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PALMER, J., concurring. I agree with the majority that the due process rights of the defendant, Julian Marquez, were not violated by the state's use of the photographic identifications at issue. Consequently, I also agree that the judgment of conviction rendered by the trial court must be affirmed. Because I reach my conclusion concerning the defendant's due process claim by a somewhat different route than the majority, however, and because I do not agree with the majority's reading of the trial court's decision in one important respect,[1] I am unable to join the majority opinion. I therefore concur in the result.

The trial court concluded that the identification procedures employed by the police in the present case were unnecessarily suggestive for two reasons.[2] The first reason on which the trial court relied was the fact that the witness, Mark Clement,[3] was shown a simultaneous rather than a sequential photographic array; that is, the photographs were displayed to him all at the same time rather than one at a time.[4] The second reason on which the trial court based its finding of unnecessary suggestiveness was comprised of two components: First, the police did not employ a double-blind identification procedure,[5] and, second, the detective who conducted the procedure commended Clement on his selection of the defendant's photograph because a second witness, Christopher Valle, previously had selected that same photograph.

With respect to the trial court's first finding, I agree with the majority and the state that, under our holding in *State* v. *Ledbetter*, 275 Conn. 534, 881 A.2d 290 (2005), cert. denied, 547 U.S. 1082, 126 S. Ct. 1798, 164 L. Ed. 2d 537 (2006), the trial court improperly concluded that the nonsequential identification procedure used by the police in this case was unnecessarily suggestive.[6] Indeed, the procedure that the police used in the present case was *less* suggestive than the procedure that we approved of in *Ledbetter* because Clement, in contrast to the witness in *Ledbetter*, was expressly advised that he "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."[7] Because there is nothing in the record of this case relating to the use of the nonsequential identification procedure that, following our opinion in *Ledbetter*, may be deemed to be unduly suggestive, the trial court's contrary finding is unsupportable.[8]

The trial court's second reason for concluding that the procedure was unnecessarily suggestive is based on the fact that the procedure was conducted by the

lead investigator in the case, namely, Detective Patricia Beaudin. As the trial court explained, it is "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 in the course of it must not be permitted in order to ensure against biasing those procedures and tainting any identifications to which they lead." Indeed, in the present case, Beaudin did, in fact, improperly advise Clement that he had "[done] good" by identifying the same person Valle identified.

I would not decide whether the failure of the police to use a double-blind identification procedure, at least without good cause for not doing so, is sufficient, standing alone, to warrant a finding of unnecessary suggestiveness. Because of the real risk that an investigator who, like Beaudin, knows the identity of the suspect may consciously or unconsciously "transmit information or expectations inadvertently to the witness, thereby leading the witness to make a particular selection," it is clear—in fact, it appears to be undisputed—that use of a double-blind procedure is preferable to the approach that the police followed in the present case.[9] For purposes of this case, however, we need not decide whether the use of the double-blind approach, when practicable, may be required to avoid a finding of unnecessary suggestiveness, because, in the present case, the failure of the police to employ that approach resulted in the very harm that its use is designed to prevent: Beaudin, knowing the identity of the actual suspect, effectively relayed that information to Clement. Thus, as the trial court aptly explained, "[h]ere . . . the risk of unfairness due to administrator bias was not just hypothetical, but real, for on at least one proven occasion . . . Beaudin acted [on] her bias *in a clear and inexcusably prejudicial manner*—specifically, when she reacted to . . . Clement's identification of the defendant by commending him on choosing the defendant's photo[graph] and informing him that . . . Valle had selected the same person." (Emphasis added.) In fact, she did so despite the following admonition on the photographic array itself: "Please do not discuss this case with other witnesses nor indicate in any way that you have, or have not identified someone."

It is true, of course, that Beaudin improperly conveyed this information to Clement after Clement had selected the defendant's photograph from the array. Thus, as the trial court stated, that information "was not shown to have tainted the witness' identification when it was initially made." As the trial court further observed, however, "[w]hat [Beaudin] risked by her conduct, however, was unfairly bolstering 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 that identification on cross-examination, and correspondingly more difficult for the jury to assess the true strength and reliability of that identification in the totality of the circumstances." In other words, Beaudin's remark 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. The record, therefore, fully supports the finding of the trial court that Beaudin's statement was "clear[ly] and inexcusably prejudicial . . . ." This is particularly significant because, even without such improper reinforcement, witnesses often are more confident of their identification after the fact. E.g., *United States* v. *Williams*, 522 F.3d 809, 812 (7th Cir. 2008). Moreover, "[p]eople confuse certitude with accuracy and so are led astray." Id., 811. Because Clement's level of confidence in his identification of the defendant cannot be separated from the identification itself—an identification is only as valuable as the witness' confidence in it—Beaudin's comment affected Clement's identification in a very real sense. That fact is not altered merely because the extent of Beaudin's influence on the identification may not become manifest until Clement's testimony at trial.[10] Under the circumstances, therefore, I agree with the trial court's conclusion that "Beaudin's violation of the warning printed on her own photo[graphic] [array] cannot simply be treated as a harmless irrelevancy." Consequently, I believe that the trial court justifiably predicated its finding of unnecessary suggestiveness on this impropriety.

The majority maintains that Beaudin's statement did not render the identification procedure unnecessarily suggestive because the statement was made after Clement's initial identification of the defendant. According to the majority, once that initial identification had been made, the identification procedure was over, and nothing that occurred thereafter can be deemed to bear on the issue of whether the procedure was unnecessarily suggestive. For several reasons, I disagree with this narrow view of when a police administered eyewitness identification procedure ends. Before setting forth my reasons for reaching this conclusion, however, I first address a second, threshold point of disagreement with the majority, namely, the majority's assertion that the trial court itself did not treat Beaudin's comment to Clement as part of the pretrial identification procedure. As the following explication of the trial court's decision reveals, that decision leaves no room for doubt that the trial court viewed Beaudin's comment as occurring during the identification procedure.

At the outset of its decision, the trial court set forth with specificity the claims that the defendant raised in connection with his motion to suppress: "[T]he defendant moved this court, under [Practice Book §] 41-13 . . . the fourteenth amendment to the United States

constitution and article I, [§] 8, of the constitution of Connecticut, to suppress as evidence all pretrial and in-court identifications of him as a perpetrator of the crimes charged against him in this case." Thus, the two identifications involving Clement that the defendant moved to suppress were (1) the pretrial identification of the defendant that Clement made in connection with the out-of-court procedure administered by Beaudin, and (2) any in-court identification of the defendant that Clement might make during the course of the defendant's trial.

The trial court then explained the legal bases of the defendant's motion to suppress: "As grounds for [his] motion, the defendant has alleged, more particularly, that: (1) the procedure by which each challenged pretrial identification was obtained was unnecessarily suggestive; (2) . . . 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 and, thus, would have no independent basis; and (3) . . . each challenged identification . . . must be suppressed for failure to meet minimum constitutional standards of reliability for procedurally tainted identification evidence, as announced 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 enforced under the due process clauses of our state and federal constitutions." Thus, with respect to the pretrial identification procedure that Beaudin administered, the defendant claimed that that procedure was unnecessarily suggestive. With respect to any subsequent in-court identification, the defendant claimed that it would be irreparably tainted due to the fact that the earlier, pretrial identification was unnecessarily suggestive. Finally, with respect to both identifications, the defendant maintained that they were unreliable and, therefore, must be suppressed. It is readily apparent, therefore, that *all* of the defendant's claims relate directly to the allegedly improper *pretrial identification procedure* that Beaudin administered; the defendant's motion to suppress contains no other claims, and the trial court did not purport to address any other claims.

After making extensive factual findings, the trial court set forth the applicable law in a section entitled "The Controlling Legal Standard." This section is relatively brief, and provides in relevant part: "To prevail on a motion to suppress identifications under the due process clause of the fourteenth amendment to the United States constitution or its Connecticut constitutional counterpart, in article I, [§] 8, of the constitution of Connecticut, the defendant must prove by a fair preponderance of the evidence both that a government administered pretrial identification procedure was unnecessarily suggestive and, if it was, that any subsequent identification to which it led or may lead in the

future was or will be unreliable in the totality of the circumstances. . . . The reliability of an identification procedure is considered under various factors, such as the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of [his] prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation. . . . Reliability is the linchpin in determining the admissibility of the identification testimony." (Citations omitted; internal quotation marks omitted.)

This is the only legal standard that the trial court mentions in its decision; at no time does the decision refer to a different legal test. Thus, consistent with the claims that the defendant raises in his motion to suppress, the law that the trial court applied pertains *only* to the allegedly unlawful pretrial identification procedure conducted by Beaudin and its effect on any subsequent in-court identification of the defendant.

The trial court then set forth in detail the parties' claims and responses. Thereafter, the court analyzed the defendant's claims concerning the pretrial identification of the defendant that Clement had made during the procedure administered by Beaudin. As I noted previously, the trial court concluded that the procedure was unnecessarily suggestive because of Beaudin's use of a nonsequential photographic array and because it was administered by a police officer who (1) had knowledge of the investigation and the suspect, and (2) commended Clement on his identification of the defendant immediately after Clement had made it.

The state claimed that Beaudin's comment to Clement did not render the identification procedure unnecessarily suggestive because (1) it occurred after Clement's identification of the defendant, and (2) in any event, the comment did no more than apprise Clement of what he ultimately would have learned prior to trial anyway, that is, that a second witness also had identified the defendant. In response to the state's first contention, the trial court acknowledged that "[t]he state correctly asserts that . . . Beaudin's utterance came after the witness had selected the defendant's photo[graph]. Thus, the utterance was not shown to have tainted the witness' identification when it was initially made." The court nevertheless was unpersuaded that the comment had not adversely affected the identification procedure, explaining: "What [Beaudin] risked by her conduct, however, 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 on cross-examination, and correspondingly more difficult for the jury to assess the true strength and reliability of that identification in the totality of the circumstances." In the trial

court's view, therefore, Beaudin's comment had infected the identification procedure with unfairness due to the fact that the comment created an undue risk that Clement's trial testimony about his photographic identification of the defendant would be skewed in favor of the state because the comment improperly had bolstered his confidence in *that* identification. The trial court next addressed, and also rejected, the state's argument that Clement inevitably would have found out about the second witness' identification of the defendant in any event.

Having concluded that various "aspects of the procedures by which the challenged photo[graphic] identifications were obtained were unnecessarily suggestive," the trial court then applied the second prong of the applicable two part test for determining the constitutionality of identifications, namely, the reliability prong. The court determined that neither Clement's pretrial identification nor any subsequent in-court identification "was thereby rendered unreliable in the totality of the circumstances in which it was made." Turning to Clement's *pretrial* identification of the defendant, the trial court stated in relevant part: "In reference to . . . Clement, *although the unnecessary suggestiveness of . . . Beaudin's postidentification commendation of him for selecting the* [*correct photograph*] *is well established on this record*, it is equally well established that he [like the second witness, Valle] had a reliable independent basis for making his challenged photo[graphic] identification of the defendant based solely [on] his memory of the gunman's face."[11] (Emphasis added.) The italicized language demonstrates beyond any doubt that the trial court found that Beaudin's comment had rendered the pretrial identification procedure unnecessarily suggestive. Moreover, unless the trial court had made such a finding, it would have had no reason to explain why Clement's identification of the defendant was *reliable notwithstanding* Beaudin's comment. Indeed, as I noted previously, all of the defendant's claims, including his claim concerning Beaudin's comment, emanated directly from the allegedly improper pretrial identification *procedure* that Beaudin administered, and there is nothing in the trial court's decision to suggest that the court treated the comment as representing an issue separate and apart from that procedure. In fact, the contrary is true: The record definitively establishes that the court considered the comment as part of the procedure itself.

The fact that the court treated the comment as having been made during that pretrial procedure is again confirmed by its analysis and resolution of the defendant's claim that any *in-court* identification by Clement should be suppressed on the ground that it merely would be the product of the unnecessarily suggestive pretrial identification procedure. With respect to this issue, the trial court stated: "As for future in-court identifications

of the defendant by . . . Clement, *whose confidence in his own identification may well have been bolstered by . . . Beaudin's postidentification comment to him*, the court agrees with the state that . . . Clement is a particularly credible, forthcoming witness . . . who still appears to be quite capable of explaining the mental processes by which he made his challenged identification. The court has every confidence that his ability to recall and relate such details honestly *will remain unaffected by . . . Beaudin's unfortunate mistake . . . and thus will be sufficiently reliable in the totality of the circumstances not to require their suppression as evidence*." The court's express references to Beaudin's comment in its analysis of the reliability prong reflects the court's earlier finding that the comment had rendered the pretrial identification procedure unnecessarily suggestive. Finally, once again, if the trial court had not made such a finding, there would have been no reason for the court to have turned to the *reliability* of the in-court identification.

It is crystal clear, therefore, that the trial court concluded that Beaudin's comment had rendered Clement's pretrial identification of the defendant unnecessarily suggestive, and that the comment had affected both that identification and any subsequent in-court identification of the defendant by Clement. Of course, as a practical matter, the unnecessarily suggestive nature of the procedure and its effect on Clement was likely to manifest itself in Clement's trial testimony about his pretrial identification of the defendant and, in particular, in his testimony about *his level of confidence in that identification*. Insofar as the administration of the identification procedure unfairly bolstered Clement's confidence in his pretrial identification of the defendant, that unfairness also was likely to manifest itself in Clement's testimony at trial about his *level of confidence in any in-court identification of the defendant*.[12]

The trial court's determination that Beaudin's comment was part of the pretrial identification procedure and, therefore, must be analyzed under the two part test applicable to claims concerning the constitutionality of such identification procedures, is amply supported by the record. Beaudin, the procedure administrator, made her improper comment immediately after Clement had selected the defendant's photograph from the array and while he was continuing to interact with Beaudin about the subject matter of the procedure, that is, his identification of a suspect. The comment, therefore, occurred toward the end of the identification procedure but not before it finally had concluded. As long as the witness remains with the police and is discussing his identification of the suspect with the officer in charge of administering the procedure, there is no legitimate reason to presume that the identification procedure has concluded. Indeed, such interaction between the witness and the police may serve to taint the witness' identifica-

tion, as it did in the present case, by bolstering the witness' confidence that he had, in fact, identified the actual perpetrator. As I stated previously, the confidence that a witness has in his identification is a critical aspect of the identification itself; indeed, the two are inextricably interrelated. Thus, Beaudin's improper comment to Clement concerning the identification that Clement had just made rendered the identification procedure unnecessarily suggestive because of the high likelihood that Beaudin's remark would serve to bolster Clement's confidence in his identification—*the very same identification that had been the subject of the procedure at issue*. Under the circumstances presented, the majority's insistence on treating Beaudin's comment as entirely separate and distinct from the identification procedure makes little sense.

Furthermore, to the extent that this court must decide precisely when an identification procedure is complete, there are strong policy reasons to conclude that it has not ended when, as in the present case, the police and the witness are discussing the witness' identification immediately after the witness identifies the suspect. In *Manson* v. *Brathwaite*, 432 U.S. 98, 111–13, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977), the United States Supreme Court identified several considerations that it deemed relevant to the determination of how best to deal with pretrial identification evidence when the police have obtained that evidence by use of a procedure that is unnecessarily suggestive.[13] The court characterized the first such factor as its "concern [generally] with the problems of eyewitness identification. Usually, the witness must testify about an encounter with a total stranger under circumstances of emergency or emotional stress. The witness' recollection of the stranger can be distorted easily by the circumstances or by later actions of the police." Id., 112. The court identified the second factor as police deterrence, that is, discouraging the police from engaging in conduct that is likely to lead to an unreliable identification. Id. The third and final factor is the effect that a particular approach will have on the administration of justice, including the extent to which the fact finder may be denied access to reliable evidence. Id., 112–13.

I believe that all of these considerations are advanced by a determination that the identification procedure in the present case had not concluded before Beaudin commended Clement on his identification of the defendant. With respect to the first such consideration, the present case exemplifies how the "later actions of the police"; id., 112; can have an unfair distorting effect on the original identification by altering the witness' confidence in that identification in a manner favorable to the state. Viewing the identification procedure more broadly to include Beaudin's improper comment to Clement also would promote the strong public interest in deterring misconduct by the police in their interac-

tions with eyewitnesses at the very time that the police are engaging those eyewitnesses in identification procedures. Finally, a determination that the identification procedure had not concluded before Beaudin made her comment would result in no adverse effect on the administration of justice because the state still would have the opportunity to establish that the comment did not so taint the procedure, under the totality of the circumstances, as to require suppression of Clement's identification of the defendant.[14]

The majority contends that "[t]he problems inherent" in the view that I advocate "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." Footnote 11 of the majority opinion. The majority further observes that "[n]one of these situations, however, presents a basis for excluding the identification"; id.; rather, they provide "customary grist for the jury mill." (Internal quotation marks omitted.) Id. I fully agree with the majority that examples abound of postidentification events that may influence the witness' confidence in his identification; indeed, it is equally possible to conceive of circumstances in which a witness' recollection of a particular suspect is influenced by events that occur *prior* to his participation in the procedure administered by the police. I also agree with the majority that such influences generally are addressed through cross-examination only. These examples, however, in no way undermine the fact that special steps must be taken to ensure that *police sponsored identification procedures* are undertaken with care, and that they are administered in an unbiased, evenhanded manner. This is true for obvious reasons, including the fact that witnesses are likely to place great weight on what the police have to say about who committed the crime under investigation. Furthermore, under the controlling two-pronged test pursuant to which reliability is the overriding consideration, it is highly unlikely that a comment of the kind made by Beaudin, standing alone, ever will result in suppression of the identification.[15] Both the state and the defendant, however, have a strong interest in seeing to it that police administered identification procedures are fair, neutral and do not skew either the witness' initial identification of a suspect or the witness' confidence in *that* identification. Unfortunately, the approach that the majority adopts does not advance that objective. Nevertheless, for the reasons set forth by Justice Katz in her concurring opinion, I agree that the trial court properly determined that the photographic identifications at issue in the present case were reliable under the totality of the circumstances and, therefore, admissible at trial.[16] Accordingly, I concur in the judgment.

I note, finally, that, despite the significant weight that juries tend to give eyewitness identification testimony,

all too often, those identifications are inaccurate. As the United States Court of Appeals for the Third Circuit recently has stated, "[i]t is widely accepted by courts, psychologists and commentators that '[t]he identification of strangers is proverbially untrustworthy.' [F. Frankfurter, The Case of Sacco and Vanzetti: A Critical Analysis for Lawyers and Laymen (Grosset and Dunlap 1962 Ed.) p. 30] ('What is the worth of identification testimony even when uncontradicted? . . . The hazards of such testimony are established by a formidable number of instances in the records of English and American trials. These instances are recent—not due to the brutalities of ancient criminal procedure.'); see also *United States* v. *Wade*, 388 U.S. 218, 228, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967) (stating that '[t]he vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification'); [C. Huff et al., 'Guilty Until Proven Innocent: Wrongful Conviction and Public Policy,' 32 Crime & Delinq. 518, 524 (1986)] ('the single most important factor leading to wrongful conviction in the United States . . . is eyewitness misidentification'). The recent availability of post-conviction DNA tests demonstrate[s] that there have been an overwhelming number of false convictions stemming from uninformed reliance on eyewitness misidentifications. In 209 out of 328 cases [64 percent] of wrongful convictions identified by a recent exoneration study, at least one eyewitness misidentified the defendant. [S. Gross et al., 'Exonerations in the United States: 1989–2003,' 95 J. Crim. L. & Criminology 523, 542 (2004)]. In fact, 'mistaken eyewitness identifications are responsible for more wrongful convictions than all other causes combined.' [A. Yarmey, 'Expert Testimony: Does Eyewitness Memory Research Have Probative Value for the Courts?,' 42 Canadian Psychol. 92, 93 (2001)]. '[E]yewitness evidence presented from well-meaning and confident citizens is highly persuasive but, at the same time, is among the least reliable forms of evidence.' Id. . . .

"Even more problematic, 'jurors seldom enter a courtroom with the knowledge that eyewitness identifications are unreliable.' [Note, 'Process v. Outcome: The Proper Role of Corroborative Evidence in Due Process Analysis of Eyewitness Identification Testimony,' 88 Cornell L. Rev. 1097, 1099 n.7 (2003)]. Thus, while science has firmly established the 'inherent unreliability of human perception and memory,' [id., 1102] . . . this reality is outside 'the jury's common knowledge,' and often contradicts jurors' 'commonsense' understandings . . . . [Id., 1105 n.48] . . . . To a jury, 'there is almost nothing more convincing than a live human being who takes the stand, points a finger at the defendant, and says . . . "That's the one!"' *Watkins* v. *Sowders*, 449 U.S. 341, 352, 101 S. Ct. 654, 66 L. Ed. 2d 549 (1981) (Brennan, J., dissenting) . . . ." *United States* v. *Brownlee*, 454 F.3d 131, 141–42 (3d Cir. 2006).

Moreover, as the United States Supreme Court recognized more than forty years ago, "[a] major factor contributing to the high incidence of miscarriage of justice from mistaken identification has been the degree of suggestion inherent in the manner in which the prosecution presents the suspect to witnesses for pretrial identification. A commentator has observed that '[t]he influence of improper suggestion upon identifying witnesses probably accounts for more miscarriages of justice than any other single factor—perhaps it is responsible for more such errors than all other factors combined.' . . . Suggestion can be created intentionally or unintentionally in many subtle ways. And the dangers for the suspect are particularly grave when the witness' opportunity for observation was insubstantial, and thus his susceptibility to suggestion the greatest." (Citation omitted.) *United States* v. *Wade*, supra, 388 U.S. 228–29.

Because of the potentially grave consequences of witness misidentification, it is imperative that all reasonable efforts be made to ensure that the identification procedures used by the police are fair and neutral and that, to the fullest extent possible, those procedures promote reliable identifications. Of course, this endeavor is the shared responsibility of the police and the courts, both of which must accord paramount importance to emerging scientific research and literature in this critical area, particularly with respect to the use of identification procedures that are not sequential and not double-blind.[17] For purposes of this case, however, the defendant has failed to establish that the identification procedures employed by the police rendered the challenged identifications so unreliable as to constitute a violation of due process.

Accordingly, I concur.

[1] As I explain more fully hereinafter, I disagree with the majority's conclusion that the trial court found that Beaudin's comment to Clement occurred after the identification procedure had concluded and, therefore, that the comment was not a part of that procedure.

[2] The following two part test governs our review of the defendant's due process claim. "In determining whether identification procedures violate a defendant's due process rights, [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. . . . The defendant bears the burden of proving both that the identification procedures were unnecessarily suggestive and that the resulting identification was unreliable. . . . Generally, [t]he exclusion of evidence from the jury is . . . a drastic sanction, one that is limited to identification testimony which is manifestly suspect." (Internal quotation marks omitted.) *State* v. *Ortiz*, 252 Conn. 533, 553, 747 A.2d 487 (2000).

[3] The police used the same essential identification procedures for each of the two eyewitnesses, Clement and Christopher Valle. For ease of reference, I discuss those procedures insofar as the police employed them in obtaining Clement's identification of the defendant as the perpetrator. My ultimate conclusion that the defendant's due process rights were not violated, however, applies equally to Valle's identification of the defendant.

[4] As Justice Katz explains in her concurrence, "[a] simultaneous photographic array displays multiple photographs together on a single page to

be shown to a witness, in contrast to a sequential identification procedure in which individual photographs are displayed to a witness one at a time." Footnote 1 of Justice Katz' concurrence.

[5] The majority explains the double-blind procedure as follows: "To qualify as double-blind, a photographic array must be administered by an uninterested party without knowledge of which photograph represents the suspect."

[6] In *Ledbetter*, this court approved of the use of a nonsequential identification procedure even though it was not accompanied by a warning to the witness that the array may or may not contain the suspected perpetrator. See *State* v. *Ledbetter*, supra, 275 Conn. 574–75. Concluding, however, that "some action is necessary to mitigate the risks of such procedures"; id., 575; we deemed it appropriate "to exercise our supervisory authority to require an instruction to the jury in those cases [in which] the identification procedure administrator fails to provide such a warning, unless no significant risk of misidentification exists." Id. That instruction includes language alerting the jury to the fact that the failure of the administrator to advise the witness that the suspected perpetrator may or may not be in the array may increase the likelihood that the witness will select one of the individuals in the array even when the suspect is not in the array. Id., 579.

[7] This warning appeared on the photographic array itself. As I explained in footnote 6 of this opinion, the nonsequential identification procedure at issue in *Ledbetter* included no such warning.

[8] Our opinion in *Ledbetter* was decided only a few months prior to the trial court's ruling on the defendant's motion to suppress the photographic identifications in the present case. As I noted previously, the procedure that we approved of in *Ledbetter* was manifestly *more* suggestive than the procedure that the police used in the present case because, in *Ledbetter*, the administrator failed to warn the witness that the suspect may or may not be included in the procedure. See *State* v. *Ledbetter*, supra, 275 Conn. 570 n.23. Although I agree with Justice Katz that, with certain exceptions, sequential identification procedures are superior to nonsequential identification procedures, I do not believe that the scientific research in this area is sufficiently clear or compelling that we now are required to revoke our approval of the kind of nonsequential procedure employed in *Ledbetter* and in the present case, especially in view of the fact that, in the present case, the witnesses were fully advised that they should not assume that the suspect's photograph was included in the array, that they should feel no obligation to identify anyone and that it is no less important to clear innocent persons of suspicion than it is to identify guilty persons.

[9] Of course, there may be times when the use of such a procedure is impossible or impracticable in light of the circumstances.

[10] Although the majority finds that Clement "felt fairly confident" about his choice, the trial court noted that Clement had testified that "the sole basis for his identification of the defendant as the gunman was his own 'gut feeling,' based [on] his personal observations of the gunman during the robbery." Clement also testified that the police never had told him that he had to identify someone in the photographic array and never had indicated to him that he should give special consideration to any particular photograph. Nevertheless, Clement did acknowledge that he believed that the police would not have shown him the photographic array unless it contained a suspect's photograph and, further, that he felt he "had to pick somebody . . . ."

[11] The trial court then proceeded to elaborate as to why Clement's photographic identification of the defendant was reliable under the totality of the circumstances.

[12] Despite the absolute clarity of the trial court's determination that Beaudin's comment was a part of the pretrial identification procedure, the majority asserts that the record demonstrates precisely the opposite. Footnote 34 of the majority opinion. The majority's explanation for its assertion reveals that there simply is nothing in the record to substantiate it. Indeed, in reaching its unfounded conclusion, the majority ignores the relevant portions of the record that I have identified and hypothesizes that "any suggestion" in the decision of the trial court that the court was treating Beaudin's comment as part of the pretrial identification procedure was "merely the product of a confusion of the issues [by the trial court]." Id. This latter assertion, along with the majority's reference to "the trial court's more equivocal statements that seemingly conflate [the relevant] issues"; id.; is wholly unwarranted. The trial court's thirty-four page memorandum of decision on the defendant's motion to suppress is characteristically scholarly, thoughtful and thorough, and most definitely not the product of any confu-

sion. The fact is that, in seeking to justify its own faulty analysis, the majority, which first describes the court's decision as " 'clearly' " reaching one conclusion and then, when it suits its purpose to do so, reverses course and characterizes the trial court's statements as "equivocal" and "the product of . . . confusion"; id.; unfairly maligns the perfectly logical analytical approach taken by the trial court.

The majority's fundamental misunderstanding of the trial court's decision is exemplified by the majority's mistaken reading of that decision as containing a finding by the trial court that the prejudice attributable to Beaudin's comment did not affect Clement's pretrial identification of the defendant. In support of this conclusion, the majority specifically relies on the following language from the trial court's decision: "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 on cross-examination, and correspondingly more difficult for the jury to assess the true strength and reliability of that identification . . . ." On the basis of this language, the majority asserts: "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," and *not* on "Clement's later memory of the [pretrial identification] procedure . . . ." Footnote 34 of the majority opinion. The majority's conclusion is manifestly and demonstrably wrong, as it is readily apparent from the very language of the trial court's decision—on which the majority itself relies—that the trial court was concerned about the defendant's memory of and confidence in *his pretrial identification* of the defendant. In fact, the language of the trial court's decision could not be clearer in this regard. The trial court determined that Beaudin's comment created an undue risk of "unfairly bolstering [Clement's] confidence in the strength of his *photo*[*graphic*] *identification* and the solidity of his basis in memory for [*that* identification]," thereby making it more difficult "for the defense to test the true certainty with which he made *that identification on cross-examination* . . . ." (Emphasis added.) In other words, Beaudin's comment gave rise to an unfair risk of affecting Clement's trial testimony *about his pretrial identification* of the defendant because that comment likely would have a distorting effect on his memory of *that out-of-court identification* of the defendant. There is absolutely nothing in the language on which the majority relies to suggest that the trial court was referring to the prejudicial effect that Beaudin's comment was likely to have on any in-court identification of the defendant; rather, it is perfectly clear from the language of the trial court that the court was referring to the effect that the comment would have on Clement's *in-court trial testimony about his pretrial*, *out-of-court identification* of the defendant.

[13] The court in *Manson* considered these factors in deciding whether to adopt a per se test pursuant to which a court would be required to exclude identification evidence that had been obtained by use of unnecessarily suggestive procedures or, alternatively, a totality of the circumstances test pursuant to which the use of an unnecessarily suggestive identification procedure by the police would not require suppression of the identification unless that identification was unreliable upon consideration of all of the relevant circumstances. *Manson* v. *Brathwaite*, supra, 432 U.S. 109–13. The court ultimately concluded that, because "reliability is the linchpin in determining the admissibility of identification testimony"; id., 114; the proper test requires an evaluation of the totality of the circumstances. Id., 113–14.

[14] I also note that one of the factors that a court must consider in determining whether the identification is sufficiently reliable to be admissible under the totality of the circumstances—the second prong of the two part test that must be applied following a determination that the identification procedure was unnecessarily suggestive—is the "level of certainty [that the witness] demonstrated" in connection with his identification of the suspect. *Manson* v. *Brathwaite*, supra, 432 U.S. 114; see also id., 114–16 (identifying five factors to be considered in evaluating reliability of identification under totality of circumstances, including witness' degree of certainty in identification). Under the test adopted by the majority, however, the fact that the witness' confidence in his identification is likely to have been affected significantly by virtue of the kind of comment that Beaudin had made in the present case is insufficient even to move the court's inquiry forward to a consideration of the totality of the circumstances. I do not believe that this approach is consistent with the test for determining the reliability of the identification.

[15] Indeed, suppression will be required only if such a comment, when considered with any other police impropriety that occurs during the identification procedure, renders the identification manifestly suspect under the totality of the circumstances. Although that eventuality is not likely, if it occurs, I see no reason why suppression would be inappropriate or unwarranted. I therefore disagree with the majority's assertion that a comment such as the one that Beaudin made can never be more than grist for cross-examination. In the overwhelming number of cases—the present one included—that is exactly what it ultimately will be. But when such a comment, in combination with some other unnecessarily suggestive police conduct that occurs at the identification procedure itself, results in an identification that is unreliable under the totality of the circumstances, the state should be precluded from using that identification at trial.

[16] Because I conclude that Valle's pretrial identification of the defendant also was reliable, I do not address the issue of whether the failure of the police to use a double-blind identification procedure with respect to Valle rendered that procedure unnecessarily suggestive.

[17] In contrast to Justice Katz, I do not read the majority opinion as signaling a contrary view.