SCHALLER, J., concurring. I concur and join in the majority's decision to affirm the judgment of the trial court. I write separately, however, to highlight several points, in the hope that doing so will provide some benefit to the trial bench and bar. Because eyewitness identification issues involving pretrial procedures arise frequently, our trial courts deserve guidance from this court in such matters.[1] In order to maximize the usefulness of the combined opinions, I will attempt to synthesize the basic consensus.

First, I agree with the majority's decision to decide this appeal by addressing the state's alternative ground for affirmance, namely, that the trial court improperly determined that the identification procedures used by the police were unnecessarily suggestive, rather than to decide this appeal by addressing the reliability issue raised by the defendant, Julian Marquez. It would be feasible—and, in some respects, simpler—to affirm the trial court's decision by determining that the court properly concluded that the identifications were reliable under the totality of the circumstances test set forth by the United States Supreme Court in *Neil* v. *Biggers*, 409 U.S. 188, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972), and *Manson* v. *Brathwaite*, 432 U.S. 98, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977). The rationale for a determination of reliability is concisely set forth in part II of Justice Katz' concurring opinion. Although I do not disagree with that rationale, affirming on that basis is not prudent, in my mind, because it would fail to address the trial court's disregard of the test set forth in *State* v. *Ledbetter*, 275 Conn. 534, 574, 881 A.2d 290 (2005), cert. denied, 547 U.S. 1082, 126 S. Ct. 1798, 164 L. Ed. 2d 537 (2006). Although the trial court conceivably may have been able to ground its conclusion on the totality of circumstances test, it did not do so. Instead, it chose to base its decision solely on the research material presented to it. If there is a single important message to be gleaned from the present case, it is that trial courts are bound to apply the totality of circumstances test in these situations.

Second, I emphasize my agreement with the majority opinion that the trial court abused its discretion in concluding that the identification procedures employed in the present case were unnecessarily suggestive. I do not find it useful, however, to establish whether the trial court *purported* to establish a per se rule or whether the trial court's admonition to the police was, in fact, a *directive*. The trial court, in my view, was persuaded by the scientific literature presented by the defendant, which supported his claim that simultaneous lineups administered by an official who was directly involved in the investigation are unnecessarily suggestive.

Although I appreciate that much of the recent research raises very serious questions about the use of simultaneous photographic arrays and the use of an interested administrator, the trial court failed to provide a totality of circumstances analysis establishing that either of those methods rendered the identification procedures in the present case unnecessarily suggestive.

Finally, and again in light of the different viewpoints expressed in the majority and concurring opinions, I emphasize that this controversy does not alter the essential holding of *Ledbetter*, that is, that the inquiry for determining whether an identification procedure was unnecessarily suggestive is still a case-by-case, factually intensive, totality of the circumstances standard. See id. In other words, none of the opinions in this case should be read to establish any per se rules, either universally authorizing or universally disapproving of *any* identification procedure. My goal, in this concurring opinion, is to highlight precisely what I see as the trial court's misstep in this case, and to offer general guidance to trial courts to help them avoid making similar missteps.

Preliminarily, I wish to emphasize what I consider to be the strongest argument in favor of deciding this case on the presented ground for appeal, rather than on the state's alternative ground for affirmance. The question raised by the alternative ground, whether the trial court improperly concluded that the identification procedures were unnecessarily suggestive, requires that we address two features of identification procedures, the validity and reliability of which are currently called into question by scientific studies. See, e.g., G. Wells & D. Quinlivan, "Suggestive Eyewitness Identification Procedures and the Supreme Court's Reliability Test in Light of Eyewitness Science: 30 Years Later," 33 Law & Hum. Behav. 1, 8 (2009) (describing ways interested photographic lineup administrator can unintentionally or intentionally influence eyewitness identification); Technical Working Group for Eyewitness Evidence, United States Dept. of Justice, "Eyewitness Evidence: A Guide for Law Enforcement" (October, 1999) p. 9 (interested administrator's "unintentional cues [e.g., body language, tone of voice] may negatively impact the reliability of eyewitness evidence"); see also sources cited in footnote 11 of Justice Katz' concurring opinion (standing for proposition that sequential identification procedures are significantly more accurate than simultaneous identification procedures). Both the majority opinion and Justice Katz' concurring opinion acknowledge that the evidence in this area of study is in a state of flux. In light of the evolving nature of the scientific research on this issue, it can be argued that it is unhelpful to reach the issue of the propriety of these procedures in the present case, when doing so may run the risk of suggesting that the identification procedures at issue in this case provide a reference point or *model* for

conducting future identification procedures. Put simply, *the jury is still out* on the continued validity of those procedures, especially the interested administrator feature.[2] Moreover, because the factual scenario involving the identification procedures in this case does not provide any helpful guidance to trial courts in judging the propriety of the procedures generally, I believe that this case does not provide an appropriate reference point or model for future investigations. The majority opinion, however, calls attention to this point and carefully avoids indicating either approval or disapproval of these two identification procedures. The majority analysis focuses on the specific factual circumstances of the present case, and highlights the fact that the trial court failed to do so.[3]

I offer a few observations regarding the trial court's ruling that the identification procedures employed in the present case were unnecessarily suggestive, first explaining why, in my view, the trial court's decision constituted an abuse of discretion. In reviewing a trial court's decision regarding the admissibility of identification evidence under the abuse of discretion standard, "we will indulge in every reasonable presumption in favor of the trial court's ruling." (Internal quotation marks omitted.) *State* v. *Ledbetter*, supra, 275 Conn. 548. We clearly have stated that "trial courts [must] determine whether individual identification procedures are unnecessarily suggestive on the basis of the totality of the circumstances surrounding the procedure, rather than replacing that inquiry with a per se rule." Id., 574. Such a determination, therefore, necessarily must be grounded on a factually intensive inquiry, not on generalizations, and not solely on scientific literature. This is the principle that the trial court overlooked in arriving at its conclusion that the identification procedures in the present case were unnecessarily suggestive.

The trial court did not support its determination that the identification procedures at issue in the present case were unnecessarily suggestive by reference to the totality of the circumstances surrounding the procedures, but instead relied solely on the facts that: (1) both procedures involved simultaneous photographic lineups rather than sequential lineups; and (2) both lineups were conducted by an interested administrator, rather than in a double-blind manner, by an uninterested person who did not know who the suspect was and whether the suspect was present in the lineup. In concluding that these features alone rendered the procedures unnecessarily suggestive, the court relied exclusively on scientific literature that criticizes both types of procedures. See, e.g., G. Wells, M. Small & S. Penrod et al., "Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads," 22 Law & Hum. Behav. 603, 614 (1998) (explaining correlation between simultaneous photographic lineups and relative judgment); J. Turtle, R. Lindsay & G. Wells,

"Best Practice Recommendations for Eyewitness Evidence Procedures: New Ideas for the Oldest Way to Solve a Case," Can. J. of Police and Security Services (March, 2003) pp. 5–19 (same); G. Wells & E. Olson, "Eyewitness Testimony," 54 Ann. Rev. Psychol. 277, 289 (February, 2003) (risk of misidentification due to unconscious bias of interested administrator of identification procedure). Other than noting that the procedures employed involved a simultaneous photographic array and an interested administrator, the trial court pointed to no particular facts that would support a determination that the procedures "[gave] rise to a very substantial likelihood of irreparable misidentification." (Internal quotation marks omitted.) *State* v. *Cook*, 262 Conn. 825, 832, 817 A.2d 670 (2003). In fact, the factual circumstances highlighted by the trial court tend to lead to the opposite conclusion. Specifically, the court found that the array did not unfairly highlight the defendant, and that both photographic arrays contained the instruction recommended by *Ledbetter*, that the suspect may or may not be included in the lineup. *State* v. *Ledbetter*, supra, 275 Conn. 575.

I emphasize that I am not convinced that the trial court created a per se rule by concluding that the procedures at issue in this case were unnecessarily suggestive. Rather, it was the trial court's failure to ground its determination on the totality of the circumstances that, in my view, constituted an abuse of discretion. The one distinguishing factual circumstance noted by the trial court, that the detective who administered the photographic arrays remarked to one of the witnesses, Mark Clement, after he had identified the defendant from the photographic array, that he had "[done] good" because he identified the same person picked out by the other witness, is irrelevant because the detective's validation of Clement's identification occurred after the fact.[4] In the absence of some reference to particular aspects of the identification procedures that rendered them unnecessarily suggestive, I believe that the trial court abused its discretion in relying solely on scientific studies, rather than grounding its decision on the totality of the circumstances surrounding the identification.[5]

Finally, in light of the different perspectives offered by the majority opinion and the concurring opinions, I offer the following guidance to trial courts as they undertake to discern a route through the virtual forest of opinions in the present case. The problem is twofold: what to do when confronted with an identification procedure that employs one of these two methods; and how to deal with scientific literature discussing identification procedures. As to the first question, the answer remains the same as it was following *Ledbetter*. In determining whether an identification procedure is unnecessarily suggestive, the court must make its inquiry "on the basis of the totality of the circumstances surrounding the procedure, rather than replacing that

inquiry with a per se rule." *State* v. *Ledbetter*, supra, 275 Conn. 574. In other words, the inquiry remains what it always has been, a factually intensive, case-by-case determination made on the basis of the totality of the circumstances.

As to the second issue, *Ledbetter* specifically authorized the trial court to consider scientific studies concerning an instruction to a witness that the perpetrator may or may not be present. Id. Beyond that, although *Ledbetter* did not preclude trial courts from reviewing scientific studies that are offered by the parties regarding the admissibility of identification testimony, it is clear that trial courts are not authorized to rely on scientific studies in order to create new rules. See, e.g., id., 568 (defendant not obligated to present to trial court scientific studies in support of argument that Connecticut should abandon *Biggers* factors on state constitutional grounds because "the trial court was bound to apply the *Biggers* factors in its analysis").

Finally, the mere fact that persuasive scientific literature may be presented to the trial court does not relieve the court of its obligation to ground its decision as to whether the procedure was unnecessarily suggestive on the *factual circumstances* surrounding the identification procedure. In *Ledbetter*, the court left no doubt that "[t]he circumstances surrounding the various identification procedures present too many variables for us to conclude that a per se rule is appropriate." Id., 574. The court, however, did identify one circumstance as giving rise to the need for an instruction by the trial court warning the jury of the risk of misidentification, namely, when an administrator indicates that a suspect is present in the identification procedure. Id., 579. It seems likely that, as scientific knowledge increases in the field of eyewitness identification, other elements also will be identified as requiring remedial steps. It is noteworthy that the remedial instruction would be unnecessary if disinterested, double-blind administrators were required in such procedures. Although the court in *Ledbetter* was reluctant to restrict the province of the law enforcement agencies of the state in their application of the processes of eyewitness identifications, consensus in research studies may lead to such restrictions in the future. Although the court in *Ledbetter* did not establish any safeguards against the " 'relative judgment process,' " it was aware of the dangers of such a process. Id., 572 (research indicating that eyewitnesses tend to identify person from lineup who looks most like culprit relative to other members of lineup).

"The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification. Mr. Justice Frankfurter once said: What is the worth of identification testimony even when uncontradicted? The identification of strangers

is proverbially untrustworthy. The hazards of such testimony are established by a formidable number of instances in the records of English and American trials. These instances are recent—not due to the brutalities of ancient criminal procedure." (Internal quotation marks omitted.) Id., 577. This reinforces the idea that the appellate courts of this state must remain vigilant to developments in this field of inquiry by engaging in careful study of the scientific literature.[6] Further developments may require the exercise of supervisory authority. Until that time, each challenge to an identification procedure must be addressed in accordance with our well established rule requiring that a trial court conduct a factually intensive inquiry, focusing on the totality of the circumstances, to determine whether the procedure was unnecessarily suggestive, and, if so, whether the identification was nevertheless reliable.

[1] When the court speaks in multiple voices rather than a single voice, the usefulness of the decision, apart from deciding the particular case, is limited. Even though all of the opinions in this case are in accord as to affirming the trial court's decision, each opinion reaches the result by a different route.

[2] Although the studies are mixed as to the benefits of simultaneous and sequential procedures under varying circumstances, there is no research literature that supports the use of an interested administrator. No matter how expedient it may be for law enforcement agencies to use interested investigators in this role, that practice imperils the integrity of the identifications.

[3] In any event, I disagree with Justice Katz' conclusion that the trial court did *not* abuse its discretion.

[4] I disagree with Justice Palmer's conclusion in his concurring opinion that the detective's remark rendered the procedure unnecessarily suggestive. When the detective made the remark, Clement already had identified the defendant, without any information as to the result of the other witness' identification. Although it is possible that the detective's remark may have bolstered Clement's confidence in the accuracy of his identification of the defendant during testimony at trial, that possibility properly would be raised during cross-examination of Clement, and used to impeach his testimony, rather than to render the identification inadmissible. As the majority opinion notes, the rationale offered to support that conclusion has the effect of improperly shifting the focus of attention from the impact of police conduct on the pretrial identification to the impact of the pretrial identification on the in-court identification. Moreover, it unnecessarily causes potential confusion about the *boundary* of the police identification procedure, a factor that is not an issue in this case.

[5] The trial court also stated in its memorandum of decision that "[p]olice personnel conducting photographic identifications should henceforth strive to eliminate the danger of misidentification arising from the simultaneous showing of multiple photographs by making all such showing sequentially." The majority opinion characterizes this statement as a directive. My reading of the statement, however, is that, while it *could* be read to issue a directive to police personnel, it need not be accorded that meaning. It is possible to interpret this statement as the court merely indicating its opinion as to what procedures would be most prudent for police personnel to employ. To the extent, however, that the statement *could* be read to issue a directive to police personnel, it would, of course, exceed the authority of the trial court.

[6] The *Ledbetter* opinion has been criticized for failing to give appropriate effect to the evidence of scientific studies that question the reliability of eyewitness identification. C. TerBeek, "A Call for Precedential Heads: Why the Supreme Court's Eyewitness Identification Jurisprudence is Anachronistic and Out-Of-Step with the Empirical Reality," 31 Law & Psychol. Rev. 21, 49–50 (2007).