furthermore, during that decade, that investigative lead had not been exhausted by DNA testing. Therefore, case review, investigation, and DNA analysis with grant funds would not be allowable.

In contrast, for a similar case committed in 2009, a FY-2010 grantee would have only had one (1) year in which to "exhaust" "all significant investigative leads," rather than a full decade for the 1987 case. Additionally, if STR DNA technology had not been available until 2010, a FY-2010 grantee could permissibly review, investigate, and test *all* cases up to that date.

OIG, however, further twists the definition of a "cold case" to link the temporal commission of the crime and the collection of evidence in that case to the existence of unspecified DNA technology at an unspecified location *at the moment in time the crime was committed*. This, of course, is a distinction without a difference from the above examples. There is no logically significant distinction between a cold case that was committed at a time when "DNA technology" (however that is defined) *was not* "readily available" (however that is defined)—but subsequently became available and yet DNA analysis was not performed until years later, versus a case committed at a time when such technology *was* available, but testing was *not* immediately conducted. Both cases share identical common denominators: 1) an unsolved violent crime "cold case;" 2) the existence of biological evidence; and 3) the concurrent existence of DNA technology and that biological evidence.

OIG's revised definition leads to a host of additional problems that will surely give rise to future *post-hoc jerry-rigged* programmatic definitions.

OIG states:

If suitable DNA technology was available at the time the crime was committed and biological evidence was collected, the biological evidence represents a significant investigative lead. If the biological evidence was not analyzed, all investigative leads have not been exhausted and the case does not qualify under the program.

(Draft Audit Report, p. 6).

This definition is completely unworkable. First of all, DNA technology is not a “lead.” Rather—as the term implies—it is *technology* that has no association to any particular case.

Second, exactly what constitutes “DNA technology” is not defined by OIG. Does “DNA technology” refer to RFLP testing “technology” that was available in the late 1980s and throughout the 1990s? What about first-generation PCR “technology,” including DQA Polymarker and DIS80 testing? Those “DNA technolog[ies]” *were available from the late 1980s throughout the 1990s*. However, pursuant to the OIG’s new definition, if evidence in an unsolved violent crime committed in 1990 was suitable for RFLP or first generation PCR testing—and that testing did *not* occur until STR technology came online sometime in the late 1990s or early 2000s—that case would *not* be eligible for review, investigation, or forensic analysis. That is because a “significant lead” existed in 1990 (biological evidence) concurrently with the existence of “DNA technology” (RFLP/PCR), and that “lead” had not been exhausted.

Case qualification under this new definition will apparently rise or fall based upon whether past DNA technologies could have successfully developed a foreign profile based on information gleaned from then-existing quantitation methods and measurements. Thus, specific nanogram levels of DNA for each sample, in conjunction with the capabilities and limitations of the technology in existence at the time the crime was committed, will be determinative. If the quantity of DNA extracted from a particular sample was sufficient for then-available technologies to have detected a foreign profile, then according to OIG, that case would be *ineligible* for review under NIJ’s Solving Cold Cases with DNA program. If not, it *might* be eligible for review. However, more questions remain. For example, what if the quantity of DNA known to be available at the time that a violent crime was committed *might* have been sufficient to detect a profile with former technologies, but the lab elected to be conservative and wait for a technology that it was more confident could detect a profile? What if that decision was unreasonable? What if this decision was wrong? What level of certainty is necessary under the programmatic definition? What if the answer was unknowable? Who is responsible for researching and making this historical, scientific determination in each case? For each sample? None of these questions are answered.

Third, the new definition asks whether “DNA technology was available at the time the crime was committed.” This prompts the question: “*available where*”? Does this mean nationally, regionally, or locally *available*? What if DNA technology was *available* at the FBI crime lab at the time the crime was committed, but not at the jurisdiction in question? What if DNA technology was *available* at a state lab at the time of the crime, but not the local lab of the jurisdiction in question? What if it was *available* at a lab in the neighboring county, but not at the lab of the investigating jurisdiction? What if “DNA technology” was *available* at certain private labs across the country at the time the crime was committed, but not at the jurisdiction in question? To further complicate matters, which generation of DNA technology is referred to as being “*available*”? RFLP? First generation PCR? Only autosomal STR testing?

OIG’s new definition also prompts the question, “*available how*”? “Available,” meaning: the technology was in “existence” *somewhere* at the time of the crime? Does it mean *economically available* to the investigating agency at the time of the crime? Does it mean *logistically available* to police at the time the crime was committed? These examples demonstrate how utterly unworkable OIG’s revised definition of a “cold case” will be for grantees. If this definition stands, confusion will be legion.

**III. NIJ HAD FULL NOTICE OF AND EXTENSIVE EXPERIENCE WITH THIS  
GRANTEE'S INTERPRETATION OF THE PROGRAMMATIC DEFINITION OF A  
"COLD CASE;" A DEFINITION CONTRARY TO OIG'S  
RECONSTRUCTED DEFINITION**

Perhaps the most compelling evidence that the intended programmatic meaning of a "cold case" in all past Solving Cold Cases with DNA solicitation documents is *not* that which is *now* asserted by OIG is the clear and unambiguous notice provided by Jackson County to NIJ about our interpretation of that definition, in conjunction with NIJ's extensive experience with our program.

In Appendix II, page three (3) of Jackson County's FY-2010 Solving Cold Cases with DNA grant application, under the heading "Project Background and History," we stated: "*Cold case investigation and prosecution with DNA technology has been ongoing in Kansas City, Jackson County, Missouri since 2000.* This endeavor was largely facilitated by the *implementation of STR DNA technology at the Kansas City Police Crime Laboratory (KCPD Crime Lab) that same year.*" This exact same statement was also provided in the first paragraph of our 2010 application attachment, "The Kansas City Model of Cold Case Review." Accordingly, NIJ was placed on explicit notice that STR DNA technology had been online and operational in our jurisdiction *since the year 2000.*

In addition, our FY-2010 grant application clearly stated in numerous passages that we had *then-identified* 1,748 cases for review which contained evidence amenable to DNA analysis that had been committed between 1979 and **2005** (*see* application narrative pp. 9, 11, 30; *see also* Project Background and History, p. 80). Accordingly, NIJ was explicitly notified that 1) STR DNA technology had been operational in our jurisdiction since 2000; and 2) that we were planning to review and investigate cases with grant funding that had been committed five (5) years *after* STR DNA technology had become available in our jurisdiction.

We also advised NIJ that 2010 grant funds would be used to review unsolved violent "cold cases" committed *within the past three (3) years* in order to toll the running of the statute of limitations. (*See* application narrative, p. 14).

Furthermore, during the term of our 2010 award, we provided NIJ with numerous programmatic progress reports. In each of those reports, we supplied metrics regarding the number of cases reviewed, along with a separate list and detailed description (including newspaper articles) of the cases that we had investigated during each reporting period. By the conclusion of our 2010 grant, we had reported *fifteen (15) cases* to NIJ that we had reviewed, investigated, and charged which *occurred after the year 2000.* Three (3) of those crimes were committed *after 2005.* These reports were all reviewed and accepted by NIJ. We never received *any* oral or written communication from NIJ that our work fell outside the programmatic definition of a "cold case."

Additionally, NIJ Cold Case Grant Manager [REDACTED] conducted a comprehensive audit of our FY-2010 Solving Cold Cases with DNA program during the week of July 22, 2013. The exit interview for that audit was conducted on July 26, 2013. At no time, either during or at the conclusion of that audit, were we ever advised that our understanding of the programmatic definition of a "cold case" was erroneous.

Moreover, we were a successful applicant for NIJ's FY-2012 Solving Cold Cases with DNA. That application included identical documentation noted above regarding the fact that STR DNA technology had been available in our jurisdiction since 2000 (*see* FY-2012 grant application,

Appendix III, p. 3, “Project Background, History, Timeline and Accomplishments”; *see also* 2012 grant application p. 8, pp. 16-17, and “The Kansas City Model of Cold Case Review,” Appendix IV, p. 7).

In our FY-2012 application, we specifically advised NIJ that prospective grant funding would be used to review cases that included then-identified offenses committed *between 1979 and 2010—up to a full ten (10) years after STR testing had become available in our jurisdiction!* (*see* 2012 grant application pp. 3, 8, 27). NIJ was also advised that we planned to use grant funding to review cases *committed within the past three (3) years* for the purpose of filing “John Doe” charges to toll the statute of limitations. (*See* FY-2012 application, p. 18).

In light of the above evidence, it is inconceivable that the actual programmatic definition of a “cold case” is consistent with that now being asserted by OIG. OIG’s attempt to retrofit this definition—which has been provided to and relied upon by grantees in all past NIJ “cold case” solicitations—not only strains credibility, it is bereft of any credibility at all. More fundamentally, OIG’s interpretation is completely refuted by NIJ’s conduct and communications with our office over the past six (6) years.

#### **IV. OIG’s ON-SITE CASE REVIEW**

On page seven (7) of the Draft Audit Report, OIG states that that in four (4) of the cases it reviewed during its on-site visit, “biological evidence had already been processed and uploaded to the Combined DNA Index System (CODIS) as part of the original investigation, which was prior to the case being reviewed as part of this award.” OIG then cites to the FY-2011 Solving Cold Cases with DNA solicitation as the basis for its concern.

First, Jackson County never applied under NIJ’s FY-2011 Solving Cold Cases with DNA grant. Thus, citation to verbiage contained in that document is completely irrelevant to the issues discussed in the Draft Audit Report.

Second, despite its criticism, OIG fails to explain how it is humanly possible to determine that evidence has been processed and uploaded to CODIS *without first reviewing a case file* (as did OIG’s auditors) which contains the lab reports that facilitate that very determination. After our unit discovered that evidence in those four (4) cases had been processed and uploaded to CODIS, no further work was performed. Until those four (4) cases had been reviewed, the fact of previous lab analysis or upload was unknown—and unknowable.

#### **V. REVIEW OF CASES BETWEEN 2006-2011 UNDER OUR FY-2010 GRANT AWARD**

On page seven (7) of its Draft Audit Report, OIG states:

We also noted that according to Jackson County’s FY 2010 award application, its primary goal was to review 1,748 cold cases for crimes committed between 1972 and 2005 that were known to have biological evidence amenable to DNA testing. According to the OJP Financial Guide, you must initiate a Grant Adjustment Notice (GAN) for changes in scope, duration, activities, or other significant areas. These changes include altering programmatic activities or changing the purpose of the project. Jackson County did not file a GAN outlining the changes in scope. Therefore, in addition to reviewing cases that were not eligible under NIJ’s program, Jackson County’s review of cases from 2006 through 2011 was also inconsistent with the primary goal stated in its application.



The entire premise upon which this finding was made is flawed and misleading. First, a review of the FY-2010 Solving Cold Cases with DNA solicitation by NIJ reveals that there is *no requirement* that applicants must specify the offense date ranges for cases that will be reviewed. Second, there is *no prohibition* in the solicitation that successful applicants *not* seek to *identify* additional cases for review during the course of the grant period. Quite to the contrary, under the heading, "Award Purposes," on page three (3) of the solicitation, the document states, in part:

The goal of this solicitation is to make funding available to States and units of local government to:

1. *Identify*, review and prioritize violent crime cold cases that have the potential to be solved using DNA analysis . . . .
2. *Identify*, collect, retrieve, and evaluate biological evidence from such cases that may reasonably be expected to contain DNA.

Thus, a major stated purpose of the FY-2010 Solving Cold Cases with DNA grant solicitation was that grantees should seek to "identify" "violent cold cases crimes that have potential to be solved using DNA analysis." That is exactly what we did during the course of the 2010 grant. However, we are *now being informed by OIG that we should be sanctioned for doing exactly what the solicitation invited us to do!*

Third, the date ranges set forth in our 2010 application identified a category of cases that had been *then-identified* (at the time of the writing and submission of the application) as containing evidence presumptively amenable to DNA analysis. We *never* certified, promised, or affirmed in the application that we would not seek to identify violent crime cold cases that went beyond those identified at the time the application was submitted. Rather, we went above and beyond the call of the solicitation by being fully prepared (at the time we submitted our application) to begin grant activities with a systematic and organized accounting of *then-known* cases with high potential for solvability. Ironically, our hard work at becoming prepared and organized for the application process is now being *used against us* by OIG's erroneous conversion of our application metrics into a restrictive and allegedly self-imposed boundary for case review activities. OIG does not, and cannot cite a single programmatic restriction in support of this finding.

A cursory reading of our FY-2010 grant application reveals that we fully informed NIJ that we would continue to seek to identify additional violent crime "cold cases" beyond those known to us at the time of our application. In our application abstract on page two (2), we stated, "The purpose of this application is to seek to enhance and continue the ongoing and systematic identification, review, investigation, and DNA analysis of existing evidence in unsolved violent cold case crimes in Jackson County, Missouri" (emphasis added). Similarly, on page four (4) of the abstract we stated, "The ultimate goal of this project is to increase the number of violent cold case offenders who are identified through DNA evidence and held accountable for their crimes." (Emphasis added).

In the "Purpose and Statement of the Problem" portion of the application on page six (6), we stated, "The purpose of this grant application is to enhance and continue the systematic interagency identification, review, and investigation of violent cold case crimes in Jackson County, Missouri capable of being solved with DNA evidence. . . This number [1,748] includes all currently known yet un-reviewed cases with potential to be solved with DNA evidence and successfully prosecuted that were originally investigated by KCPD." (Emphasis added).

Fourth, we specifically stated on page thirteen (13) of the application that “we will strive to identify and review all violent cold case crimes from these smaller and more rural agencies [those in eastern Jackson County] within our county.” (Emphasis added). It was clear from the application that our *then-identified* (at the time the application was submitted) cases between 1979 and 2005, totaling 1,748, were distinct from those cases that had been committed in eastern Jackson County, but that had *not yet been identified*.

Our position is further bolstered by the “Projected Timeline of Cold Case Milestones” in our FY-2010 application Appendix I, pages 24-26, which reference the fact that “review continues on eastern Jackson County violent crime cold cases.” (Emphasis added). These cases were specifically *not* included in the category of cases identified between 1979 and 2005 (in other words, not the 1,748 cases then-identified), but were *explicitly mentioned* as a category of violent crime “cold cases” that our 2010 project *would attempt to identify*.

Fifth, on page fourteen (14) of our application, we identified an additional class of cases separate from those that had been *then-identified* between 1979-2005. We specifically stated we would review these cases. The relevant passage states:

Although Missouri law was amended in 2002 to eliminate the statute of limitations for forcible sexual crimes, the prosecution of non-sexual crimes committed during the same event will be barred if not filed within 3 years of the date of the offense. To prevent this from happening, each year our office receives a list of cases from the KCPD Crime Laboratory in which the statute is due to expire the following year. Cold Case Analysts conduct legal and factual review of these cases and file John Doe charges when legally and factually appropriate.

(Emphasis added).

A cursory review of this paragraph would have clearly advised those who reviewed our application that it was the intent of our project, if funded, to review cases committed within the last three (3) years of the date of the award. The application specifically stated that this review was necessary to toll the running of the statute of limitations in cases that had *occurred within the last three (3) years*. Accordingly, our application would have provided a grant reviewer clear notice that the intended time frame for this review would cover cases committed during the years 2010 (part of the year), 2009, 2008, and 2007. Therefore, for this reason alone, OIG’s claim that our application stated we would not review cases committed after 2005 is refuted by the plain language of the application itself.

On page seven (7) of the Draft Audit Report, OIG also states:

According to the OJP Financial Guide, you must initiate a grant adjustment notice (GAN) for changes for changes in scope, duration, activities, or other significant areas. These changes include altering programmatic activities or changing the purpose of the project. Jackson County did not file a GAN outlining the changes in scope. Therefore, in addition to reviewing cases that were not eligible under NIJ’s program, Jackson County’s review of cases from 2006 through 2011 was also inconsistent with the primary goal stated in its application.

The reader should be aware that despite at least two lengthy telephone discussions and an email communication summarizing OIG’s findings, the Draft Audit Report is the *first time* that the OIG

auditors involved in this inquiry have *ever* cited 1) the *OJP Financial Guide*; and 2) the absence of a GAN as justification for their finding on this point. To date, the OIG allegation that unauthorized cases had been reviewed was based on 1) the programmatic definition of a "cold case;" and 2) this grantee's allegedly binding self-declaration of the limited nature of case review to be performed under our FY-2010 grant, which is refuted above.

Apparently, OIG now feels that it needs to bolster the basis for this finding. However, the premise upon which this argument is based remains fatally flawed. This is because the "scope, duration, activities," etc. of our case review activities performed under the FY-2010 grant *never changed*. As is evidenced by the clear language of our FY-2010 application cited above, NIJ was on *full notice* that we would continue to seek to identify further cold cases for review during the course of the grant. OIG fails to explain why a GAN was required to advise NIJ of that which it had already been specifically advised in our application documents. There was no change in scope, duration, or activities beyond those patently disclosed in our FY-2010 application. Accordingly, a GAN was *not required*. OIG's allegation to the contrary is factually baseless.

#### VI. TRACKING HOURS FOR GRANT-FUNDED EMPLOYEES

On page eight (8) of the Draft Audit Report, OIG states:

We are questioning all costs charged to the cooperative agreement, all of which was for personnel costs, because a significant number of the cases reviewed by the award funded employees were not eligible under the program. Further, Jackson County officials stated that it did not have a formal system to track the number of hours award funded employees spent on each case, which would allow us to determine the percentage of time award funded employees spent on eligible cases.

(Draft Audit Report, p. 8).

By OIG's own calculation, 66% of the cases reviewed under our FY-2010 grant award were committed between 1979 and 2005 (the disputed time frame addressed above). Despite that fact, OIG has announced its intent to question *all* draw downs that occurred *before and after* October 30, 2013, a time frame which completely encompasses grant-funded work which—by OIG's own admission—was *validly performed* (under OIG's disputed definition of a "cold case") by our office *on nearly 70% of the cases we reviewed and investigated!* OIG's recommendation based on that calculation is not only fundamentally unfair, it is completely illogical. In effect, IOG concedes that under its disputed interpretation of an eligible case, the vast majority of the work we performed was *permissible* under the terms of the application, but still wants *all* funding back anyway—in total! This recommendation is patently unreasonable.

The stated reason for this draconian conclusion is that Jackson County "does not have a formal system to track the number of hours award funded employees spent on each case, which would allow us to determine the percentage of time award funded employees spent on eligible cases." (Draft Audit Report, p. 8). However, OIG fails to inform the reader that the simple reason for *that* state of affairs—which the Draft Audit Report never mentions—is that NIJ never informed us—or any other cold case grantee for that matter—that we were required keep track of time spent working on *each individual case*. If we had been told to do that, we would have done so. Despite that fact, OIG once again wants to hold *us* responsible for a non-existent programmatic requirement. NIJ has never required "cold case" grantees to track hours spent working on

individual cases. That non-existent grant requirement is the *sole* reason that the only remedy that OIG can construct is to seek to force us to completely reimburse DOJ for our FY-2010 grant funding. This finding simply adds insult to error (as described in the points addressed above).

#### **VII. 2012 GRANT "FUNDS TO BETTER USE" FINDING**

On page eight (8) of the Draft Audit Report, OIG states:

[W]e have concerns regarding the use of Cooperative Agreement 2012-DN-BX-K031 funds totaling \$415,829, none of which were spent as of the conclusion of our audit. The FY 2012 award application expanded the case timeframe that would be subject to review, including 2,545 cases with evidence amendable [sic] to DNA testing from years 1979 through 2010. Despite the fact that Jackson County included more recent case years for review and investigation, the concerns we have regarding the eligibility of the more recent cases still exist. Jackson County's case load, *at least in part*, mirrors Kansas City's case load because of the dual review process. Therefore, *it is likely* that the ineligible cases reviewed by Kansas City using FY 2011 award funds, which was 95 percent of what was reviewed, are *in large part* the same cases that will be reviewed by Jackson County using its FY 2012 award funds. Therefore, we identified the entire award totaling \$415,829 as funds to better use.

(Emphasis added).

With this statement, OIG substitutes rank speculation and surmise in place of evidence. Even more startling, based upon that speculation, OIG recommends that \$415,829.00 of currently in-use grant funding (which employs four (4) people) be designated as "funds to better use." Moreover, OIG acknowledges that its finding is based on its limited understanding of a case review "process" rather than actual numbers and evidence.

Pursuant to Chapter 7 of the *GAO Government Accounting Standards: Implementation Tool* document, Field Work Standards for Performance Audits, under the heading of Overall Assessment of Evidence, Standard 7.70 b., states:

Evidence is not sufficient or not appropriate when (1) using the evidence carries an unacceptably high risk that it could lead to an incorrect or improper conclusion, (2) the evidence has significant limitations, given the audit objectives and intended use of the evidence, or (3) the evidence does not provide an adequate basis for addressing the audit objectives or supporting the findings and conclusions. Auditors should not use such evidence as support for findings and conclusions.

It is probably fair to say that most reasonable people would find that rank speculation and conjecture 1) carry an unacceptably high risk of an incorrect or improper conclusion; 2) has significant limitations; and 3) does not provide an adequate basis for addressing audit objectives or supporting findings and conclusions. Nevertheless, OIG happily ignores its own binding audit standards while arriving at its predetermined conclusion.

Conspicuously, however, OIG fails to inform the reader of the basis for its conclusion that 95 percent of the cases reviewed by the Kansas City Police Department are "ineligible." Presumably, this is based on the same erroneous reasoning by which OIG claims that 34% of the

cases reviewed by Jackson County during its FY-2010 grant were ineligible: 1) OIG's *post hoc* programmatic reconstruction of the definition of a "cold case"; and/or 2) the scope of KCPD's case review went beyond those cases that had been identified in its application at the time of submission. As noted above, the premise upon which both of these positions rest is erroneous.

Most fundamentally, however, OIG fails to mention that KCPD was awarded its FY-2011 grant after having notified NIJ in its application that it would be reviewing cases committed after the year 2000 (the year STR technology was available in this jurisdiction); 2) that NIJ never notified KCPD at any time—including after progress reports had been submitted and audits completed—that nearly all of the case review that it was engaged in was allegedly unauthorized.

In the final analysis, NIJ's conduct on this point speaks much louder than OIG's words: NIJ did not consider the cases in question that were reviewed by KCPD to be unauthorized grant-funded work. If it had, KCPD's FY-2011 grant application would have been denied; its progress reports would have been rejected; and its programmatic audit reports would have reflected this concern. None of these actions were ever taken.

#### **VIII. ALLEGEDLY "LATE" PROGRESS REPORT METRICS**

OIG claims that the submission dates for the first three (3) progress reports under our FY-2010 grant were "late." (Draft Audit Report, p. 10). OIG further asserts that the first report under the FY-2012 grant was "late." (Draft Audit Report, p. 10).

Jackson County has been the recipient of three (3) Solving Cold Cases with DNA grant awards. We began work on our FY-2008 award on June 1, 2009. This grant continued until November 30, 2010. However, due to an unspent training budget, NIJ extended our FY-2008 grant until May 31, 2011.

Our FY-2010 award began on December 1, 2010. During the period between December 1, 2010, and May 31, 2011, we asked NIJ which of our two ongoing grants we should report metrics under. We were advised by the Cold Case Program Manager in late February 2011, that we should not report metrics under both grants, since that would constitute double counting. Rather, we were advised that we should continue to report metrics (that were then accruing during the running of our FY-2010 grant) under our FY-2008 grant. We were never advised by NIJ that progress reports were due for our FY-2010 grant despite the complete absence of grant-related activity under that award at that time. Relying on this advice, we continued to report incoming metrics *only* under our FY-2008 grant since it had not yet been closed.

At a much later point in time, NIJ contractor [REDACTED] advised us that we had received incorrect advice, and that the metrics previously reported under FY-2008 grant that had accrued after our FY-2010 grant had begun should instead be reported in our FY-2010 progress reports. We then completed a number of entirely new progress reports and submitted them under our FY-2010 grant. The incorrect advice received from NIJ is the *sole* reason that our initial two (2) progress reports under the FY-2010 award were "late" as described in the Draft Audit Report.

Regarding the FY-2012 grant report, OIG is correct that the lateness of the report was based on a misunderstanding regarding reporting requirements. Due to the fact that there was no activity under our FY-2012 grant because our FY-2010 grant was ongoing, and all case metrics were being progress-reported under that grant, we were unaware that a progress report was necessary. Once we were provided with correct information from NIJ, we immediately rectified the situation.

## IX. THE JULY-DECEMBER 2011 REPORTING PERIOD

On page twelve (12) of the Draft Audit Report, OIG states:

We also noted that Jackson County reported 61 violent crime cold cases with biological evidence that were subjected to DNA analysis in the July through December 2011 reporting period. According to NIJ's *Guidelines for Performance Measures and Progress Reports*, award recipients should not include this metric if the award does not include funding for DNA analysis. Therefore, this metric should have been reported as 'N/A' in that period.

Further, in footnote 4 on page twelve (12) of the Draft Audit Report, OIG states:

NIJ issued the Guidelines for Performance Measures and Progress Reports to award recipients in December 2012. The guidance was available to award recipients prior to the July through December 2012 progress report period due date on January 30, 2013. In addition to using the guidance to complete the performance measures table for that period and all periods moving forward, it is reasonable to conclude that award recipients could also use the guidance to revise the metrics that were included as part of previous reporting periods, if necessary.

In footnote four (4), the Draft Audit Report correctly notes that NIJ's *Guidelines for Performance Measures and Progress Reports* was issued to grantees—for the first time—in December 2012. However, OIG incorrectly states that “[t]he guidance was available to award recipients prior to the July through December 2012 progress report period due date on January 30, 2013.” (Emphasis added).

If OIG had actually proofread its own draft report, it may have noticed that it had earlier stated (correctly) on page twelve (12) of the report that the reporting period in question was July-December 2011, not 2012 as stated in footnote four (4). Therefore, OIG's assertions to the contrary notwithstanding, guidance was not available to award recipients prior to the progress report due date on January 30, 2013.

Further, OIG's asserts that “it is reasonable to conclude that award recipients could also use the guidance to revise metrics that were included as part of previous reporting periods, if necessary.” (Draft Audit Report, p. 12, n.4). Given the tenor of this audit, it is *more likely* that had Jackson County revised any previous progress report metrics in the absence of explicit authority permitting such revisions, OIG would have claimed that this was a programmatic infraction as well. More fundamentally, NIJ *never* advised Jackson County that it was required to revise past metrics to conform to a guidance document provided to grantees well after those metrics had been reported, based on a document that did not exist at that time.

The guidance document cited above was issued to “cold case” grantees for the *first time* on December 10, 2012. Therefore, during the questioned time frame of July-December 2011, we had received *no guidance* from NIJ that the number of cases subjected to DNA analysis should not be a reported metric under our grant award. In fact, this was a reporting category included in the GMS computer system *that called for a metric*. Furthermore, there was *no* indication in GMS that this reporting category should not be completed for grantees who limited their grant-funded work to case review and investigation. Finally, we *never* received *any* oral or written direction from NIJ until *after* the July-December reporting period that this metric category should not be completed.

We also take issue with OIG's communications that characterized the reported metric of sixty-one (61) cases as "inaccurate." The number is accurate. We were told *after* this metric was provided that reporting under this category was *not necessary*. If we had direction and guidance on this topic earlier, we could have saved ourselves and the KCPD Crime Laboratory a substantial amount of time and effort gathering this information. Based on a lack of guidance from NIJ, we provided too much information, rather than providing "inaccurate" information. Once we were told by NIJ that it was not necessary to report this information, we stopped providing it. To hold this finding against our program, absent any guidance from NIJ to the contrary—especially in light of the fact that it appeared to be a *mandatory* reporting category on the GMS website—is fundamentally unfair.

#### **X. ALLEGED DUPLICATION OF PERFORMANCE METRICS**

On page twelve (12) of the Draft Audit Report, OIG states:

We identified another form of duplication, which was the result of Jackson County's and Kansas City's dual review process. We found that both Kansas City and Jackson County were counting cases reviewed by both agencies as part of their performance metrics. According to NIJ's *Guidelines for Performance Measures and Progress Reports*, case should only be counted as reviewed once, even if they are reviewed multiple times under an award or across multiple awards. ***This means that in order to avoid double-counting, only one agency should report a case reviewed as part of its performance metrics, regardless of the case being reviewed by both agencies.*** In total, we found that as of the end of July 2013 both agencies reported 485 of the same cases as being reviewed, 444 of which were reported by Kansas City first. ***This means that*** Jackson County should not have reported 444 cases, as they had already been counted as reviewed.

(Emphasis added).

As was the case with its reconstruction of the programmatic definition of a "cold case," OIG once again goes beyond the plain wording of the guidance document it cites as authority for its conclusion. It does so in search of an interpretation that meets its predetermined needs. This is evidenced by the fact that OIG substitutes its own favored verbiage (highlighted above) for the *actual wording set forth in the NIJ document*. To shoehorn Jackson County and KCPD's dual review process into the prohibited category of double-counting, OIG asserts, "***This means*** that in order to avoid double-counting, only one agency should report a case reviewed as part of its performance metrics, regardless of the case being reviewed by both agencies." (Emphasis added). A review of the guidance document, of course, reveals that it says nothing of the sort.

The plain language of the guidance document fails to support OIG's finding. Although "double counting" is never defined, certain examples are provided: counting cases more than once "under one award and under multiple awards if *the agency administers this program* under multiple fiscal years"; counting a case "twice *within the same award*" or "re-reviewing the same case"; and "*the grantee*" counting a case twice "under two or more different awards." (See page 3 of guidance document) (emphasis added).

Moreover, OIG's finding is further flawed for a number of reasons. First, this office has *never* received *any* indication from NIJ that it considered *inter-agency* "dual review" of cases *between different grantees* to constitute impermissible "double counting" of grant metrics. To the

contrary, the dual case review procedure practiced by our office and KCPD was specifically and unequivocally described in detail in our FY-2008, FY-2010, and FY-2012 grant applications (*see* 2010 grant application p. 13, pp. 22-23, and grant application attachment, “The Kansas City Model of Cold Case Review”—including the cold case review protocol chart) (*see also* 2012 grant application p. 8, pp. 16-17, and “The Kansas City Model of Cold Case Review”—including the cold case review protocol chart, Appendix IV, p. 7). After extensive study and consideration of each application, NIJ awarded our office grant funding in each of the noted fiscal years. Furthermore, it is our belief that each KCPD Solving Cold Cases with DNA grant application also provided a detailed description of our inter-agency case review procedure. Again, there was *never* any indication from NIJ at that this practice constituted prohibited “double counting” as alleged by OIG.

Second, this document was *first provided* to all “cold case” grantees on December 10, 2012, along with the new semi-annual progress report template. At a conference call held between NIJ and “cold case” grantees on December 18, 2012, the guidance document and the new progress report template were *explained for the first time*. There was *no* indication from NIJ during that call that inter-grantee review of “cold cases” constituted double counting of metrics.

Finally, at no time *after* December 2012, did NIJ *ever* inform our office that the “dual review” procedure outlined in our three (3) successful grant applications was prohibited. There were many opportunities to have done so. Between December 2012 and the present, we submitted a number of semi-annual grant progress reports, specifically stating the number of cases reviewed and investigated during the relevant time frames. All reports were approved, and we received *no* indication from NIJ that our method of calculating metrics was against any policies outlined in the guidance document.

Moreover, NIJ conducted a comprehensive audit of our FY-2010 Solving Cold Cases with DNA program during the week of July 22, 2013. Solving Cold Cases with DNA grant Manager, [REDACTED], informed us that the programmatic aspect of our audit would be conducted based upon our FY-2010 grant application—which contained an explicit description of our dual review procedure. The exit interview for that audit was conducted on July 26, 2013. *At no time*, either during or at the conclusion of that audit, was our method for calculating metrics ever questioned. The issue was never even raised by NIJ.

Furthermore, from a programmatic standpoint, OIG’s conclusion that our documented case review procedures constitute “double counting” of metrics makes no sense in light of NIJ’s strong emphasis in the FY-2010 solicitation document that applicants seek “collaboration with appropriate members of the criminal justice community,” such as “law enforcement.” (*See* FY-2010 solicitation document, p. 9; *see also* p. 10, requiring “Letters of cooperation/support or administrative agreements from organizations *collaborating in the project*”; p. 12, Project/Program Design and Implementation criteria, “Soundness of methodology and analytic and technical approach, including *demonstrated team approach to solving cold cases.*”) (Emphasis added). These statements don’t merely suggest interagency collaboration; they make it very clear that such collaboration is an important component of a *successful application*.

We never double counted metrics in *any* fashion described in the guidance document. All of the examples provided direct a *single grantee* to not “double count” cases within or across multiple grants *administered by that grantee*. There is no prohibition in the guidance document against counting cases that have been previously reviewed by a *different Solving Cold Cases with DNA grantee*.



This is not a difficult concept to articulate. If NIJ had intended to prohibit “double-counting” *between* separate grantees, it could have certainly have made a clear and unambiguous statement to that effect in the guidance document. The fact that NIJ provided *no such example* in the document is clear evidence that dual inter-grantee case review *was not*, and *is not*, a prohibited practice.

In conclusion, our 2008, 2010, and 2012 grant applications fully, completely, and explicitly disclosed the fact that our metrics would be based upon *interagency dual case review*. The solicitations issued for the stated fiscal years failed to define—or even mention—the concept of “double counting.” Furthermore, the December 2012 guidance document failed to prohibit—or even address—whether or not case review metrics could be “double counted” *between grant awardees*. The only examples provided in the guidance document address double counting for *an individual grantee*, whether during a single award or for consecutive awards *to that grantee*.

We were never, at any time, provided verbal or written notice that our method of counting metrics was contrary to programmatic directives. In fact, this model was promoted by NIJ, as evidenced by the fact that we were awarded *three consecutive grants* based on this model of case review (*see* 2010 grant application pp. 13, 22-23, and grant application attachment, “The Kansas City Model of Cold Case Review”) (*see also* 2012 grant application p. 8, pp. 16-17, and “The Kansas City Model of Cold Case Review” Appendix IV, p. 7). At no time was this explicitly-disclosed practice ever questioned by NIJ. Thus, we had absolutely *no notice* of a programmatic infraction. Accordingly, the imposition of sanctions on our program for this fully disclosed and long-standing practice would be *fundamentally unfair*.

A document published by NIJ in 2002, titled *Using DNA to Solve Cold Cases*,<sup>3</sup> also supports our position that inter-grantee case review was not intended to be considered as “double counting” of metrics by NIJ. In pertinent part, the report states:

The nature and scope of these issues [considerations made before DNA testing is attempted] require that *any approach to reexamining old cases for potential DNA evidence be collaborative*, whether by an individual investigator or by a specialized unit developed specifically for cold case review. *Local prosecutors can provide valuable insight into legal issues that might prevent or help a future prosecution.*

(Page 13) (emphasis added).

*At all stages of the process, investigators should avail themselves of the scientific advice of the laboratory and the legal expertise of the local prosecutor’s office.* . . . Similarly, prosecutors can help identify issues that might occur at trial if a suspect is identified and arrested upon successful DNA testing. Good communication between police, laboratories, and prosecutors can help identify and convict serious offenders and save valuable time and resources.

(Page 17) (emphasis added).

*Cases should be preliminarily reviewed by investigators in conjunction with the prosecutor’s office* to identify which prosecutions would be barred by the statutes of limitation.

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<sup>3</sup> National Institute of Justice, *Using DNA to Solve Cold Cases*. July 2002.

(Page 17) (emphasis added).

*[C]onsultation [by police] with a prosecutor is very important to determine which evidence will be probative to the case.* Building the new investigation on cooperative efforts between the laboratory and prosecutor can save valuable resources, develop leads, and identify previously overlooked evidence that may yield a DNA profile.

(Page 20) (emphasis added).

From the section of the 2002 report titled, "Sample Checklist":

*In consultation with the laboratory and prosecutors,* submit appropriate (probative) evidence to the laboratory for testing.

(Page 23) (emphasis added).

Based on these published statements by NIJ, it is inconceivable that it considered inter-grantee case review to be prohibited double counting of cases. This is because dual review by police and prosecutors is prominently set forth in a report titled, "Using DNA to Solve Cold Cases" *as an NIJ best practice guideline!* This fact is further confirmed by the fact that both Jackson County and KCPD *specifically advised* NIJ of our dual case review process. *NIJ was well aware that both our office and KCPD were reviewing and counting identical cases as separate work performed under separate grants.*

#### **XI. ALLEGED OVERSTATEMENT OF THE NUMBER OF CASES REVIEWED**

On page thirteen (13) of the Draft Audit Report, OIG states:

Finally, we found that Jackson County's progress reports overstated the number of cases reviewed, based on our determination that 34 percent of cases were ineligible, as outlined in the Expenditure section of this report. For the progress report ending on June 30, 2013, Jackson County reported a total of 1,242 cases reviewed with biological evidence for the life of the award. According to Jackson County's database as of July 2013, there were 1,280 cases reviewed, all of which contained biological evidence. From those cases, we removed any cases listed in Jackson County's database more than once. We then determined the number of eligible cases not previously counted by Kansas City. We found the actual number of eligible cases reviewed as of July 2013 to be 751, all of which contained biological evidence. At the time of our fieldwork, Jackson County's award was still in progress; therefore, we were unable to identify the total number of eligible cases reviewed under the award. However, it clear [sic] that the actual number of eligible cases reviewed under the program is less than what was reported.

With little ammunition at its disposal, OIG continues to fire the same spent rounds, seemingly in an effort to add additional pages to its Draft Audit Report. The above finding is simply a rehashed version of OIG's fundamentally flawed *post hoc* reconstruction of the programmatic definition of a "cold case," and its claim that Jackson County failed to request a GAN to advise NIJ of that which it was already well aware. As noted above, we categorically reject the premises upon which these findings are based. The number of eligible cases as reported by

Jackson County in each our progress reports to NIJ was correct. These reports were accepted by NIJ after 1) it had been explicitly informed in writing on multiple occasions by this grantee of the time frames which our case review encompassed; and 2) after it had been explicitly informed in writing of the date that STR DNA technology had become available in our jurisdiction. This is clear evidence that NIJ *did not* consider these cases to be “ineligible” for review as is now being claimed by OIG.

## **XII. REQUEST FOR A FINAL PROGRESS REPORT**

On page thirteen (13) of the Draft Audit Report, OIG states:

A final progress report was submitted in November 2013. The report includes the same information as the report ending on June 30, 2013, plus 123 additional cases in the July through September 2013 reporting period. It is possible that Jackson County counted additional duplicate cases between the end of July 2013 and the end of the award, September 30, 2013. It is also likely that a number of the cases reviewed between the end of July 2013 and September 30, 2013 were not eligible under the program. We recommend that the OJP obtain a final progress report, which includes the corrected performance data based on eligible cases under the program.

OIG’s recommendation is based upon the same erroneous premises addressed above: that Jackson County should have somehow known that NIJ allegedly considered inter-grantee review of the same cases to be a programmatic infraction, despite the fact that the document used to support this claim 1) was not published or provided to “cold case” grantees until at least two (2) years *after* our FY-2010 grant had begun; 2) completely fails to describe or prohibit the questioned inter-grantee case review as “double counting”; and 3) NIJ never once indicated that our inter-agency case review methods violated programmatic dictates, despite the fact that we have been subjected to two (2) NIJ audits (under our FY-2008 and our FY-2010 grants) and have submitted three (3) grant applications, as well as countless progress reports that specifically described this procedure in detail.

OIG’s recommendation is also based on its fundamentally unfair *post hoc* and retroactive reconstruction of the programmatic definition of a “cold case.” In order to meet its predetermined needs, OIG constructs a completely new programmatic definition of a “cold case,” adding substantial new verbiage which nowhere appears in the original programmatic definition.

Based on OIG’s substantively new reconstruction of both “double counting” and the definition of a “cold case,” we believe that the problem lies with OIG’s finding, not with Jackson County’s conduct. Therefore, we reject the basis upon which OIG’s recommends that OJP obtain a final progress report from Jackson County. We have already fully, completely, and accurately reported our FY-2010 grant metrics, consistent with documented program directives, communications provided, and our interaction with NIJ over the course of our FY-2010 grant cycle—and indeed, over the last six (6) years.

## **XIII. OIG’S ALLEGATION THAT JACKSON COUNTY FAILED TO ACHIEVE ITS PROGRAMMATIC GOALS**

On pages thirteen (13) and fourteen (14) of its Draft Audit Report, OIG engages in an assessment of whether Jackson County has met its stated programmatic goals for the FY-2010 grant. Regarding our first goal, to review 300 case files per reporting period, or 900 files over the life of

the award, OIG refuses to advise the reader of our actual grant metrics; choosing instead to yet again repeat its erroneous conclusion that 34% of the cases reviewed under the grant program were not eligible for review. Next, OIG, continuing to speculate in lieu of actually gathering evidence, states, “[I]n our opinion, the fact that 34 percent of the cases reviewed were ineligible likely represents that a *significant portion* of Jackson County’s efforts and *resources were not related to the goal of the program.*” (Emphasis added). This conclusion is based upon an erroneous premise, is uninformed, and constitutes speculation and conjecture.

For the reader’s information, during the FY-2010 grant cycle, our unit reviewed **1,365 violent and unsolved crimes** that met the programmatic definition of a "cold case" set forth in the solicitation document. **We also filed charges in thirty-four (34) separate previously unsolved violent cold case crimes that affected thirty-six (36) victims.**

Regarding our goals for the FY-2010 grant, OIG states:

Jackson County’s second goal was to follow and improve upon the ‘Cold Hit/Cold Case Inter-agency Guidelines’ and the ‘Cold Case Investigation Guidelines.’ The third goal was to work with Kansas City to improve a cold case investigative checklist. The fourth goal was to meet bi-monthly with Kansas City and the Kansas City Crime Laboratory to discuss CODIS hits, ongoing investigations, and case prioritization. The fifth goal was to maintain and update all databases that record work completed by the cold case unit. *We did not see any indication that Jackson County was not meeting these goals.*

(Draft Audit Report, p. 14) (emphasis added).

Immediately after finding *no* indication that Jackson County was not meeting its programmatic goals, OIG asserts:

Based on the information outlined above, we determined that the goals of the program were limited by Jackson County’s review of ineligible cases. Therefore, *in our judgment Jackson County did not achieve the program goals and overstated its program accomplishments.*

(Draft Audit Report, p. 14) (emphasis added).

This statement not only contradicts the one noted immediately above, it demeans the many victims for whom justice was finally achieved thanks to the countless hours of hard work performed by our staff. As noted above, we reviewed at least **1,365 cases** and filed charges against **thirty-four (34)** violent offenders who victimized a total of **thirty-six (36)** women. We are confident that these figures meet or exceed the work performed by any other NIJ Solving Cold Cases with DNA grantee over the course of a single grant cycle in the history of the program. We also invite the OIG auditors who made this statement to personally inform each of the thirty-six (36) victims who found justice under this grant that Jackson County did not achieve its program goals and overstated its accomplishments.

#### **XIV. THE QUESTION OF FUNDAMENTAL FAIRNESS**

The core problem with each of the disputed findings and conclusions noted above is that they violate very fundamental notions of fairness. The finding regarding duplication of performance metrics was based on a document (“Guidelines for Performance Measures and Progress

Reports”) that was issued by NIJ *seven (7) months after* our 2012 grant application—which explicitly described our process for calculating grant metrics—had been submitted to NIJ. Furthermore, *at no time after* 1) submission of the application; 2) the issuance of the guidelines; and 3) the award of the 2012 grant, were we *ever* advised by NIJ—nor was KCPD for that matter—that our method for calculating metrics was in violation of those guidelines. *Furthermore, this document did not even exist until at least two (2) years after our FY-2010 grant award had begun!*

Likewise, the finding of inaccurate performance metrics was based upon a figure included in a semi-annual progress report that was submitted *a full year before* the guidance document was ever provided to us, or any other “cold case” grantee.

The finding of “unallowable costs” is baseless. There is no provision in NIJ’s FY-2010 solicitation (or any other programmatic document) that required applicants to pre-certify a fixed set of cases that will be reviewed by applicants under a grant award. In fact, a major *goal* set forth in the solicitation was for successful applicants to *identify* “cold cases.” Furthermore, nowhere in our application did we assert that we would not seek out cases beyond those that had been identified for review at the time document was submitted. To the contrary, our application explicitly stated that we *would* do this! Thus, OIG has absolutely no basis to describe 33% of the cases we reviewed under our FY-2010 award as transgressing some alleged self-imposed boundary of case identification and review set forth in our application document.

Finally, OIG’s reformulation of the programmatic definition of a “cold case” in no way resembles the one set forth four (4) years ago in the FY-2010 Solving Cold Cases with DNA solicitation document. OIG now wishes—after the fact—to rewrite the definition, inserting the substantively new criteria that DNA technology must *not* have existed at the time a grant-eligible crime was committed—criteria which *nowhere appear* in the plain wording of the original definition. Furthermore, it is OIG’s desire to make this revised definition retroactively applicable. This, ironically, in spite of the fact that the OIG auditors who made this finding *themselves* needed further clarification of its meaning from NIJ!

Additionally, the new definition of a “cold case”—if it stands—is hopelessly vague, completely unworkable, and begs a host of additional questions noted above.

We believe that OIG’s reliance upon a guidance document that was published and provided to us *after* the grant-related conduct in question had concluded; which does not by its patent terms prohibit our dual review method of calculating metrics; and the use of a substantively new reconstruction of the programmatic definition of a “cold case,” runs afoul of the *GAO Government Accounting Standards: Implementation Tool*. Pursuant to Chapter 7 of that document, Field Work Standards for Performance Audits, under the heading of Overall Assessment of Evidence, Standard 7.70 b., states:

Evidence is not sufficient or not appropriate when (1) using the evidence carries an unacceptably high risk that it could lead to an incorrect or improper conclusion, (2) the evidence has significant limitations, given the audit objectives and intended use of the evidence, or (3) the evidence does not provide an adequate basis for addressing the audit objectives or supporting the findings and conclusions. Auditors should not use such evidence as support for findings and conclusions.

We also believe that the use of the guidance document and the reconstructed definition of a “cold case” as standards as evidence against which to judge our programmatic conduct carries a high risk of an improper conclusion. We also believe that those items of evidence have significant limitations, to wit: they were published/reconstructed/reinterpreted *after* our 2010 application had been submitted, and we *never* had any indication from NIJ *after* our award that *our* interpretation of those standards was incorrect.

Finally, we believe that reliance upon this evidence does not provide an adequate basis for audit objectives or for supporting the findings and conclusions of the audit because we had no fair notice of their applicability. NIJ never indicated in any way that our conduct was not consistent with programmatic directives. Therefore, OIG, *by its own auditing standards*, should not utilize this evidence to support its findings and conclusions.

However, based upon the fundamentally flawed and unfair foundational findings noted above, OIG’s recommendation is that our 2012 grant award be designated as “funds to better use.” As noted, this recommendation is contrary to the most basic notions of notice, due process, and fair dealing. If it actually comes to fruition, the credibility and trust placed by state and local forensic science grantees in the Department of Justice will be forever lost.

At a very basic level, rewriting and/or reinterpreting the rules *after* the game has been played and then claiming that those rules have been violated, strikes all reasonable people as an abuse of power. The prohibition of this type of conduct is explicitly written into our national constitution as well as the constitutions of every state in the Union.

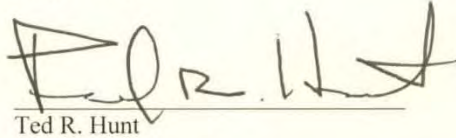
We strongly believe that all of our interactions with NIJ have been forthright, open, and honest in every way. We have followed all programmatic directions and guidelines provided by NIJ, and have never failed to execute a programmatic directive. In addition, from a performance perspective, we have been one of the, if not *the* most successful grantee in the history of NIJ’s Solving Cold Cases with DNA program.

We strongly believe that we should not be required to remit *any* funding from the 2010 grant. Further, we believe that our 2012 award should remain unaltered. If OIG or NIJ want to change the rules, then change them. But do it from this point forward. Don’t change the rules *after* the game has been played, and then claim that these newly created/constructed/interpreted rules weren’t followed when, in fact, it was impossible to have done so due to their nonexistence, inapplicability, vagueness, or ambiguity.

***Most fundamentally, we relied in good faith on NIJ’s conduct and communications with us over the last six (6) years. That conduct and communication never once indicated that Jackson County was in violation of any programmatic definitions or directives. This, after NIJ had been explicitly and repeatedly advised in writing of the nature and scope of our ongoing project.***

We respectfully disagree with each of the three (3) Recommendations set forth on page fifteen (15) of OIG’s Draft Audit Report. We also strongly believe that 1) we incurred no “Questioned Costs” under our FY-2010 award because *all* cases reviewed *were* eligible pursuant to published programmatic guidelines and definitions; and 2) that our FY-2012 award should *not* be designated as “Funds to Better Use” because *all* cases that have been reviewed and are subject to future review under that award are eligible based upon those same published guidelines and definitions.

Respectfully,

A handwritten signature in black ink, appearing to read "Ted R. Hunt", written over a horizontal line.

Ted R. Hunt  
Chief Trial Attorney  
DNA Cold Case Project Manager  
Jackson County Prosecutor's Office  
Kansas City, Missouri

OFFICE OF JUSTICE PROGRAMS RESPONSE



U.S. Department of Justice  
 Office of Justice Programs  
 Office of Audit, Assessment, and Management

FEB - 5 2014

Washington, D.C. 20531

MEMORANDUM TO: David M. Sheeren  
 Regional Audit Manager  
 Denver Regional Audit Office  
 Office of the Inspector General

FROM: *LeToya A. Johnson*  
 LeToya A. Johnson  
 Acting Director

SUBJECT: Response to the Draft Audit Report, *Audit of the Office of Justice Programs, National Institute of Justice, Solving Cold Cases with DNA Cooperative Agreements Awarded to the Jackson County, Missouri Prosecutor's Office*

This memorandum is in reference to your correspondence, dated January 7, 2014, transmitting the above-referenced draft audit report for the Jackson County, Missouri Prosecutor's Office (Jackson County). We consider the subject report resolved and request written acceptance of this action from your office.

The draft report contains **three** recommendations, **\$504,524** in questioned costs, and **\$415,829** in funds to better use. The following is the Office of Justice Programs' (OJP) analysis of the draft audit report recommendations. For ease of review, the recommendations are restated in bold and are followed by our response.

1. **We recommend that OJP remedy \$504,524 in unallowable questioned costs associated with the review of ineligible cases.**  
 OJP agrees with the recommendation. We will coordinate with Jackson County to remedy the \$504,524 in unallowable questioned costs associated with the review of ineligible cases.
2. **We recommend that OJP remedy \$415,829 in funds to better use associated with the review of ineligible cases.**  
 OJP agrees with the recommendation. We will coordinate with Jackson County to remedy the \$415,829 in funds to better use associated with the review of ineligible cases.



3. **We recommend that OJP obtain a final progress report that includes the corrected performance metrics based on eligible cases under the program.**

OJP agrees with the recommendation. We will coordinate with Jackson County to obtain a final progress report, which reflects corrected performance metrics based on eligible cases under the Solving Cold Cases with DNA program.

We appreciate the opportunity to review and comment on the draft audit report. If you have any questions or require additional information, please contact Jeffery A. Haley, Deputy Director, Audit and Review Division, on (202) 616-2936.

cc: Jeffery A. Haley  
Deputy Director, Audit and Review Division  
Office of Audit, Assessment, and Management

Gregory Ridgeway  
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### OFFICE OF THE INSPECTOR GENERAL ANALYSIS AND SUMMARY OF ACTIONS NECESSARY TO CLOSE THE REPORT

The Office of the Inspector General (OIG) provided a draft of this audit report to the Jackson County, Missouri Prosecutor's Office (Jackson County) and the Office of Justice Programs (OJP). Jackson County's response is included as Appendix III and OJP's response is included as Appendix IV of this final report. The following provides the OIG analysis of the responses and a summary of actions necessary to close the report.

#### **Analysis of OJP's Response**

In response to our draft audit report, OJP agreed with our recommendations and discussed the actions it will implement in response to our findings.

#### **Analysis of Jackson County's Response**

In its response, Jackson County did not agree with our specific recommendations and raised several concerns about our audit report that did not pertain to those recommendations. We address Jackson County's disagreement with our recommendations and many of its additional statements in the paragraphs below before discussing OJP's specific responses to each of our recommendations and the actions necessary to close those recommendations.

#### Initial Observations and Clarifications

In its response to the draft audit report, Jackson County makes numerous criticisms of the audit report that we believe to be unfounded, including that the OIG failed to adhere to government auditing standards. As stated throughout our report and in this appendix, our findings are based on the program solicitation, as well as the OJP Financial Guide and Jackson County's own award documentation. We believe that this information, in addition to the other evidence gathered throughout the audit, provides a reasonable basis for our findings and recommendations, which are entirely consistent with government auditing standards.

We also wish to note our strong disagreement with Jackson County's assessment of our conclusion that Jackson County did not achieve the program goals. According to Jackson County's response, our conclusion "demeans the many victims for whom justice was finally achieved" under the program. Our audit and its conclusion do not assess, and are not intended to assess, the importance of these cases or their significance to the victims. We appreciate the importance of solving criminal cases, whether they are in Jackson County or elsewhere in the United States. However, federal funding for this program is limited, and many jurisdictions in the United States compete for those funds. Indeed, a majority of

the state and local jurisdictions that apply for funds do not receive any. Those that do receive funding are required to abide by the program requirements set by NIJ. As stated in this report, we found that a significant number of cases reviewed by Jackson County were ineligible under this particular federal program. However, the fact that these cases were ineligible for review under this program in no way suggests that the OIG believes justice was not due for these victims or that these cases should not have been investigated as vigorously as possible, including by conducting prompt tests of all relevant biological evidence prior to inactivating the case.

We further note that, contrary to certain statements contained in Jackson County's response, expenditures may be identified as questioned costs in instances other than when they fail to comply with legal, regulatory, or contractual requirements—specifically, expenditures may be so identified when they are not supported by adequate documentation at the time of the audit, or are unnecessary or unreasonable. Additionally, and as stated in our report, questioned costs may be remedied by offset, waiver, recovery of funds, or the provision of supporting documentation. OJP is responsible for remedying the questioned costs identified in this report, and has indicated in its response that it will work with Jackson County to address this issue.

#### Specific Concerns Raised by Jackson County's Response

Several of the specific arguments that Jackson County makes in its response merit discussion. In the following paragraphs, we address those arguments and reaffirm our conclusion that Jackson County used its award funding to review a significant number of cases that were not eligible under the program.

In Section II of its response, Jackson County criticizes the OIG for creating its own definition of a cold case. Among its criticisms, Jackson County asserts that the OIG's understanding of a cold case is inconsistent with and more stringent than the definition in the NIJ solicitation; unworkable because it illogically limits the number and kind of cases that may be considered cold under the award; and unfair because, if the OIG's understanding were accepted as correct, the NIJ's definition of a cold case in the solicitation did not give applicants fair notice regarding the parameters of the program. In Jackson County's view, for purposes of the NIJ's definition in its solicitation – “any unsolved UCR Part 1 violent crime case for which all significant investigative leads have been exhausted” – the existence of untested biological evidence should not be considered an unexhausted significant investigative lead, even if the means for testing that evidence were available prior to inactivating the case.

We disagree with Jackson County's narrow reading of the definition of a cold case under this program. The cited definition from the NIJ solicitation cannot be read in isolation; rather, it must be viewed in the context of the FYs 2010 and 2012 program solicitations as a whole. Those solicitations provide context for the purpose of the Solving Cold Cases with DNA program and the definition of cold cases eligible under the program. A full reading of those documents makes clear

that award funding was not meant to cover cases with biological evidence that was obtained during a time when the DNA technology was available but a decision was made by the agency to inactivate the case without processing the biological evidence. In other words, the program is meant to fund cases where limits in DNA technology at the time the crime was committed prevented the investigation from moving forward, not cases where DNA testing of biological evidence could have been conducted but was not.

Moreover, Jackson County's view is inconsistent with any reasonable understanding of what it means for a case to be "cold." If suitable DNA technology was available at the time the crime was committed and biological evidence was collected, the biological evidence represents a significant investigative lead. If the biological evidence was not analyzed using that DNA technology before the case was inactivated, all investigative leads were not exhausted and the case does not reasonably qualify under this program. Nothing about the NIJ's definition of cold cases is inconsistent with this common sense understanding of a cold case.

Jackson County's hypothetical example of a 1987 cold case with biological evidence illustrates the point. Due to the state of forensic sciences in that era, it is fair to assume that the active investigation of such a case might not have included any DNA analysis. Thus, such a case could be eligible for NIJ's program, even if the case could have been reopened and DNA tested prior to the NIJ award. In contrast, Jackson County's hypothetical 2009 case, which could have been tested using STR technology but, at the election of the investigative agency, was not, would not be eligible under the program. This is because a significant investigative lead (the biological evidence of the case) was not exhausted, despite the availability of suitable DNA technology, during the active investigation. Nothing about these examples is absurd or unworkable; on the contrary, this understanding of the scope and purpose of NIJ's award program is consistent with the NIJ's definition of a cold case and represents the most reasonable interpretation of all relevant information. As stated in the report, the Solving Cold Cases with DNA program is not meant to fund the testing of unprocessed biological evidence that could have been processed during the active investigation.

Jackson County also states in Section II of its response that the OIG discussed the meaning of the program's definition of a cold case with NIJ officials after completing our fieldwork. According to Jackson County, these OIG discussions with NIJ are evidence that that the programmatic definition of a cold case set forth in NIJ's 2010 and 2012 solicitation was vague. We disagree with this statement. We first discussed the definition of a cold case with NIJ officials well before our visit to Jackson County. During these earlier discussions, NIJ officials confirmed our understanding of how a cold case is defined under the program. The purpose of our later discussion with NIJ officials, which occurred after we concluded our fieldwork at Jackson County, was primarily to notify them about the results of our audit and to discuss any concerns NIJ may have had about those results. We did not conduct that later discussion with NIJ because we believed the NIJ's solicitations to be vague, but rather because we wanted to obtain NIJ's view on our findings. Notably,

during that discussion, NIJ again reconfirmed that our understanding of the definition of a cold case under this program was correct.

Jackson County's response also argues that NIJ, in awarding the award funds to Jackson County, must have known that Jackson County would use the funds to review cases with biological evidence that could have been analyzed prior to inactivating the case. Thus, by implication, Jackson County argues that NIJ approved of its expenditures even if the OIG's definition of cold case is accepted as correct. In support of its assertion, Jackson County points out that its FY 2010 and FY 2012 applications identified cases that post-dated 2000, which the applications disclosed as the date that STR technology was available in the jurisdiction. However, Jackson County's response focuses on only one technological advancement, while the purpose of the program is to take advantage of all of the advancements in DNA technology, including the CODIS Convicted Offender database, that were not available at the time the crime was committed. Moreover, Jackson County significantly deviated from the cases it planned to review in its grant application. The timeframe for reviewing cold cases from 1972 through 2005 was clearly outlined in Jackson County's 2010 award application. However, 34 percent of cases reviewed by Jackson County occurred after 2005 and Jackson County failed to file a grant adjustment notice (GAN) notifying NIJ that it planned to change to scope of its award. Therefore, NIJ was not on notice that Jackson County intended to use award funding to review more recent cases for which suitable DNA technology was available at the time the crime was committed.

Section III of Jackson County's response elaborates on the assertion that it provided NIJ "clear and unambiguous notice" regarding the way it defined a cold case, including its intention to fund cases that post-dated the availability of STR technology in Jackson County, and its intention to fund cases dated later than 2005. As stated previously, we disagree that based on Jackson County's application NIJ was on notice that it planned to use award funding to review ineligible cases. Jackson County significantly deviated from the purpose stated in its application. Jackson County's FY 2010 application stated that the goal of the funding is to review cases from 1972 through 2005, yet 34 percent of the cases reviewed by Jackson County occurred after 2005. The application does briefly mention that it will review cases where the expiration of the statute of limitations is imminent for non-sexual crimes committed during a forcible sexual crime event. However, according to the supporting documentation, there were fewer than 30 of these cases as of the date of our review, and Jackson County informed us that the cases were not included as part of the count of the number of cases reviewed under the program. While the narratives included with the progress reports provide details regarding three crimes committed after 2005, Jackson County also reports almost 1,400 cases as reviewed under the program without detailing when the crimes were committed, making it difficult to determine how many of those cases were dated after 2005. The FY 2012 application expanded the timeframe to include cases through 2010; our concerns related to this action are outlined on page 8 of this report. Moreover, Jackson County failed to file a GAN, which would have been the appropriate mechanism to notify NIJ that it planned to change to scope of work performed under its award. As a consequence, we do not agree that either the

FY 2010 application or the subsequent progress reports provided the “clear and unambiguous notice” regarding Jackson County’s use of program funds that Jackson County asserts.<sup>7</sup>

Section V of Jackson County’s response highlights Jackson County’s disagreement with our finding that its review of cases from 2006 through 2011 was inconsistent with the primary goals as stated in its application. Jackson County asserts that, while it referenced cases dated between 1979 and 2005 in its FY 2010 application, it never specified a timeframe from which all funded cases would be identified. Jackson County also asserts that its application provided indications that it would fund cases outside of that timeframe, including cases for which a 3-year statute of limitations had not yet run, and adequately disclosed that its case identification process was ongoing. Jackson County therefore asserts that its scope did not change after its application, and therefore it did not need to initiate the required GAN.

We disagree. Jackson County’s application explicitly and repeatedly stated that the purpose of the FY 2010 funding was to review the 1,748 cases from the 1972 through 2005 timeframe that had yet to be reviewed by the cold case unit. For example, the first page of the applications states, “The goal of this enhanced funding request is to facilitate the expedited and complete review of the remaining large number of unsolved violent crime cold cases with evidence in Jackson County, Missouri (1,748 cases) before [previously-awarded] grant funding is no longer available.”<sup>8</sup> The application also stated that reviewing the 1,748 cases from this time frame represented a significant workload, requiring additional county resources, including an additional hire. However, a significant amount of its award-funded efforts involved the review of ineligible cases that were not identified in its application. In light of these explicit statements, the small number of cases involving a 3-year statute of limitations, which were not included in the cases reported as being reviewed using award funding, and the other language to which Jackson County refers in its response were not sufficiently clear to put NIJ on notice that it intended to fund such a significant number of cases that post-dated 2005, which was the cutoff for the count of eligible cases it had identified at the time of its application.

In Section VI of its response, Jackson County states that the OIG’s decision to question all funds drawn down under the FY 2010 award, despite the audit determining that 66 percent of the cases reviewed under the program were eligible,

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<sup>7</sup> We intend to discuss the matter of the NIJ enhanced programmatic desk review (EPDR) to which Jackson County’s response repeatedly refers in a separate, forthcoming audit report assessing related oversight activities by OJP and NIJ.

<sup>8</sup> Similarly, in the first paragraph of the “Purpose, Goals, and Objectives” section of its FY 2010 application, Jackson County stated, “We are requesting enhanced funding to employ an additional Cold Case Analyst in an attempt to complete our review, testing, and investigation of the enormous number of remaining Jackson County cases (1,748) that have been identified to contain evidence amenable to DNA testing. This number includes all currently known yet un-reviewed cases with potential to be solved with DNA evidence and successfully prosecuted that were originally investigated by KCPD.”

is fundamentally unfair and illogical. To clarify, we did not find that 66 percent of the cases that Jackson County reviewed using award funding were eligible under the program. Rather, we found that at least 34 percent of the cases the OIG reviewed were ineligible for such funding because they post-dated 2005. Our audit did not review every case, and we note that some of the pre-2005 cases not reviewed during our audit may also have been ineligible. Further, we questioned the entire FY 2010 award because our finding that at least 34 percent of the cases we reviewed were ineligible evidenced a material departure from the purpose of the program, which we believe justifies questioning the entire award.

In Section VII of its response, Jackson County disagrees with our concerns regarding the use of FY 2012 award funding, asserting that we relied on insufficient evidence and a limited understanding of a case review process. Jackson County further asserts that the OIG did not inform the reader of the basis of its conclusion that 95 percent of the cases reviewed by its partner, the Kansas City Police Department (Kansas City), were ineligible, a conclusion that Jackson County believes to be erroneous.

Jackson County is incorrect in stating that our finding is based on inadequate evidence. As stated in this report, Kansas City and Jackson County received separate Solving Cold Cases with DNA awards to conduct "dual reviews" of unsolved sex crimes cases. According to Jackson County officials, Kansas City was responsible for determining which cases qualified as cold cases. However, based on a separate audit of the Kansas City FY 2011 award, we found that 95 percent of the cases reviewed by Kansas City under the program were not eligible.<sup>9</sup> Jackson County's case load nearly mirrors Kansas City's case load because of the dual review process. In addition, Jackson County's FY 2012 award application made it clear that the funding would be used to continue its close partnership with Kansas City, including interagency reviews of cases. The fact that a large majority of Kansas City's most recent award was used for ineligible cases leads us to reasonably conclude that Jackson County intends to use future funding for similar purposes.

In Section IX of its response, Jackson County asserts that we made certain factual errors regarding the date certain supplemental NIJ guidance pertaining to performance metrics became available. We did not. Footnote 4 of this report correctly states that the information included as part of the report due in January 2013 could have included updates to previous reports, if necessary. This would have included the July through December 2011 reporting period. We note that we made no specific recommendation related to this issue.

Section X of Jackson County's response takes issue with our conclusion that Jackson County overstated the number of cases reviewed by reporting duplicate cases previously reported by Kansas City. The response includes the concerns

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<sup>9</sup> U.S. Department of Justice Office of the Inspector General, *Audit of the National Institute of Justice Cooperative Agreement Award Under the Solving Cold Cases with DNA Program to the Kansas City, Missouri Board of Police Commissioners*, Audit Report GR-60-14-007 (March 2014).

outlined and addressed on pages 12 and 13 of this report. NIJ's Guidelines for Performance Measures and Progress Reports state that the data collection plan for projects that fund activities for more than one agency must include an explanation of how tracking and reporting methods will avoid the possibility of double counting cases affected by federal funds. In our judgment, the purpose of the guidelines is to achieve an accurate presentation of case metrics, which includes preventing inflated statistics resulting from cases being counted more than once by one or multiple agencies. Jackson County is responsible for adhering to these NIJ Guidelines, yet the progress reports submitted by Jackson County did not contain the detailed case information for all cases reported as reviewed that would be necessary for NIJ to identify the duplicate cases reviewed by Jackson County and Kansas City.

Section XI of Jackson County's response, which also takes issue with our finding that its progress reports overstated the number of cases reviewed, focuses on NIJ's acceptance of the progress reports as evidence that NIJ considered the cases included therein to be eligible under the award. However, NIJ's acceptance of a progress report is not an acknowledgement by NIJ that it is in agreement with the activity outlined in the progress report. Rather, NIJ's acceptance acknowledges receipt of a report. Moreover, because progress reports provide only summary data, it would have been difficult for NIJ to identify the issues we encountered during the course of our audit using the data contained in these reports.

Section XII of Jackson County's response maintains that NIJ should not seek to obtain a final progress report that includes the corrected performance metrics based on eligible cases under the program. Section XIII asserts that, contrary to the OIG's conclusions, Jackson County achieved its programmatic goals under the award. Section XIV asserts that the OIG's conclusions violated notions of fundamental fairness. Because we do not agree with Jackson County's assertions as to the eligibility of the cases it reviewed and the propriety and accuracy of the statistics reported in its progress reports to date, and for the reasons provided above and in our report, we do not agree with these positions, and we encourage Jackson County to work quickly and cooperatively with NIJ in addressing the recommendations contained in this report.

## **Summary of Actions Necessary to Close the Report**

### **1. Remedy the \$504,524 in unallowable questioned costs associated with the review of ineligible cases.**

Resolved. OJP agreed with our recommendation to remedy the \$504,524 in unallowable questioned costs associated with the review of ineligible cases. In its response, OJP stated that it will coordinate with Jackson County to remedy the questioned costs.



This recommendation can be closed when we receive documentation demonstrating that OJP has remedied the \$504,524 in unallowable questioned costs.

**2. Remedy the \$415,829 in funds to better use associated with the review of ineligible cases.**

Resolved. OJP agreed with our recommendation to remedy the \$415,829 in funds to better use associated with the review of ineligible cases. In its response, OJP stated that it will coordinate with Jackson County to remedy the funds to better use.

This recommendation can be closed when we receive documentation demonstrating that OJP has remedied the \$415,829 in funds to better use.

**3. Obtain a final progress report that includes the corrected performance metrics based on eligible cases under the program.**

Resolved. OJP agreed with our recommendation to obtain a final progress report that includes the corrected performance metrics based on eligible cases under the program. In its response, OJP stated that it will coordinate with Jackson County to obtain a corrected final progress report.

This recommendation can be closed when we receive documentation demonstrating that OJP obtained a final progress report that includes the corrected performance metrics based on eligible cases.