STATE OF CONNECTICUT *v.* JULIAN MARQUEZ
(SC 17663)

Katz, Palmer, Vertefeuille, Zarella and Schaller, Js.

Argued September 3, 2008—officially released April 14, 2009

Conrad Ost Seifert, special public defender, for the appellant (defendant).

Michele C. Lukban, senior assistant state's attorney, with whom, on the brief, were *Gail P. Hardy*, state's attorney, and *Edward R. Narus*, senior assistant state's attorney, for the appellee (state).

Opinion

ZARELLA, J. The defendant, Julian Marquez, appeals from the judgment of conviction, rendered after a jury trial, of one count of felony murder in violation of General Statutes § 53a-54c, two counts of robbery in the first degree in violation of General Statutes § 53a-134 (a) (2), and one count of attempt to commit robbery in the first degree in violation of § 53a-134 (a) (2) and General Statutes § 53a-49. On appeal, the defendant claims that the trial court's denial of his motion to suppress two eyewitness identifications violated his right to due process of law under both the fourteenth amendment to the United States constitution[1] and article first, § 8, of the Connecticut constitution.[2] Specifically, the defendant challenges the trial court's ruling that those 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),[3] even though the court found that the police had used an unnecessarily suggestive identification procedure. The defendant also claims that, even if this court concludes that the trial court ruled correctly under existing law, we nevertheless should exercise our supervisory authority to mandate the adoption and use of new and purportedly more accurate identification procedures.[4]

The state urges this court to uphold the trial court's denial of the defendant's motion to suppress the identifications. Specifically, the state argues that the trial court correctly concluded that the identifications were reliable under the totality of the circumstances and asserts that there is no basis for this court to exercise its supervisory authority to mandate new identification procedures.[5] As an alternative ground for affirmance, the state also argues that the trial court improperly concluded that the identification procedures used by the police were unnecessarily suggestive.[6] We agree with the state and affirm the judgment of the trial court on this alternative ground.

In its memorandum of decision on the defendant's motion to suppress, the trial court made the following findings of fact. On the evening of Friday, December 19, 2003, Mark Clement and his friend, Christopher Valle, were visiting at the apartment of a mutual friend, Miguel Delgado, Jr., at 134 Babcock Street in Hartford. The three men, along with various others, socialized regularly on weekends at Delgado's apartment. The apartment itself was on the third floor of the building and could be accessed by visitors through a front door that opened into a lighted common hallway at the top of the interior staircase.

Delgado's apartment was relatively small, consisting

of a short interior hallway leading from the front door directly into the living room, a small game room adjacent to the living room, a kitchen to the rear of the living room and a bedroom off of the kitchen. On the evening of December 19, the living room was illuminated only indirectly by light emanating from the kitchen and game room. There was a couch on the back wall of the living room that faced the front door.

After arriving at the apartment, Delgado, Clement, Valle and another man named Amauri Escobar primarily remained in the game room playing video games and drinking alcoholic beverages.[7] While several other people visited the apartment intermittently throughout the night, only these four men were present just prior to the robbery.[8]

At around midnight on December 20, as Valle was preparing to leave the apartment, he exited the game room to say goodnight to Delgado, who was standing just inside the front door attempting to get rid of two men who stood facing him in the common hallway. As Valle approached the front door, one of the strangers, a Hispanic male in his early twenties wearing braids and black clothing, pointed a handgun directly at him and entered the apartment, forcing Valle and Delgado backward into the living room and ordering them to sit on the couch. Shortly thereafter, the intruders entered the game room, announced their presence and ordered Clement and Escobar to join Valle and Delgado. Once everyone returned to the living room, the intruders were only one or two feet away from their victims for a period of several minutes. Importantly, both Valle and Clement had multiple opportunities to see the faces of the perpetrators, particularly the gunman. Valle initially saw the gunman in the brightly lit common hallway while Delgado was trying to get rid of him. Clement observed the gunman's face when the gunman entered the lighted game room and announced that "it was a stickup." Further, while Valle and Clement were seated on the couch, they both viewed the intruders' faces with the light from the kitchen and the game room providing illumination.

The intruders then ordered all of them to surrender their money and jewelry, which Clement, Valle and Escobar did promptly. Delgado, however, offered only a small amount of marijuana, insisting that that was all he had. The intruders, who were dissatisfied with this offer, apparently were convinced that Delgado had money and drugs stashed elsewhere in the apartment, and demanded to be taken to inspect the back bedroom. Delgado, who was now standing to the side of the couch and blocking the entrance to the kitchen, refused. Delgado suddenly rushed at the gunman and grabbed his arm. A struggle ensued, during which Delgado forced the gunman back toward the front of the apartment, and a shot rang out. Valle jumped to his feet from

his position on the couch and began to head for the perceived safety of the game room. He then heard a second shot and saw Delgado fall to his knees on the floor. Valle made it to the game room with Clement behind him, while Escobar apparently escaped out of the rear exit of the apartment.

Valle heard a third shot fired, and, once it was apparent that the intruders had fled, he eventually emerged from the game room. Feeling around on the floor in the relative darkness of the hall near the front door, Valle discovered Delgado lying in a pool of blood. When he turned the living room light on, Valle realized that Delgado was critically wounded and called the police. Immediately after the incident, both Valle and Clement expressed to police investigators their confidence that they could identify the gunman.

On December 23, 2003, while making his regular visit to his parole officer, Valle was startled to observe the defendant at the office of the parole officer, immediately recognizing him as the gunman who had robbed him four days earlier. Valle reported his observation to personnel on duty in the office. This information was relayed to Detective Patricia Beaudin of the Hartford police department, who was leading the investigation into the incident. On the basis of this information, a photographic array was produced consisting of photographs of eight men fitting the description that Valle had provided, including that of the defendant.

Beaudin and her partner, Detective Ezequiel Laureano, contacted Valle and asked him to come to the police station to view the photographs in the array. Prior to having him look at the photographic array, Beaudin instructed Valle simply to look at the photographs and tell her if he recognized anyone, and that it was fine if he did not. Neither Beaudin nor Laureano told Valle that he had to select a photograph, and they did not indicate in any way which photograph he should pick. In addition, consistent with the detectives' instructions, there was a notice prominently printed at the bottom of the photographic array that provided: "You have been asked to look at this group of photographs. The fact that they are shown to you should not influence your judgment. You should not conclude or guess that the photographs contain the person who committed the offense under investigation. You are not obligated to identify anyone. It is just as important to free innocent persons from suspicion as to identify guilty parties. Please do not discuss this case with other witnesses nor indicate in any way that you have, or have not identified someone."

Valle immediately selected the photograph depicting the defendant, indicating that he was sure that the individual pictured was the gunman. Although acknowledging some superficial differences between the defendant's photograph and the others in the array, Valle

denied that such discrepancies played any roll in his choice.

Four days later, Beaudin contacted Clement and requested that he view the photographic array that Valle had previously viewed.[9] The detectives followed an almost identical procedure with Clement, and either read aloud or pointed out the same prominent notice at the bottom of the board on which the photographic array was mounted. Clement believed that the array contained photographs of known robbers but did not know if photographs of either of the persons who had robbed him would be included in the display. He further indicated that, although neither of the detectives pressured him to select any photograph or indicated in any way that he should choose a particular photograph, he did feel that a suspect was probably in the array and that he should "pick somebody . . . ."

Clement found himself immediately drawn to one photograph but was concerned about speaking up too quickly and identifying the wrong person. He described how he eliminated all but two of the photographs as possibilities and how he kept returning to the photograph that originally had garnered his attention. Clement noted that he based his identification almost exclusively on the defendant's eyes, which he recognized as the eyes of the gunman who had robbed him and his companions. He indicated that the choice he had made was based on his own "gut feeling," derived from his personal observations of the gunman during the robbery. When he finally did inform Beaudin of his choice, about which he felt fairly confident, she informed him that he had done well because he had chosen the same photograph as Valle.

On the basis of these identifications, an arrest warrant was issued for the defendant, which was executed on December 30, 2003. The state subsequently filed a five count information charging the defendant with one count of felony murder, three counts of robbery in the first degree, and one count of attempt to commit robbery in the first degree.

Prior to trial, the defendant filed a motion to suppress as evidence any pretrial or in-court identifications offered by the state. The defendant argued that the procedures used in connection with the photographic array identifications were unnecessarily suggestive and unreliable and that any in-court identification by Valle and Clement would be irreparably tainted by such prior, purportedly improper identifications. The state responded that the identification procedures were not unnecessarily suggestive and that, even if they were, the identifications themselves were sufficiently reliable under the totality of the circumstances.

The trial court held a hearing on the motion on December 7, 2005, and heard testimony from Valle,

Clement and Beaudin. In addition, the trial court considered several scientific articles and reports regarding the suggestiveness and reliability of various identification methods. On December 20, 2005, the court heard arguments on the motion, and, on January 4, 2006, the court made an oral ruling denying the defendant's motion to suppress. The trial court issued a "[c]orrected" memorandum of decision on the defendant's motion to suppress on March 20, 2006.

In its memorandum of decision, the trial court determined that the identification procedures used were unnecessarily suggestive but nonetheless sufficiently reliable under the totality of the circumstances to be admissible at trial. The court based its determination primarily on what it termed the "universal judgment of the relevant scientific community" that sequential identification procedures, pursuant to which a witness views photographs or live suspects one at a time, are superior to the traditional lineup or photographic array in which a witness views all of the individuals simultaneously. The court was persuaded by the suggestion in the literature that sequential procedures may be superior because they limit the operation of " 'relative judgment,' " whereby a witness may be tempted to choose the photograph or individual who looks the most like their memory of the perpetrator relative to the others viewed through a process of elimination, rather than by actually comparing each individual to their memory of the perpetrator. Sequential procedures reduce or eliminate this tendency, it is argued, by depriving a witness of the opportunity to compare subjects to each other and by forcing the witness to rely strictly on his memory rather than on the relative judgment process.[10]

The trial court also was "troubled" by the fact that the identification procedures in this case were not "double blind." To qualify as double-blind, a photographic array must be administered by an uninterested party without knowledge of which photograph represents the suspect. Again relying on the scientific literature, the court found that "[t]he risk of producing a misidentification in such circumstances, due to conscious or unconscious bias by a highly interested person administering the procedure, is so well established in the relevant scientific literature that experts have strongly recommended that all pretrial identification procedures be conducted only by persons who do not know which member of the lineup or photospread is the suspect." The court was concerned that Beaudin's statement to Clement congratulating him on choosing the same photograph as Valle was outward evidence of a bias in the process that subtly and perhaps subconsciously infected the procedure before Clement had made his choice.[11]

For the foregoing reasons, and on the basis of the scientific research,[12] the trial court essentially concluded that the traditional identification procedure that

the police used in this case was per se unnecessarily suggestive. The court further directed that "[p]olice . . . conducting photo[graphic] identifications should henceforth strive to eliminate the danger of misidentification arising from the simultaneous showing of multiple [photographs] by making all such showings sequentially." Despite finding these flaws in the identification process in the present case, the court nonetheless examined the totality of the factual circumstances under the *Manson* test, determined that the identifications by Valle and Clement were reliable, and denied the defendant's motion to suppress.

Thereafter, the jury found the defendant guilty of the felony murder charge, two of the robbery charges and the attempted robbery charge. The trial court rendered judgment in accordance with the jury verdict and sentenced the defendant to a total effective term of fifty years imprisonment, execution suspended after thirty-five years, and five years probation. This appeal followed.

We begin by noting that we need not reach the defendant's claim that the trial court improperly concluded that the challenged identifications were reliable under the *Manson* test because we decide this case on the state's alternative ground. In this regard, the state claims that the trial court improperly determined that the identification procedures were unnecessarily suggestive, whereas the defendant agrees with the court's conclusion. We elect to address this aspect of the court's ruling, rather than simply uphold the court's analysis of reliability, in order to confront what we view as the trial court's establishment of a per se rule with respect to the question of the suggestiveness of the identification procedures at issue. Although we appreciate the trial court's laudable desire to improve the dependability of the eyewitness identification process, we cannot agree that the procedures used in this case were unnecessarily suggestive.

Turning to the applicable legal principles, we first observe that the defendant invoked his due process rights under both the fourteenth amendment to the United States constitution and article first, § 8, of the Connecticut constitution in support of his motion to suppress. The trial court's memorandum of decision does not differentiate its analysis between these sources of law. This is the correct approach as this court explicitly has held that article first, § 8, provides no greater protection than the federal constitution in the realm of identification procedures. *State* v. *Ledbetter*, 275 Conn. 534, 568, 881 A.2d 290 (2005), cert. denied, 547 U.S. 1082, 126 S. Ct. 1798, 164 L. Ed. 2d 537 (2006). We reaffirm the congruence between the protections afforded by our state constitution and the federal constitution in the area of pretrial identification and therefore proceed to analyze the question in the same fashion

under both provisions.

Although we have never directly addressed the standard for reviewing whether a photographic array is unnecessarily suggestive,[13] we are influenced by federal precedent and the approach taken by our sister states. The United States Supreme Court has held that "the ultimate question as to the constitutionality of . . . pretrial identification procedures . . . is a mixed question of law and fact . . . ." *Sumner* v. *Mata*, 455 U.S. 591, 597, 102 S. Ct. 1303, 71 L. Ed. 2d 480 (1982). More specifically, the Fifth Circuit Court of Appeals recently has affirmed that "a court must determine whether the pretrial identification was impermissibly suggestive . . . . Such an analysis is a mixed question of law and fact." (Citation omitted.) *Coleman* v. *Quarterman*, 456 F.3d 537, 544 (5th Cir. 2006), cert. denied, 549 U.S. 1343, 127 S. Ct. 2030, 167 L. Ed. 2d 772 (2007); accord *Lee* v. *Keane*, Docket No. 01-2136, 2002 U.S. App. LEXIS 23588, *4 (2d Cir. November 13, 2002), cert. denied sub nom. *Lee* v. *Fischer*, 540 U.S. 869, 124 S. Ct. 191, 157 L. Ed. 2d 125 (2003); *Armstrong* v. *Young*, 34 F.3d 421, 427 (7th Cir. 1994), cert. denied, 514 U.S. 1021, 115 S. Ct. 1369, 131 L. Ed. 2d 224 (1995). "We review the [trial] [c]ourt's decision for abuse of discretion, applying clear error review to its underlying factual findings and plenary review to its conclusions drawn from such facts." *United States* v. *Mathis*, 264 F.3d 321, 331 (3d Cir. 2001), cert. denied, 535 U.S. 908, 122 S. Ct. 1211, 152 L. Ed. 2d 148 (2002). Our sister states that have addressed this question are generally in accord. See, e.g., *People* v. *Hogan*, 114 P.3d 42, 49 (Colo. App. 2005) ("The ultimate question as to the constitutionality of pretrial identification procedures is a mixed question of law and fact. Thus, we give deference to the trial court's finding of historical fact . . . but may give different weight to those facts and may reach a different conclusion."), review denied, Docket No. 05SC46, 2005 Colo. LEXIS 597 (Colo. June 27, 2005); *State* v. *Mack*, 255 Kan. 21, 26, 871 P.2d 1265 (1994) ("[a]n eyewitness identification due process determination is a mixed question of law and fact that should be reviewed de novo"); *McClenton* v. *State*, 167 S.W.3d 86, 96 (Tex. App. 2005) ("[t]he admissibility of an identification is a mixed question of law and fact that we review de novo"); see also *State* v. *Moore*, 334 S.C. 411, 418, 513 S.E.2d 626 (App. 1999) (Howell, C. J., dissenting) ("[w]hether an eyewitness identification is sufficiently reliable is a mixed question of law and fact subject to de novo review on appeal"), rev'd in part on other grounds, 343 S.C. 282, 540 S.E.2d 445 (2000).

Given the weight and uniformity of the preceding authority, as well as its commonsense appeal, we conclude that a claim of an unnecessarily suggestive pretrial identification procedure is a mixed question of law and fact. With respect to our review of the facts, we further note that, because the issue of the sugges-

tiveness of a photographic array implicates the defendant's constitutional right to due process, we undertake a "scrupulous examination of the record to ascertain whether the findings are supported by substantial evidence." *State* v. *Mullins*, 288 Conn. 345, 364, 952 A.2d 784 (2008); cf. *State* v. *Ledbetter*, supra, 275 Conn. 547 ("[b]ecause the issue of the reliability of an identification involves the constitutional rights of an accused . . . we are obliged to examine the record scrupulously to determine whether the facts found are adequately supported by the evidence and whether the [trial] court's ultimate inference of reliability was reasonable" [internal quotation marks omitted]).

Our analysis proceeds in three parts. In part I of this opinion, we examine the approach taken by the trial court and, in particular, the scientific foundation underlying its conclusions. In part II of this opinion, we more fully describe the appropriate legal framework for analyzing suggestiveness and proceed to apply those principles to the facts of this case. Finally, in part III of this opinion, we address the defendant's request that this court exercise its supervisory authority to mandate the implementation of specific eyewitness identification procedures.

I

We begin our analysis with the state's claim that the trial court improperly concluded that a photographic array conducted pursuant to the traditional simultaneous identification procedure by an interested administrator is inherently unnecessarily suggestive.[14] We agree. To the extent that the trial court's decision implies that the simultaneous display of photographs in an array by a police officer with specific knowledge of the case is *per se* unnecessarily suggestive, it is incorrect.[15]

This court has, for some time, maintained a stern test for suggestiveness: "An identification procedure is unnecessarily suggestive *only* if it gives rise to a *very substantial* likelihood of irreparable misidentification." (Emphasis added; internal quotation marks omitted.) *State* v. *Cook*, 262 Conn. 825, 832, 817 A.2d 670 (2003), quoting *State* v. *Reid*, 254 Conn. 540, 555, 757 A.2d 482 (2000). We take this opportunity to revisit our definition of suggestiveness. The phrase we have been using to define "unnecessarily suggestive" seems to have its origins in *Simmons* v. *United States*, 390 U.S. 377, 88 S. Ct. 967, 19 L. Ed. 2d 1247 (1968), in which the United States Supreme Court declared that "convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification."[16] Id., 384. The first use of this language by this court appears to have occurred in *State* v. *Theriault*,

182 Conn. 366, 438 A.2d 432 (1980), in which we resolved the claim of the defendant, Norman A. Theriault, that the trial court improperly declined to suppress a pretrial identification in violation of "his due process rights because it was impermissibly suggestive *and* gave rise to a substantial likelihood of irreparable misidentification." (Emphasis added.) Id., 371. We concluded that the one-on-one "show-up" procedure used in *Theriault* was inherently suggestive as well as unnecessary under the circumstances. Id., 372–73. We upheld the trial court's ruling, however, concluding that the identification, although suggestive, was nonetheless sufficiently reliable. Id., 375.

In *Theriault*, we examined the suggestiveness of the identification procedures, in addition to the overall reliability of the identification itself, under the totality of the circumstances; see id., 371–72; in order to determine whether the challenged identification violated Theriault's due process rights on the ground that it "gave rise to a substantial likelihood of irreparable misidentification." Id., 371. There is no indication in *Theriault* that we used this phrase to *define* suggestiveness.

The first instance in which this court conflated these two concepts apparently occurred in *State* v. *Williams*, 203 Conn. 159, 523 A.2d 1284 (1987). In *Williams*, we stated that "[a]n identification procedure is unnecessarily suggestive when it 'give[s] rise to a very substantial likelihood of irreparable misidentification.' " Id., 174. Part of this statement was derived from our opinion in *State* v. *Fullwood*, 193 Conn. 238, 243–44, 476 A.2d 550 (1984). This language also can be traced from *Ledbetter* back to *State* v. *Outlaw*, 216 Conn. 492, 501, 582 A.2d 751 (1990), which contains the exact same language as *Williams* and which also cited to *Fullwood*. In our view, defining "unnecessarily suggestive" in this manner has been the result of a misstep. It is illogical and inconsistent with the authority on which it purports to be based.

We next set forth what we believe is the correct approach to this issue. First, there appears to be a consensus with regard to the overall analytical framework to be used in considering a claim of this sort: "In determining whether identification procedures violate a defendant's due process rights, the required inquiry is made on an ad hoc basis and is two-pronged: first, it must be determined whether the identification procedure was unnecessarily suggestive; and second, if it is found to have been so, it must be determined whether the identification was nevertheless reliable based on examination of the totality of the circumstances." (Internal quotation marks omitted.) *State* v. *Theriault*, supra, 182 Conn. 371–72; see also *Manson* v. *Brathwaite*, supra, 432 U.S. 107 ("[T]he first inquiry [is] whether the police used an impermissibly suggestive [identification] procedure . . . . If so, the second inquiry is whether, under all the circumstances, that

suggestive procedure gave rise to a substantial likelihood of irreparable misidentification."); *United States* v. *DeCologero*, 530 F.3d 36, 62 (1st Cir.) ("we first determine whether the identification procedure was impermissibly suggestive, and if it was, we then look to the totality of the circumstances to decide whether the identification was reliable"), cert. denied, U.S. , , 129 S. Ct. 513, 615, 172 L. Ed. 2d 376, 469 (2008). We continue to endorse and adhere to this widely utilized analytical approach.

In the seminal case of *Neil* v. *Biggers*, supra, 409 U.S. 188, the Supreme Court explained the overarching concern that courts face when assessing a challenged identification procedure: "It is . . . apparent that the primary evil to be avoided is 'a very substantial likelihood of irreparable misidentification.' . . . It is the likelihood of misidentification which violates a defendant's rights to due process . . . ." Id., 198, quoting *Simmons* v. *United States*, supra, 390 U.S. 384. As courts apply the two-pronged test to determine if a particular identification procedure is so suggestive and unreliable as to require suppression, they always should weigh the relevant factors against this standard. In other words, an out-of-court eyewitness identification should be *excluded* on the basis of the procedure used to elicit that identification *only* if the court is convinced that the procedure was so suggestive *and* otherwise unreliable as to give rise to a very substantial likelihood of irreparable misidentification. See *Simmons* v. *United States*, supra, 384.

The critical question for our present purposes is what makes a particular identification procedure "suggestive" enough to require the court to proceed to the second prong and to consider the overall reliability of the identification. This is a straightforward question that does not appear to have received a very direct answer. There are, however, two factors that courts have considered in analyzing photographic identification procedures for improper suggestiveness. The first factor concerns the composition of the photographic array itself. In this regard, courts have analyzed whether the photographs used were selected or displayed in such a manner as to emphasize or highlight the individual whom the police believe is the suspect. See, e.g., *State* v. *Williams*, supra, 203 Conn. 176 (multiple photographs of same individual in same or subsequent photographic arrays possibly suggestive "when, in the context of the entire array, the recurrence unnecessarily emphasizes the defendant's photograph"); *State* v. *Fullwood*, supra, 193 Conn. 247 (to be unnecessarily suggestive, variations in array photographs must highlight defendant to point that it affects witness' selection); *State* v. *Gold*, 180 Conn. 619, 656, 431 A.2d 501 ("[when] a feature is placed on the defendant's photograph in order to make the picture conform to the witness' description of the criminal he or she had seen, the identification

proceeding has been held to have been rendered highly suggestive''), cert. denied, 449 U.S. 920, 101 S. Ct. 320, 66 L. Ed. 2d 148 (1980); see also *United States* v. *DeCologero*, supra, 530 F.3d 62 (at first step in two-pronged test, court ''consider[s] whether the photo[graphic] array included, as far as was practicable, a reasonable number of persons similar in appearance to the suspect''); *United States* v. *Rattler*, 475 F.3d 408, 413 (D.C. Cir. 2007) (court must ''examine the suggestivity of irregularities between the subjects in the array'').

The second factor, which is related to the first but conceptually broader, requires the court to examine the actions of law enforcement personnel to determine whether the witness' ''attention was directed to a suspect because of police conduct. . . . In considering this [factor, the court should] look to the effects of the circumstances of the pretrial identification, not whether law enforcement officers intended to prejudice the defendant.'' (Citation omitted; internal quotation marks omitted.) *Howard* v. *Bouchard*, 405 F.3d 459, 470 (6th Cir. 2005), cert. denied, 546 U.S. 1100, 126 S. Ct. 1032, 163 L. Ed. 2d 871 (2006). It stands to reason that police officers administering a photographic identification procedure have the potential to taint the process by drawing the witness' attention to a particular suspect. This could occur either through the construction of the array itself or through physical or verbal cues provided by an officer. See, e.g., *State* v. *Fullwood*, supra, 193 Conn. 248 (irregularity in defendant's photograph not suggestive because it did not ''signal to the witnesses that the defendant was the person whom the police believed to be the perpetrator of the robbery''); see also *Simmons* v. *United States*, supra, 390 U.S. 385 (''[t]here is no evidence to indicate that the witnesses were told anything about the progress of the investigation, or that the [law enforcement] agents in any other way suggested which persons in the pictures were under suspicion''); *State* v. *Ledbetter*, 185 Conn. 607, 612, 476 A.2d 550 (1981)[17] (no basis for claiming that ''display itself was suggestive or that [the administering officer] was suggestive in any respect in the selection process''); *State* v. *Gold*, supra, 180 Conn. 656 (''[a] procedure is unfair which suggests in advance of identification by the witness the identity of the person suspected by the police'' [internal quotation marks omitted]).

We hereby clarify that a determination as to whether a particular identification procedure is ''unnecessarily suggestive'' must focus on the foregoing factors. The phrase ''very substantial risk of irreparable misidentification'' must be understood as the overall standard for suppressing an out-of-court identification. By improperly making the test of suggestiveness so rigorous, we essentially have made the reliability prong of the analysis vestigial. Obviously, any identification resulting from a procedure that fails our current test for suggestiveness could never be considered sufficiently reliable under

the totality of the circumstances to warrant admissibility. The suggestiveness prong should be less stringent and more focused on the mechanics of the photographic array itself as well as the behavior of the administering officers. This approach is more logical, gives some meaning to the term "suggestive" that accords with common experience, and can be readily applied by trial courts.

We stress that this is *not* a "best practices" test. In other words, the test does not require a court to engage in a relative value judgment of various possible identification techniques and settle on the one that it believes bears the least risk of mistake, a decision that would be prone to being revised or second-guessed as the scientific debate evolves and new studies become available. See, e.g., *State* v. *Nunez*, 93 Conn. App. 818, 832, 890 A.2d 636 (2006) ("[t]he question . . . is not whether a double-blind, sequential identification procedure is less suggestive than the traditional procedures . . . but . . . whether the traditional procedures are unnecessarily suggestive under [the Connecticut] constitution"), cert. denied, 278 Conn. 914, 899 A.2d 621, cert. denied, 549 U.S. 906, 127 S. Ct. 236, 166 L. Ed. 2d 186 (2006); see also *State* v. *Fullwood*, supra, 193 Conn. 244 ("[i]t has been generally recognized that the presentation of several photographs to witnesses, including that of the suspect . . . is by itself a nonsuggestive and constitutionally acceptable practice, in the absence of any unfairness or other impropriety in the conduct of the exhibit" [internal quotation marks omitted]). Nor does this test require law enforcement personnel to alter their procedures every time a fresh scientific study suggests that a new identification procedure might lead to more reliable results. Moreover, although our analysis focuses principally on two key functional aspects of the eyewitness identification process,[18] we stress that it is the *entire* procedure, viewed in light of the factual circumstances of the individual case, that must be examined to determine if a particular identification is tainted by unnecessary suggestiveness. The individual components of a procedure cannot be examined piecemeal but must be placed in their broader context to ascertain whether the procedure is so suggestive that it requires the court to consider the reliability of the identification itself in order to determine whether it ultimately should be suppressed.

In the present case, although the facts adduced at the hearing on the motion to suppress are essentially undisputed, the true controversy involves the potential suggestiveness of the chosen procedures in light of the scientific data presented to the trial court, which the court clearly found to be overwhelmingly persuasive in fashioning its categorical rule. It is this evidence that we now review to determine whether the court's conclusion that the photographic arrays and the detectives' method of presenting them were indeed unnecessar-

ily suggestive.

The defendant presented four scientific documents to the trial court in support of his contention that the simultaneous, single-blind procedures used in this case were inherently suggestive. The state responds by presenting this court with two additional documents indicating that the science in this area is less than settled.[19] We will briefly discuss each article or report, organizing our discussion chronologically on the basis of the date that the document was published and beginning with the scientific documents presented by the defendant.

The authors of the first document; see G. Wells et al., "Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads," 22 Law & Hum. Behav. 603 (1998); discuss potential problem areas with traditional procedures and eventually make four recommendations that they believe would improve the accuracy and reliability of eyewitness identifications. The authors admit to relying "heavily on relative-judgment theory, which describes a process by which eyewitnesses make lineup identifications." Id., 613. They note that "[t]here is good empirical evidence" in support of the relative judgment theory; id.; and their recommendations are aimed primarily at countering the negative effect that the relative judgment process can have on the accuracy of eyewitness identifications.

The authors' first recommendation is that "[t]he person who conducts the lineup or photospread should not be aware of which member of the lineup or photospread is the suspect." Id., 627.[20] The authors admit, however, that they are "aware of no studies indicating that lineup and photospread administrators are affecting the identification behaviors of eyewitnesses in actual cases"; id., 628; and caution that this recommendation should be taken "somewhat on face value . . . ." Id. The authors' second recommendation is that a warning be given to eyewitnesses indicating that the suspect may or may not be present in the lineup or photospread, and that the witness therefore should not feel compelled to make an identification. Id., 629. The third recommendation concerns the structure of the lineup or photospread itself and advises that "[t]he suspect should not stand out in the lineup or photospread as being different from the distracters based on the [eyewitness'] previous description of the culprit or based on other factors that would draw extra attention to the suspect." Id., 630. Finally, the authors recommend that the identification administrator collect a statement from the witness after an identification is made regarding the witness' level of confidence in his selection. Id., 635. The authors of this article expressly decline to recommend the use of sequential identification procedures, noting that "[t]he superiority of the sequential over the simultaneous procedure is evident primarily under conditions [when recommendation two] (warn-

ing the eyewitness that the culprit might not be present) and [recommendation three] (distractors fitting the description) are violated . . . ." (Citation omitted.) Id., 640. Furthermore, the authors note that the adoption of a sequential procedure without the adoption of double-blind testing actually could lead to a greater error rate than that realized with a simultaneous procedure without double-blind testing. Id.

The second document offered by the defendant; United States Dept. of Justice, Eyewitness Evidence: A Guide for Law Enforcement (1999);[21] contains a fairly brief section covering suspect identification procedures. Id., p. 29. Interestingly, although the report provides different instruction sets for conducting sequential and simultaneous lineups and photographic arrays, it does not make a recommendation favoring one procedure over the other. Moreover, the report makes no mention of the use of double-blind testing procedures.

The third document on which the defendant relies is from the Canadian Journal of Police and Security Services. J. Turtle, R. Lindsay & G. Wells, "Best Practice Recommendations for Eyewitness Evidence Procedures: New Ideas for the Oldest Way to Solve a Case," 1 Canadian J. Police & Security Serv. 5 (2003).[22] In addition to advocating that warnings be given to the witness to reduce the effect of the relative judgment process and providing practical guidelines for composing lineups, the article also recommends the use of blind, sequential identification procedures. Blind procedures are recommended because of the potential for an officer with knowledge of the investigation to transmit information or expectations inadvertently to the witness, thereby leading the witness to make a particular selection.[23]

The article cites studies indicating that, although simultaneous identification procedures are three times more likely to yield misidentifications than sequential procedures, sequential procedures also yield lower correct identification rates than simultaneous procedures. Moreover, the article highlights a number of circumstances in which the use of a sequential procedure "may be no better or even worse than the traditional simultaneous line-up." Such circumstances include (1) identifications by child witnesses, who can become confused by a sequential procedure, (2) scenarios in which a witness is asked to identify multiple perpetrators, and (3) situations involving "cross-race identifications," in which a witness is asked to identify a person of a different race. Although the authors of this article clearly advocate the use of sequential procedures generally, the authors nevertheless conclude that "the sequential line-up has not been demonstrated to show its superiority under these conditions and, in fact, some data exist suggesting that there may be some disadvantage to using the procedure under these conditions. Until more

and better data are available, we do not recommend using sequential line-ups in these particular situations."

The defendant's final scientific document; see G. Wells & E. Olson, "Eyewitness Testimony," 54 Ann. Rev. Psychol. 277 (2003); is a relatively brief review of much of the material discussed in connection with the previous documents. The authors strongly support the use of "might or might not be present" instructions, which, they note, have been shown to reduce mistaken identification rates significantly in lineups in which the perpetrator is absent. (Internal quotation marks omitted.) Id., 286. The authors also show a preference for sequential line-up procedures, noting the tendency of such procedures to reduce "the chances of mistaken identifications in culprit-absent lineups by nearly one half" while also reducing "accurate identification rates in culprit-present lineups." Id., 288. The authors discuss and support the use of double-blind testing procedures, although they stress that such procedures are especially necessary when a sequential identification procedure is utilized. Id., 289. The authors conclude by lamenting the paucity of "real-world data" in this field of research. Id., 290.

The state offers two documents presumably intended to highlight the lack of scientific consensus in the eyewitness identification field. The first document, which was a report to the Illinois legislature; see S. Mecklenburg, Report to the Legislature of the State of Illinois: The Illinois Pilot Program on Sequential Double-Blind Identification Procedures (2006) (Mecklenburg Report); was the product of a year long pilot program conducted at three police departments in the Chicago area.[24] The results of this field study, which the author characterized as surprising, were that "sequential, double-blind procedures resulted in an overall *higher* rate of known false identifications than did the simultaneous lineups."[25] (Emphasis in original.) Id., p. iv. The author concluded that "the sequential, double-blind method [could not] be regarded as superior to the simultaneous method"; id., p. 64; and emphasized the need for further study. Id., p. 65.[26]

The second document that the state submits is a 2006 article from Psychology, Public Policy, and Law. See D. McQuiston-Surrett, R. Malpass & C. Tredoux, "Sequential vs. Simultaneous Lineups: A Review of Methods, Data, and Theory," 12 Psychol., Pub. Policy & L. 137 (2006). In this article, written after the release of the Mecklenburg Report, the authors maintain some reservations about the methodologies and significance of that report but nonetheless conclude that "the literature concerning [simultaneous lineups] versus [sequential lineups] may be underdeveloped in some important ways . . . ." Id., 141. In addition, "the research base for [sequential lineups] may not be sufficiently developed from a methodological or theoretical point of view to

. . . advocate for its implementation to the exclusion of other procedures." Id., 162.[27]

Presented with the foregoing research, the trial court considered several factors in determining that the procedures used in this case were unnecessarily suggestive. First, the court concluded, in the abstract, that "the simultaneous showing of all photo[graphs] to each witness on a single . . . board created an unnecessary risk of producing irreparable misidentifications by enabling the witnesses to make side-by-side comparisons of the photo[graphs], and thus to select one of them simply by eliminating all the others in an unreliable exercise of relative judgment." The court based this judgment on the "unchallenged findings of the scientific research studies . . . ."[28]

The trial court also was "troubled" by the fact that Beaudin, the lead detective investigating the robbery, administered both identification procedures. The court expressed "concern . . . based [on] the undisputed judgment and recommendation of well respected scientific researchers" that an officer with knowledge of the investigation, particularly, the identity of the suspect, runs the risk of intentionally or inadvertently "injecting bias into the identification process . . . and thus of producing irreparable misidentifications."

Contrary to the trial court, we conclude that the scientific evidence regarding the value of sequential procedures is more nuanced and uncertain than portrayed by the defendant, and, therefore, it cannot definitively answer the question of whether the procedures used in this case were unnecessarily suggestive.[29] For instance, the research indicates that, in multiple perpetrator scenarios, the use of sequential identification procedures may not be advisable, or even practical: "[I]f multiple perpetrators were involved in the crime and more than one suspect is to be shown to the witness, it is not clear how a sequential procedure should be used, and traditional methods have not been shown to be inferior in such cases." J. Turtle, R. Lindsay & G. Wells, supra, 1 Canadian J. Police & Security Serv. 5. In this case, for example, the detectives knew from eyewitness statements that the robbery had been committed by two individuals. As a result, the value of using a sequential procedure is at least questionable. Moreover, although the scientific community recommends the use of a double-blind identification procedure, and such a procedure has intuitive appeal, we never have held that the failure to use such a procedure carries such a substantial risk of misidentification that its use must be *required* to avoid unnecessary suggestiveness.[30]

Upon consideration of the scientific literature, we conclude that one thing is clear, namely, that the judgment of the relevant scientific community with respect to eyewitness identification procedures is far from uni-

versal or even well established, and that the research is in great flux.[31] Indeed, when the reported research was seemingly more uniform, we still found that "[t]he scientific studies are not definitive."[32] *State* v. *Ledbetter*, supra, 275 Conn. 568. The more recent research offered by the state muddies the water further and only confirms this view. Thus, this continues to be an issue particularly ill suited to generic, bright line rules. Indeed, we repeatedly have insisted that this inquiry be made on an ad hoc basis, and we affirm that the courts of this state should continue to evaluate "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. We agree with the Appellate Court that, until the scientific research produces more definitive answers with respect to the effects of various procedures, "[d]ue process does not require the suppression of a photographic identification that is not the product of a double-blind, sequential procedure."[33] *State* v. *Smith*, 107 Conn. App. 666, 674, 946 A.2d 319, cert. denied, 288 Conn. 902, 952 A.2d 811 (2008).

II

Having concluded that the trial court overemphasized the significance of the scientific research and improperly applied a per se analysis to the challenged identifications, we now turn to an examination of the procedures at issue.

The defendant made several claims of suggestiveness at the suppression hearing that were based on the factual context of this case. The defendant asserted that the photographic array itself was *in fact* unnecessarily suggestive insofar as the composition of the array unfairly highlighted him and was designed to promote his identification by the witnesses. Specifically, the defendant claimed that the array was unnecessarily suggestive because his photograph was distinctive. He specifically asserted that his photograph was somewhat brighter in appearance than the other photographs and had a white height scale in the background, whereas six of the other seven photographs contained visible height scales that were black in color. The defendant further argued that Beaudin's administration of the identification procedure was flawed because she knew which photograph represented the suspect. The defendant points to the confirmatory comment that Beaudin made to Clement after he selected the defendant's photograph as evidence of a bias on her part that must have tainted the entire process.

In its memorandum of decision, the trial court addressed the defendant's claims and determined that the photographic arrays used in this case were fair and did not draw attention to the defendant's photograph. The court concluded that "the array used in this case

did not unfairly highlight the defendant or promote his identification by the witnesses in any way." The trial court, however—perhaps as a corollary to its finding with respect to the importance of utilizing double-blind procedures—was impressed by the testimony regarding Beaudin's reaction to Clement's selection. The court characterized Beaudin's comment to Clement that he "did good because that was the same guy [Valle] picked," as an indication of a real "risk of unfairness due to administrator bias . . . ." The court determined that this was a revelation of the detective's bias, which "risked . . . unfairly bolstering the witness' confidence in the strength of his . . . identification . . . thus making it harder for the defense to test the true certainty with which he made that identification on cross-examination . . . ."[34] In the same passage of its memorandum of decision, however, the trial court noted that Beaudin's comment was made *after* the identification was complete and Clement had expressed his confidence in the selection and, thus, that "the utterance was not shown to have tainted the witness' identification when it was initially made."[35]

In assessing the constitutionality of challenged eyewitness identifications, we engage in a case-by-case review. "[T]he required inquiry is made on an ad hoc basis and is two-pronged: first, it must be determined whether the identification procedure was unnecessarily suggestive; and second, if it is found to have been so, it must be determined whether the identification was nevertheless reliable based on an examination of the totality of the circumstances." (Internal quotation marks omitted.) *State* v. *Ledbetter*, supra, 275 Conn. 547–48, quoting *State* v. *Cook*, supra, 262 Conn. 832.[36] As we noted in part I of this opinion, an out-of-court identification will be excluded only if the procedures utilized to obtain that identification "[give] rise to a very substantial likelihood of irreparable misidentification." (Internal quotation marks omitted.) *State* v. *Ledbetter*, supra, 548, quoting *State* v. *Cook*, supra, 832. We conclude that any analysis of unnecessary suggestiveness must be conducted in light of the totality of the circumstances and must focus specifically on the presentation of the photographic array itself as well as the behavior of law enforcement personnel to determine if the procedure was designed or administered in such a way as to suggest to the witness that a particular photograph represents the individual under suspicion.

In evaluating the suggestiveness of a photographic array, "a court should look to both the photographs themselves and the manner in which they were presented to the identifying witness." *Hodges* v. *Commonwealth*, 45 Va. App. 735, 774, 613 S.E.2d 834 (2005), rev'd on other grounds, 272 Va. 418, 634 S.E.2d 680 (2006). We consider the following nonexhaustive factors in analyzing a photographic array for unnecessary suggestiveness: "(1) the degree of likeness shared by

the individuals pictured . . . (2) the number of photographs included in the array . . . (3) whether the suspect's photograph prominently was displayed or otherwise was highlighted in an impermissible manner . . . (4) whether the eyewitness had been told that the array includes a photograph of a known suspect . . . (5) whether the eyewitness had been presented with multiple arrays in which the photograph of one suspect recurred repeatedly . . . and (6) whether a second eyewitness was present during the presentation of the array." (Citations omitted.) *State* v. *Randolph*, 284 Conn. 328, 385–86, 933 A.2d 1158 (2007). It is important to note, however, that "[p]hotographs will often have distinguishing features. The question . . . is not whether the defendant's photograph could be distinguished from the other photographs . . . but whether the distinction made it unnecessarily suggestive." *State* v. *Nunez*, supra, 93 Conn. App. 828; see also *Hodges* v. *Commonwealth*, supra, 774 ("[a] valid lineup does not require that all the suspects or participants be alike in appearance and have the same description as long as nothing singles the accused out from the rest").

We find it significant that the trial court's analysis essentially ignores the fact that both photographic arrays contained a conspicuous "might or might not be present" warning, indicating to each witness that the perpetrator was not necessarily among those pictured and that the witnesses should not feel obligated to choose someone. The presence of such a warning is a consistent recommendation of the scientific literature that we have reviewed and is deemed to counteract effectively the tendency of witnesses to use relative judgment. See, e.g., G. Wells et al., supra, 22 Law & Hum. Behav. 629–30 (recommending warnings and explaining how they obviate need for sequential procedure); see also United States Dept. of Justice, supra, p. 31 (indicating importance and purpose of instructions). Moreover, this court expressly has endorsed, without mandating, the use of such warnings and has recognized their potential prophylactic effect against the dangers of the relative judgment process. "[W]e recognize that [certain] studies . . . strongly militate in favor of an affirmative warning to witnesses that the perpetrator may or may not be among the choices in the identification procedure . . . . [T]rial court[s], as part of [their] analysis, should consider whether the identification procedure administrator instructed the witness that the perpetrator may or may not be present in the procedure . . . ." (Citations omitted.) *State* v. *Ledbetter*, supra, 275 Conn. 574–75. Significantly, we have concluded that, even when police not only fail to give such a warning but affirmatively inform the witness that the suspected culprit is in the lineup, there is no *presumption* of suggestiveness. See *State* v. *Reid*, supra, 254 Conn. 556. "[E]ven if a court finds that the police expressly informed witnesses that the defendant would

be in the array, our courts have found the identification procedure unnecessarily suggestive only when other factors exist that otherwise emphasize the defendant's photograph." *State* v. *Owens*, 38 Conn. App. 801, 811, 663 A.2d 1094, cert. denied, 235 Conn. 912, 665 A.2d 609 (1995).

In the present case, Clement testified at the suppression hearing that he remembered that Detective Beaudin had read him the warning before he viewed the photographic array. He further testified that the detectives did nothing to influence his decision or to direct his attention to any particular photograph, and that he selected the defendant's photograph from the array solely on the basis of his "gut feeling." Moreover, the trial court credited Clement's testimony that "he was not at all sure that the true perpetrator would be in the array" and observed that, "although [Clement] believed that the police would not have invited him to view photo[graphs] if they did not at least have a suspect in mind, he was not at all sure that the true perpetrator would be in the array, and so he commendably took his time in order not to implicate an innocent man."

Valle testified that he did not remember reading the warning or having it read to him prior to identifying the defendant from the photographic array. His identification was unique, however, insofar as he originally had reported spotting the defendant at the parole office, and that it was this information that led to the defendant's inclusion in the photographic array in the first place. In light of this independent source for his identification, it is not surprising that Valle did not remember any warnings being given, or any other specifics about the identification procedure.[37]

Although there is no evidence that Valle heeded the warning written on the photographic array, there is ample evidence that he needed no such warning. Under these somewhat unusual circumstances, including Valle's chance encounter with the defendant at the parole office and Valle's immediate selection of the defendant from the array, it is clear that Valle's selection of the defendant's photograph was not influenced by relative judgment because he simply did not have the time or the need to engage in a process of elimination.

Furthermore, as we previously stated, the failure to use a double-blind procedure does not automatically render an identification suspect, particularly when, as in the present case, there is no evidence that the detectives conducting the procedure influenced the witnesses in any discernible way prior to their making the identification.[38] Moreover, we agree with the Appellate Court, which has held that "[t]he police officer's telling the victim that she had identified the suspect *after* she positively identified the defendant as her assailant does not render the identification procedure unnecessarily suggestive." (Emphasis in original.) *State* v. *Smith*,

supra, 107 Conn. App. 675. Thus, although Beaudin's comment to Clement may affect the weight or even the admissibility of a subsequent *in-court* identification, it is irrelevant to our analysis regarding the suggestiveness of the procedure itself.[39]

In view of the totality of the circumstances, we are convinced that the trial court improperly concluded that the identification procedures used in this case were so flawed as to present "a very substantial likelihood of irreparable misidentification." (Internal quotation marks omitted.) *State* v. *Randolph*, supra, 284 Conn. 385. The detectives employed traditional procedures and proceeded in a neutral fashion. There is no evidence that they attempted to influence, consciously or subconsciously, the outcome of the identification process, and the witnesses' testimony bears this out. The photographic arrays themselves were not designed or presented in an unfair or suggestive manner. Furthermore, we emphasize the importance of the warnings provided on the photographic arrays themselves or read aloud by the detectives, which served to counter any tendency of the witnesses to engage in the process of relative judgment. We conclude that the procedures employed in this case, although not ideal, were within the acceptable parameters of effective and fair police work, and satisfy the requirements of due process.

III

Finally, we turn to the defendant's contention that this court should exercise its supervisory authority to mandate new identification procedures in the interests of justice. The defendant urges this court to implement three specific procedural changes: (1) the double-blind identification procedure; (2) the sequential display of live suspects or photographs; and (3) a prohibition on police informing witnesses, after they identify a suspect, that the individual that they chose is the person whom police believe is the culprit. We decline the defendant's request to exercise our supervisory authority in this manner.

We first note the reluctance with which we have occasionally exercised our supervisory authority. "Our supervisory powers are not a last bastion of hope for every untenable appeal. They are an *extraordinary* remedy to be invoked only when circumstances are such that the issue at hand, while not rising to the level of a constitutional violation, is nonetheless of utmost seriousness, not only for the integrity of a particular trial but also for the perceived fairness of the judicial system as a whole." (Emphasis in original; internal quotation marks omitted.) *State* v. *Hines*, 243 Conn. 796, 815, 709 A.2d 522 (1998), quoting *State* v. *Holloway*, 209 Conn. 636, 645, 553 A.2d 166, cert. denied, 490 U.S. 1071, 109 S. Ct. 2078, 104 L. Ed. 2d 643 (1989). "We ordinarily invoke our supervisory powers to enunciate a rule that is not constitutionally required but that we

think is preferable as a matter of policy." *State* v. *Ledbetter*, supra, 275 Conn. 578.

We are not persuaded that this case presents an appropriate forum for the exercise of our supervisory authority. We are not convinced that allowing law enforcement officers to engage in identification procedures such as those used in the present case presents a threat to the "perceived fairness of the judicial system as a whole." (Internal quotation marks omitted.) *State* v. *Hines*, supra, 243 Conn. 815. Our thorough review of the scientific research offered by the parties reconfirms the opinion we held in *Ledbetter*, namely, that "[t]he circumstances surrounding the various identification procedures present too many variables for us to conclude that a per se rule is appropriate." *State* v. *Ledbetter*, supra, 275 Conn. 574. We believe that the development and implementation of identification procedures "should continue to be the province of the law enforcement agencies of this state." Id. We also reiterate that "the trial courts should continue to 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. Any residual element of suggestiveness or untrustworthiness that does not bear a "very substantial likelihood of irreparable misidentification"; (internal quotation marks omitted) id., 548; is "customary grist for the jury mill. Juries are not so susceptible that they cannot measure intelligently the weight of identification testimony that has some questionable feature." (Internal quotation marks omitted.) *State* v. *Garner*, 270 Conn. 458, 469, 853 A.2d 478 (2004).

This opinion is not a blanket endorsement of any particular identification procedure. We emphasize that we have not created a per se rule approving of the procedures used in this case but, rather, have evaluated those specific procedures within the totality of the circumstances and have not found them to be unnecessarily suggestive. We would, of course, encourage the state's law enforcement agencies to maintain currency in the latest research in this field and to adapt their policies to implement the most accurate, reliable and practical identification procedures available. In fact, we believe that the scientific research and common sense suggest that the employment of double-blind procedures, whenever reasonably practicable, is preferable to the use of an interested administrator because such procedures avoid the possibility of influencing the witness, whether intentionally or unintentionally, and thereby tainting the accuracy of any resulting identification. At this time, however, we continue to review suggestiveness on a case-by-case basis using the established standards.

The judgment is affirmed.

In this opinion VERTEFEUILLE and SCHALLER, Js., concurred.

[1] The fourteenth amendment to the United States constitution provides in relevant part: "No State shall . . . deprive any person of life, liberty or property, without due process of law . . . ."

[2] Article first, § 8, of the Connecticut constitution provides in relevant part: "No person shall . . . be deprived of life, liberty or property without due process of law . . . ."

[3] In *Biggers*, the United States Supreme Court held that when there is a finding of unnecessary suggestiveness, the court considers "whether under the 'totality of the circumstances' the identification was reliable . . . . [T]he factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation." *Neil* v. *Biggers*, supra, 409 U.S. 199–200. In *Manson*, the court reaffirmed the holding of *Biggers*, stating that "reliability is the linchpin in determining the admissibility of identification testimony for both pre- and post-*Stovall* confrontations. [See *Stovall* v. *Denno*, 388 U.S. 293, 87 S. Ct. 1967, 18 L. Ed. 2d 1199 (1967).] The factors to be considered are set out in *Biggers*." *Manson* v. *Brathwaite*, supra, 432 U.S. 114. For convenience, we hereinafter refer to this test as the *Manson* test.

[4] The defendant also asserts that *Manson* should be modified or overruled to the extent that it would allow the admission of eyewitness identifications procured through procedures similar to those used by the police in this case. As the defendant concedes, however, it is beyond the authority of this court to overrule a decision of the United States Supreme Court with respect to an issue of federal law. See, e.g., *State* v. *Ledbetter*, 275 Conn. 534, 559, 881 A.2d 290 (2005), cert. denied, 547 U.S. 1082, 126 S. Ct. 1798, 164 L. Ed. 2d 537 (2006). Therefore, we decline to entertain this argument.

[5] The state also responds to the defendant's argument that *Manson* should be modified or overruled. For the reason set forth in footnote 4 of this opinion, we need not address the state's argument on this point.

[6] Although the state notified this court of its intention to offer alternative grounds for affirmance by filing a statement of such grounds pursuant to Practice Book §§ 63-4 (a) (1) and 84-11, this particular claim was not specified in the state's filing. Nevertheless, we will consider this additional alternative ground for affirmance inasmuch as the defendant has not argued that he was prejudiced by the state's failure to include this claim in its statement. This determination is bolstered by the fact that the claim was fully briefed and argued before this court, and the defendant had the opportunity to, and did, respond to this issue. See, e.g., *Dickinson* v. *Mullaney*, 284 Conn. 673, 682 n.4, 937 A.2d 667 (2007); *State* v. *DeLoreto*, 265 Conn. 145, 152 n.11, 827 A.2d 671 (2003).

[7] Clement recalled drinking only one twenty-two ounce beer during the course of the evening, whereas Valle testified that he and the other three men shared the contents of a one-half pint bottle of Hennessy cognac and a small bottle of hypnotic liquor.

[8] Delgado's girlfriend also was present, but she remained in the bedroom in the back of the apartment during the robbery.

[9] The arrays that Clement and Valle viewed differed only in that the position of the defendant's photograph in each array had changed.

[10] In the literature, this process often is referred to as "absolute judgment."

[11] In my view, Justice Palmer's concurrence is based on a misunderstanding of the facts of this case and a misapplication of the standard set forth in *Ledbetter*. The crux of Justice Palmer's disagreement with the majority is his view that Beaudin's comment to Clement, although made *after* Clement had already confirmed his selection of the defendant's photograph from the array, "gave rise to an undue risk that the extent or degree to which Clement was confident about the accuracy of his identification would be skewed in favor of the state." Suggestiveness, however, refers to the witness' *initial* selection of an individual from a photographic array or lineup. In other words, the term "suggestive" signifies that the police have done something *during the course* of the identification procedure to *suggest* that the witness should choose a specific individual. Once Clement chose the defendant's photograph, however, the procedure had ended, and it no longer was possible for Beaudin to *suggest* anything. The trial court recognized this when it concluded that Beaudin's "utterance was not shown to have tainted the

witness' identification when it was initially made." Justice Palmer strains to justify his position by improperly shifting the focus from the impact of police conduct on the out-of-court identification to the impact of the out-of-court identification on the subsequent in-court identification, thus unduly expanding the temporal and conceptual scope of what constitutes an identification procedure administered by the police.

The problems inherent in Justice Palmer's view are manifest, as there are many events that may, and often do, occur prior to or during trial that may reinforce or otherwise affect the witness' level of confidence in his recollection. For instance, the witness may see a news report of the suspect's arrest, or he may disregard the warnings that police typically provide and compare notes with other witnesses about his identification of a particular suspect. Moreover, when a witness takes the stand, his recollection may be affected by his observation of the individual he selected during the identification procedure sitting at the defense table. All of these scenarios, and countless others, carry the potential for affecting the "witness' confidence in the strength of his photo[graphic] identification and the solidity of his basis in memory for it, thus making it harder for the defense to test the true certainty with which he made the identification on cross-examination . . . ." None of these situations, however, presents a basis for excluding the identification. To the contrary, the defendant may elicit from the witness, on cross-examination, any factors that might have influenced the witness' confidence in the accuracy of his initial pretrial identification. The jury is then in the best position to weigh the probative value of the identification in light of these potential influences. This is truly "customary grist for the jury mill. Juries are not so susceptible that they cannot measure intelligently the weight of identification testimony that has some questionable feature." (Internal quotation marks omitted.) *State* v. *Garner*, 270 Conn. 458, 469, 853 A.2d 478 (2004).

[12] Although Justice Katz concedes in her concurrence that the trial court "failed to make specific findings" that the risks purportedly inherent in simultaneous presentations "were present in the present case," she nonetheless concludes that "the trial court made its determination of unnecessary suggestiveness by examining the procedure as a whole, such that the use of the simultaneous array was evaluated in concert with the other factors present." The only other "factor" the concurrence refers to, however, is the group of studies indicating that, generally, the use of an uninterested administrator *may* lead to more accurate results. Despite her best efforts, however, Justice Katz cannot highlight a single fact that the trial court relied on *in this case* to determine that the identification procedures were unnecessarily suggestive. Although the trial court expressed concern about Beaudin's confirmatory comment to Clement, it specifically found that this comment did not taint the accuracy of the initial identification, with which our suggestiveness analysis is concerned.

[13] We have, however, set forth the standard of review for the reliability prong of the *Manson* test. In *State* v. *Wooten*, 227 Conn. 677, 631 A.2d 271 (1993), we stated that "we examine the legal question of reliability with exceptionally close scrutiny and defer less than we normally do to the related fact finding of the trial court." (Internal quotation marks omitted.) Id., 688, quoting *State* v. *Gordon*, 185 Conn. 402, 416, 441 A.2d 119 (1981), cert. denied, 455 U.S. 989, 102 S. Ct. 1612, 71 L. Ed. 2d 848 (1982).

[14] In his reply brief, the defendant claims that the state "never argued that a sequential showing would not have been superior to a simultaneous showing," and quotes the trial court's memorandum of decision for the proposition that "the state does not dispute the findings of scientific researchers that sequential identification procedures are more reliable than simultaneous identification [procedures]." (Internal quotation marks omitted.) The defendant claims that the state has thus waived its ability to contest this point on appeal, citing *State* v. *Cruz*, 269 Conn. 97, 106, 848 A.2d 445 (2004), for the principle that a party cannot challenge on appeal an alleged error that it has induced. Although we agree with this principle, we find it has no application in the present case. First, the state did generally contest the defendant's argument that the identification procedures used in this case were unnecessarily suggestive. Second, there is a distinct difference between inducing an error and failing to address a discrete argument that the court eventually relies on in making its decision. Finally, we note that the appropriate legal standard for determining unnecessary suggestiveness does not require that the court decide whether a particular procedure is more reliable or superior but, rather, whether the procedure employed is designed or administered in such a way as to suggest to the witness that a

particular individual is the correct choice. See, e.g., *State* v. *Gold*, 180 Conn. 619, 656, 431 A.2d 501, cert. denied, 449 U.S. 920, 101 S. Ct. 320, 66 L. Ed. 2d 148 (1980). Thus, the significance that the defendant attaches to the state's failure to address this argument is misplaced.

[15] In her concurrence, Justice Katz appears to agree generally with our characterization of the trial court's analysis. The *sole* factual ground on which Justice Katz bases her disagreement with us that the trial court implemented a per se rule is her belief that "the trial court also reasonably relied on the fact that the detective in charge of the investigation not only administered the procedure but also conveyed approval of the identification made by one of the witnesses as a basis for its determination that the identification procedure was unnecessarily suggestive . . . ." The concurrence, however, overlooks the fact that the court determined, unequivocally, that Beaudin's "utterance was not shown to have tainted the witness' identification when it was initially made." This is the court's key finding relating to the suggestiveness of the procedure itself with respect to the use of an interested administrator. Justice Katz appears to misread the court's memorandum of decision when she declares that "[t]he trial court was particularly troubled by [Beaudin's utterance] because Clement noticeably had hesitated before selecting the defendant's photograph." This statement is flatly contradicted by the court's statement that "the only reason [Clement] felt such hesitation was his genuine concern, which was reasonable under the circumstances, that he not identify an innocent man. . . . [H]e was not at all sure that the true perpetrator would be in the array, and so he commendably took his time in order not to implicate an innocent man." The trial court concluded with a resounding endorsement of the quality of Clement's identification: "The court thus agrees with the state that his selection of the defendant was not made by the exercise of relative judgment . . . but by the process of positive selection based [on] his personal memory of the gunman's face." Moreover, when the court did examine the photographic arrays actually used in the present case, it determined that they "did not unfairly highlight the defendant or promote his identification by the witnesses in any way." It is, therefore, unsurprising that Justice Katz fails to point to *any* basis in fact for the trial court's determination that the procedures used in this case were so flawed as to present a "very substantial risk of irreparable misidentification." *State* v. *Reid*, 254 Conn. 540, 555, 757 A.2d 482 (2000).

[16] Although similar language was employed by the court in *Stovall* v. *Denno*, 388 U.S. 293, 301–302, 87 S. Ct. 1967, 18 L. Ed. 2d 1199 (1967), this is the first occasion that the court used this exact phrase in this precise context.

[17] The similarity in names between this case and the 2005 *Ledbetter* case cited previously in this opinion is purely coincidental. Hereinafter, all references to *Ledbetter* are to the 2005 case.

[18] We focus primarily on the presentation of photographs in either a simultaneous or sequential fashion, and whether the person administering the procedure is "blind" to the identity of the suspect.

[19] Although the studies that the state presents were not published when the trial court made its ruling, both parties had the opportunity to supply this court with the most current research and to respond to the research presented by the opposing side in their briefs and at oral argument. Furthermore, "it is appropriate for this court to survey relevant scientific data as that data [have] been reported in the decisions of other courts and in the scientific literature. Such a survey does not amount to fact-finding by this court." *State* v. *Ledbetter*, supra, 275 Conn. 568; see also *State* v. *Porter*, 241 Conn. 57, 94–95, 698 A.2d 739 (1997) (even when no evidence is presented in trial court, appellate court can take notice of relevant scientific literature), cert. denied, 523 U.S. 1058, 118 S. Ct. 1384, 140 L. Ed. 2d 645 (1998).

[20] The authors reach this recommendation by analogizing lineups with scientific experiments, in which double-blind procedures are widely accepted when necessary to ensure that the tester does not consciously or unconsciously act so as to bias the results. G. Wells et al., supra, 22 Law & Hum. Behav. 627.

[21] Intended as a practical field guide for law enforcement personnel, this document provides instructions and advice regarding (1) the composition of lineups (photographical and live), (2) model instructions that should be administered to the eyewitness prior to attempting an identification, (3) the method of conducting the identification procedure, and (4) the proper method of recording the identification results. United States Dept. of Justice, supra, pp. 29–38.

[22] As its title suggests, this article is intended to marshal the relevant

scientific theory together with existing recommendations guiding the training of police services in North America and elsewhere in the world and to transform them into practical recommendations that can be used by law enforcement personnel with the goal of increasing accurate eyewitness identifications.

As we were unable to obtain the exact pagination for this article, we do not provide pinpoint citations. The text of this article may be found at page 105 of volume one of the appendix to the defendant's brief to this court.

[23] The authors note the beneficial use of double-blind procedures in scientific experiments and clinical drug trials, analogizing the eyewitness identification process to such endeavors.

[24] The pilot program was designed to compare the effectiveness of the sequential, double-blind method with the traditional, nonblind (or, more accurately, single-blind) simultaneous lineup procedure. See S. Mecklenburg, supra, p. ii. In her concurrence, Justice Katz claims that "the conclusions [of the Mecklenburg Report] have been discredited as the product of an unsound, unscientific methodology that does not support the conclusions reached therein." We believe that this is an overblown and inaccurate assessment of the criticism of the report. Although some commentators have sharply criticized the methodologies employed in the report, at least one prominent researcher in the field has recognized that "partisans on both sides of the debate over procedures have unfairly dismissed some criticism and praise of the . . . [r]eport as reflecting nothing more than the scientific commentators' stubborn loyalty to their own preexisting beliefs." D. Schacter et al., "Policy Forum: Studying Eyewitness Investigations in the Field," 32 Law & Hum. Behav. 3, 4 (2007). Other prominent academics in the field, commenting on the debate surrounding the supposed inadequacies of the report, have declared: "Given that there is so much left unresolved we believe it premature to advocate policy change, especially since the policy communities are so dispersed and since psychological science will both take a black eye and have difficulty implementing alternative policies if current advocacy is found to be incorrect, oversold or both." S. Ross & R. Malpass, "Moving Forward: Response to 'Studying Eyewitness Investigations in the Field,' " 32 Law & Hum. Behav. 16, 17 (2007). The same authors opined that the purported methodological flaw was not particularly important, in light of the purposes of the Mecklenburg Report: "After carefully examining the arguments and the available research, we find little evidence that the blind confound is important even for an academic interpretation of the Illinois study." Id. Thus, we think it is hyperbole to state that the Mecklenburg Report has been "discredited" or that its conclusions are unsupported. We believe the very controversy and debate engendered by this report is but further evidence that all of the research in this area must be taken with a substantial dose of salt.

[25] The author of the report also collected and analyzed surveys from officers in the field, highlighting practical challenges in implementing the procedures.

[26] In the appendix to his reply brief, the defendant included an article that is highly critical of the methodologies employed in the Mecklenburg Report. That article calls for further, better designed field studies and recognizes that "[a] standoff has arisen" in the field. See D. Schacter et al., "Policy Forum: Studying Eyewitness Investigations in the Field," 32 Law & Hum. Behav. 3, 4 (2007).

[27] This article also highlights the inherent uncertainty in laboratory studies in which many aspects of the study methodology that may significantly impact results are unknown or underreported. See McQuiston-Surrett, R. Malpass & C. Tredoux, supra, 12 Psychol., Pub. Policy & L. 160–61.

[28] The trial court was even more direct in its oral ruling on the motion to suppress: "The bottom line on that, and I'll just state for the record for you now, is that I am concerned about two aspects of the procedures [the 'nonblind process' and simultaneous presentation of photographs] which we[re] utilized here because of their *generic potential* to cause unfair prejudice in [the] identification process." (Emphasis added.)

[29] The defendant's contrary contention notwithstanding, it is appropriate for this court to engage in close scrutiny of the scientific evidence presented to the trial court; see *State* v. *Ledbetter*, supra, 275 Conn. 568; and to review the legal conclusions drawn from such evidence de novo. See *State* v. *Porter*, 241 Conn. 57, 94–95, 698 A.2d 739 (1997), cert. denied, 523 U.S. 1058, 118 S. Ct. 1384, 140 L. Ed. 2d 645 (1998). The defendant's citation to our opinion in *Schoonmaker* v. *Cummings & Lockwood of Connecticut, P.C.*, 252 Conn. 416, 747 A.2d 1017 (2000), simply does not support his proposition that our

review of this evidence would constitute "an unwarranted interpretation of the evidence before the trial court."

[30] For instance, in a case very similar to the present case, both factually and in terms of the claims raised, the Appellate Court concluded, rather persuasively, that, "[g]iven the limited number of studies on the subject [at that time], [the court is] not convinced . . . that [the] state constitution requires . . . [the] adopt[ion] [of] double-blind, sequential identification procedures because the traditional procedures are unnecessarily suggestive." *State* v. *Nunez*, supra, 93 Conn. App. 832; see also *State* v. *Nieves*, 106 Conn. App. 40, 50, 941 A.2d 358 ("[d]ue process does not require the suppression of a photographic identification that is not the product of a double-blind, sequential procedure"), cert. denied, 286 Conn. 922, 949 A.2d 482 (2008). As we have noted in this opinion, we are convinced that the research is even more unsettled today in light of the introduction of the Mecklenburg Report and the other field reports cited therein. See S. Mecklenburg, supra, pp. 42–43 (referring to field studies conducted in Hennepin County, Minnesota, and Queens, New York).

[31] In her concurrence, Justice Katz expresses a concern that our decision will "discourage, if not halt, development of jurisprudence surrounding witness identification procedures," and "[close] off debate on witness identification procedures at a time when a clearer consensus about those procedures is just beginning to emerge from scientific research." We do not believe that this decision risks any such result. In fact, we believe that our approach clearly evinces an open-mindedness with respect to the import of the continuing scientific debate, and that our adherence to *Ledbetter*'s ad hoc approach is the most conducive method for ensuring that the jurisprudence in this area does not become ossified. We believe that this opinion encourages trial courts to continue to consider the evolving scientific evidence, in light of the facts and circumstances of each individual case, to determine if a particular identification procedure is unnecessarily suggestive.

In her concurrence, Justice Katz highlights several articles, the product of her own independent research, that she claims either supports the defendant's assertions or calls into question the methodology of the Mecklenburg Report. See footnotes 8 through 13 and accompanying text of Justice Katz' concurrence. Notwithstanding our belief that Justice Katz has cherry picked these articles and that their results and recommendations are much more ambivalent than Justice Katz portrays them to be, the very existence of these articles serves as further support for our conclusion that the science of eyewitness identification procedures is far too unsettled to support a per se approach. The additional research that Justice Katz presents simply adds more silt to the already muddy water. To the extent that Justice Katz cites further studies in support of the supremacy of sequential, double-blind procedures, we remain convinced that the very availability of such research emphasizes the uncertain state of the science. If the issue were definitively decided, the scientific debate would have ceased. Justice Katz has demonstrated that it has not. Thus, we remain tethered to the ad hoc approach mandated by *Ledbetter* until the scientific evidence reaches a point of uniformity with respect to the unnecessarily suggestive nature of simultaneous, single-blind procedures such that due process requires us to jettison such procedures in favor of a demonstrably superior alternative. We are not yet at that point.

[32] In *Ledbetter*, we engaged in a very thorough review of several aspects of the relevant scientific research, particularly, the validity of the fourth *Biggers* factor, namely, witness certainty, which we found to be a relatively unreliable measure of reliability, as well as the effect that a warning can have on procedures that are not double-blind and the process of relative judgment. See generally *State* v. *Ledbetter*, supra, 275 Conn. 566–75. We are confident that our current understanding of the uncertain state of the science is consistent with the letter and tone of *Ledbetter*.

[33] In her concurrence, Justice Katz expresses concern that, by deciding this case on the state's alternative ground for affirmance, our opinion "signals our approval of the use of an interested administrator and closes off debate on witness identification procedures . . . ." The plain language of the Appellate Court's conclusion in *State* v. *Smith*, 107 Conn. App. 666, 674, 946 A.2d 319, cert. denied, 288 Conn. 902, 952 A.2d 811 (2008), is clearly to the contrary. Holding that due process *does not require* a finding that procedures that are not sequential or double-blind are unnecessarily suggestive is quite different from declaring such procedures forever immune from challenge. We expressly leave open the possibility that, in a future case, under different circumstances, the procedures utilized by the police in the present case

could violate due process. We are especially cognizant of the theoretical and commonsense value of utilizing a blind administrator whenever practical. The unequivocal intent of the court's conclusion in *Smith*, as well as the thrust of this entire opinion, however, is to reinforce our holding in *Ledbetter* that each eyewitness identification scenario must be judged on its own facts.

[34] In his concurrence, Justice Palmer reads this statement and similar statements to signify that the trial court believed that Beaudin's comment was "part of the pretrial identification procedure" and thus susceptible to review for suggestiveness. In fact, the entire basis for Justice Palmer's concurrence rests on the most slender of reeds. What Justice Palmer fails to recognize is that the trial court was responding to a motion to suppress two distinct pieces of evidence. The defendant sought exclusion of *both* the out-of-court identification, which was derived from the photographic identification procedure at issue, and Clement's subsequent in-court identification. The court confirmed this fact in the first paragraph of its memorandum of decision, referring to the defendant's "[motion] to suppress as evidence all pretrial *and* in-court identifications" on the grounds "that: (1) the procedure by which each *pretrial* identification was obtained was unnecessarily suggestive; [and] (2) that any *in-court* identification by a witness who previously identified him in an unnecessarily suggestive pretrial identification procedure would be irreparably tainted by the prior illegal identification . . . ." (Emphasis added.) In his concurrence, Justice Palmer asserts that "[i]t is crystal clear . . . that the trial court concluded that Beaudin's comment had rendered Clement's pretrial identification of the defendant unnecessarily suggestive . . . ." In fact, the record demonstrates precisely the opposite. After determining that the photographic identification procedure used by the police in this case "created an unnecessary risk of producing irreparable identifications" because of the use of a simultaneous photographic array the administration of which was not double-blind, the trial court explicitly found that "Beaudin's utterance came *after* the witness had selected the defendant's photograph . . . [and] [t]hus . . . was not shown to have tainted the witness' identification when it was initially made." (Emphasis added.) Although Justice Palmer places great emphasis on the word "initially," it is clear from the very next sentence that the court was using that word to refer specifically to the fact that Beaudin's remark did not affect the *out-of-court* identification. The court stated in that next sentence: "What [Beaudin] risked by her conduct . . . was unfairly bolstering [Clement's] confidence in the strength of his photo[graphic] identification and the solidity of his basis in memory for it, thus making it harder for the defense to test the true certainty with which he made that identification . . . and correspondingly more difficult for the jury to assess the true strength and reliability of that identification . . . ." This potential harm clearly refers to the prejudicial effect that Beaudin's comment might have on Clement's subsequent in-court identification of the defendant. As the trial court noted, however, the physical evidence derived from the photographic identification, i.e., the photographic array itself with Clement's initials next to a circled photograph of the defendant, was not in any way tainted by Beaudin's remark because it was produced before she made the remark. Clement's later memory of the procedure is simply irrelevant to a determination of whether the procedure itself was suggestive, and any suggestion to the contrary in the trial court's memorandum of decision is merely the product of a confusion of the issues.

In making a determination of suggestiveness, we look to whether the allegedly suggestive aspect of the identification procedure unnecessarily emphasized the defendant's photograph or otherwise indicated which individual the police considered a suspect. See, e.g., *State* v. *Gold*, supra, 180 Conn. 656. This is not an inquiry into the potential in-court prejudice that a defendant may suffer because of police conduct or other events occurring *subsequent* to the witness' selection but, rather, a determination of whether the selection *itself* is suspect because it may be the *product* of the suggestive conduct or display. Moreover, although comments such as Beaudin's may not be a "harmless irrelevancy," we must be careful to pinpoint the potential harm and identify why that harm might be relevant. Only then can a court determine the appropriate remedy. To be clear, the purportedly prejudicial effect created by Beaudin's comment that the trial court identified was the potentially reduced efficacy of defense counsel's cross-examination of Clement because of his allegedly heightened sense of certitude and *not* the inherent suggestiveness of the procedure leading to Clement's selection of the defendant's photograph from the array in the first place. Thus, we

conclude that the trial court correctly determined that Beaudin's remark had no bearing on the prior photographic identification. To the extent that Justice Palmer feels bound by some of the trial court's more equivocal statements that seemingly conflate these issues, however, we simply note that this court is not obliged to perpetuate a perceived error: "Our oath is to do justice, not to perpetuate error." (Internal quotation marks omitted.) *Mendillo* v. *Board of Education*, 246 Conn. 456, 507, 717 A.2d 1177 (1998).

[35] Justice Palmer not only fails to recognize the significance of this explicit finding but appears to ignore it entirely when he declares in his concurrence that "the trial court justifiably predicated its finding of unnecessary suggestiveness on [Beaudin's comment]." It is patently contradictory to claim that the trial court "predicated its finding" of suggestiveness on an impropriety that it found did *not* taint the witness' identification at the time it was made. The trial court actually predicated its finding of unnecessary suggestiveness on "the unchallenged findings of the scientific research studies . . . that the simultaneous showing of all photo[graphs] to each witness on a single photo[graphic] [array] created an unnecessary risk of producing irreparable misidentifications . . . ." Moreover, although the court expressed a concern on the basis of "the undisputed judgment and recommendation of well respected scientific researchers that the practice of having persons with special knowledge of a criminal investigation administer identification procedures" was undesirable because the procedure might be biased and the subsequent identification tainted, the court found that, *in this case*, the identification was not tainted. Furthermore, the trial court also examined the photographic array itself and determined that it "did not unfairly highlight the defendant or promote his identification by the witnesses in any way." Although Justice Palmer decries "the majority's insistence on treating Beaudin's comment as entirely separate and distinct from the identification procedure," he fails to recognize that the basis for our treatment of Beaudin's statement is the trial court's determination that the comment did not infect Clement's initial selection of the defendant from the photographic array. It is this initial identification, and the procedure used to elicit that identification, with which our suggestiveness analysis is concerned. Police conduct occurring *after* the witness' definitive selection of a defendant's photograph from an array is more appropriately dealt with in cross-examination, where the credibility of the initial identification and the reliability of the witness' subsequent recollection of his level of confidence in that identification can be tested in the crucible of jury scrutiny.

[36] The first case in which we used this language to describe the test for the constitutionality of pretrial identification procedures appears to be *State* v. *Theriault*, supra, 182 Conn. 371–72, which we decided in 1980.

[37] Valle testified as follows:

"Q. Okay. And on that occasion, what, if anything, did [Detective Beaudin] describe for you to do in terms of looking at photographs?

"A. I don't really remember. The first set [of photographs] they laid down, I already knew who it was."

[38] In Justice Katz' concurrence, Justice Katz lists "many ways that a lineup administrator can influence an eyewitness' identification decision"; (internal quotation marks omitted) footnote 9 of Justice Katz' concurrence; and declares that "the research submitted by the defendant universally indicates that the use of an interested administrator . . . contaminates the process, even when the individual makes no conscious effort to influence the identification . . . ." (Citation omitted.) Footnote 5 of Justice Katz' concurrence. Making the same mistake as the trial court, Justice Katz fails to refer us to *any* evidence that such "contamina[tion]" actually occurred *in this case*. It is just this type of generalizing that *Ledbetter* cautions against and that leads to unnecessary per se rules.

[39] We strongly discourage such police commentary, especially if it made prior to the witness' identification, because it could, under some circumstances, taint the identification process to such an extent that any subsequent identification would be subject to suppression as the product of an unnecessarily suggestive procedure. That is not the case here, however.