FOTI, J., concurring in part and dissenting in part. I agree completely with part I of the majority opinion, both in its thoughtful analysis and result, that the evidence adduced at trial was sufficient to support the conviction of the defendant, Irvin D. Rose. I respectfully disagree, however, with the majority's conclusion in part II that the trial court violated the defendant's constitutional rights under the due process clause of the fourteenth amendment to the federal constitution by compelling the defendant to wear prison attire during trial. Although I agree with the majority's conclusion that the defendant was compelled impermissibly by the court to wear prison attire during his trial, I disagree with the majority's conclusion that it is inappropriate to apply harmless error analysis to the present case and that, in any event, the error was not harmless beyond a reasonable doubt. In my opinion, the precedents from the United States Supreme Court do not support the majority's position that harmless error analysis is unavailing under these circumstances. Moreover, my review of the record indicates that the evidence of the defendant's guilt is overwhelming, and, therefore, the error visited upon him by the court impermissibly compelling him to wear prison attire throughout trial was harmless beyond a reasonable doubt.[1]

I first address the majority's contention that it is inappropriate to apply harmless error analysis to the present case. The majority declares that *Estelle* v. *Williams*, 425 U.S. 501, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976), does not stand for the proposition that harmless error analysis applies to circumstances in which a defendant is impermissibly compelled to stand trial in prison attire. I agree that *Estelle* does not stand for this proposition because the question of whether compelling a defendant to attend trial in prison attire could result in harmless error was not before the court. The question before the court in *Estelle* was "whether an accused who is compelled to wear identifiable prison clothing at his trial by a jury is denied due process or equal protection of the laws"; id., 502; in other words, had a constitutional error occurred at all. The court concluded that "[a]lthough the State cannot, consistently with the Fourteenth Amendment, compel an accused to stand trial before a jury while dressed in identifiable prison clothes, the failure to make an objection to the court . . . is sufficient to negate the presence of compulsion necessary *to establish a constitutional violation*." (Emphasis added.) Id., 512–13. The court also found that there was no compulsion in *Estelle* because the defendant did not timely object, and, therefore, there was no error.[2] The court simply did not address the applicability of harmless error analysis because the error was not established.[3] This, however,

does not end the inquiry.

Although the applicability of harmless error analysis to circumstances in which a defendant is impermissibly compelled to attend trial in prison attire has not been addressed directly by this court or our Supreme Court, state and federal appellate courts confronting this issue have approved of applying such analysis. As the majority correctly points out, the United States Court of Appeals for the Second Circuit in *United States* v. *Hurtado*, 47 F.3d 577, 581 (2d Cir.), cert. denied, 516 U.S. 903, 116 S. Ct. 266, 133 L. Ed. 2d 188 (1995), declared that "[e]ven where a defendant is compelled to wear prison clothes at trial, however, that constitutional error is subject to harmless error analysis." The United States Court of Appeals for the Seventh Circuit has applied harmless error analysis in this context as well. See *Whitman* v. *Bartow*, 434 F.3d 968, 971 (7th Cir.), cert. denied, 547 U.S. 1199, 126 S. Ct. 2883, 165 L. Ed. 2d 908 (2006); see also *Fernandez* v. *United States*, 375 A.2d 484, 485–86 (D.C. 1977) (applying harmless error when defendant compelled to attend trial in prison attire). The Court of Appeals of Maryland[4] in *Knott* v. *State*, 349 Md. 277, 292, 708 A.2d 288 (1998), applied harmless error analysis to this issue in factually comparable circumstances, as did the Supreme Court of Pennsylvania in *Commonwealth* v. *Moore*, 534 Pa. 527, 544–45, 633 A.2d 1119 (1993), cert. denied, 513 U.S. 1114, 115 S. Ct. 908, 130 L. Ed. 2d 790 (1995), and the Supreme Court of Louisiana in *State* v. *Brown*, 585 So. 2d 1211, 1213 (La. 1991). See also *People* v. *Steinmetz*, 287 Ill. App. 3d 1, 6–7, 678 N.E.2d 89 (applying harmless error when defendant compelled to attend trial in prison attire), leave to appeal denied, 173 Ill. 2d 542, 684 N.E.2d 1341 (1997). I agree with those courts that the application of harmless error analysis is appropriate in circumstances in which a defendant is impermissibly compelled to attend trial in prison attire.

Moreover, the United States Court of Appeals for the Sixth Circuit declared that "there *is* [United States] Supreme Court precedent holding that harmless error analysis *should* apply in cases where the courtroom atmosphere hints at a defendant's dangerousness or guilt." (Emphasis in original.) *Ruimveld* v. *Birkett*, 404 F.3d 1006, 1013 (6th Cir. 2005). Citing *Holbrook* v. *Flynn*, 475 U.S. 560, 572, 106 S. Ct. 1340, 89 L. Ed. 2d 525 (1986), the Sixth Circuit concluded that "[t]he [United States Supreme] Court [has] made clear that a particular trial practice ought to be examined as to whether it prejudiced the defendant's case. [Furthermore, this] is in line with the majority of other constitutional errors considered by the Supreme Court." *Ruimveld* v. *Birkett*, supra, 1013. I agree and, therefore, would apply harmless error analysis in this case.

Additionally, the United States Supreme Court has "recognized that most constitutional errors can be

harmless [and has] found an error to be structural, and thus subject to automatic reversal, only in a very limited class of cases." (Citations omitted; internal quotation marks omitted.) *Neder* v. *United States*, 527 U.S. 1, 8, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999).[5] I also take issue with the majority's apparent case-by-case approach to the applicability of harmless error analysis to this, or any, constitutional error. The United States Supreme Court expressly has rejected such an approach to errors of a constitutional magnitude. In *Neder*, the court was faced with a "[p]etitioner's submission [that] import[ed] into the initial structural-error determination (i.e., whether an error is structural) a case-by-case approach that [was] more consistent with [the court's] traditional harmless error inquiry (i.e., whether an error is harmless)." Id., 14. Although the majority admittedly does "not announce a per se rule that trial in prison clothing after an objection requires automatic reversal," it also concluded that "it is inappropriate to apply harmless error analysis in cases such as [the present case]." The majority, therefore, apparently endorses a case-by-case approach to the application of harmless error analysis to situations in which a defendant was compelled impermissibly to attend trial in prison attire. "Under [United States Supreme Court] cases, a constitutional error is either structural or it is not." *Neder* v. *United States*, supra, 14. Therefore, I find that the majority is misguided in its apparent endorsement of a case-by-case approach to the application of harmless error analysis.

Last, my review of the record reveals that the court's compelling the defendant to wear prison attire throughout trial, even though erroneous, was harmless beyond a reasonable doubt. "The harmless error doctrine is rooted in the fundamental purpose of the criminal justice system, namely, to convict the guilty and acquit the innocent. . . . Therefore, whether an error is harmful depends on its impact on the trier of fact and the result of the case." (Citation omitted.) *State* v. *Daugaard*, 231 Conn. 195, 212, 647 A.2d 342 (1994), cert. denied, 513 U.S. 1099, 115 S. Ct. 770, 130 L. Ed. 2d 666 (1995). "As the United States Supreme Court said in *Chapman* v. *California* [386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)], before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt. [Our Supreme Court] has held in a number of cases that when there is independent overwhelming evidence of guilt, a constitutional error would be rendered harmless beyond a reasonable doubt." (Internal quotation marks omitted.) *State* v. *Davis*, 109 Conn. App. 187, 197, 951 A.2d 31, cert. denied, 289 Conn. 929, 958 A.2d 160 (2008).

As the majority correctly notes, intent is the only real issue in dispute. Evidence of intent, therefore, that was not only sufficient to support the defendant's conviction had to be present, but for our purposes here, that evidence must be overwhelming to find the error at trial

harmless. See id. Before I summarize the relevant evidence properly before the jury, however, I underscore what was already pointed out by the majority that "[i]t is well established that the question of intent is purely a question of fact. . . . Intent may be, and usually is, inferred from the defendant's *verbal or physical conduct*. . . . *Intent may also be inferred from the surrounding circumstances*. . . . The use of inferences based on circumstantial evidence is necessary because direct evidence of the accused's state of mind is rarely available. . . . *Intent may be gleaned from circumstantial evidence such as . . . the events leading up to and immediately following the incident*. . . . Furthermore, it is a permissible, albeit not a necessary or mandatory, inference that a defendant intended the natural consequences of his voluntary conduct." (Citation omitted; emphasis added; internal quotation marks omitted.) *State* v. *Porter*, 76 Conn. App. 477, 487–88, 819 A.2d 909, cert. denied, 264 Conn. 910, 826 A.2d 181 (2003). With this in mind, I now turn to the evidence properly before the jury.

An incident report that was entered into evidence as a full exhibit details effectively the surrounding circumstances and events leading to and immediately following the incident. Just prior to the incident, the defendant "was naked in his cell due to [his] shoving his . . . gown and blanket underneath the cell door [sometime earlier and] was ripping the seam of the mattress." This behavior led to the intervention by department of correction officers and the spitting incident that the majority relates. After this incident, "[a]round ten minutes later, [the defendant] was pacing [in] his cell when suddenly he went to his cell door and started to urinate everywhere. A short time later . . . [the defendant] wet some toilet paper and tried to cover the camera monitor. . . . [H]e then climbed up the wall and shook the camera trying to break it. . . . [H]e [then] grabbed the wet toilet paper, climbed the up the wall again and placed it on the camera monitor." The report goes on to indicate that another department of correction intervention ensued resulting in the physical restraint of the defendant.[6]

These factors lead me to conclude that in light of our prevailing standards, evidence that the defendant, when he spit on correction Officer Brian Guerrera, acted "with intent to prevent [an] employee of the Department of Correction . . . from performing his or her duties"; General Statutes § 53a-167c (a); was not only sufficient to support the conviction but overwhelming as well. As a result, I conclude that the defendant's being compelled to wear prison attire during trial amounted to error that was harmless beyond a reasonable doubt and did not violate the defendant's constitutional rights.

For all of the foregoing reasons, I respectfully dissent in part. I would affirm the judgment of conviction.

[1] "[Our Supreme Court] has held in a number of cases that when there

is independent overwhelming evidence of guilt, a constitutional error would be rendered harmless beyond a reasonable doubt." (Internal quotation marks omitted.) *State* v. *Davis*, 109 Conn. App. 187, 197, 951 A.2d 31, cert. denied, 289 Conn. 929, 958 A.2d 160 (2008).

[2] In *Estelle*, the United States Supreme Court stated: "Nothing in this record . . . warrants a conclusion that [the] respondent was compelled to stand trial in jail garb or that there was sufficient reason to excuse the failure to raise the issue before trial." *Estelle* v. *Williams*, supra, 425 U.S. 512.

[3] The court did counterpoise this result, a finding of *no error* when a defendant was not compelled to be tried in jail attire, with the cases in footnote 8 of the majority of this opinion, cases that applied harmless error analysis for nonobjecting, therefore, noncompelled defendants. The court did this, in my opinion, to clarify that when there is no compulsion, there is no error and *not*, as those cited cases had concluded, that any error was *harmless*. The court was supplying the standard for establishing the error and rejecting the need for the application of harmless error analysis in cases in which compulsion is not found.

[4] The Court of Appeals is the highest tribunal in Maryland.

[5] In *Neder*, the court cited the following examples it had determined to be structural errors: "*Johnson* v. *United States*, 520 U.S. 461, 468 [117 S. Ct. 1544, 137 L. Ed. 2d 718] (1997) (citing *Gideon* v. *Wainwright*, 372 U.S. 335 [83 S. Ct. 792, 9 L. Ed. 2d 799] (1963) (complete denial of counsel); *Tumey* v. *Ohio*, 273 U.S. 510 [47 S. Ct. 437, 71 L. Ed. 749] (1927) (biased trial judge); *Vasquez* v. *Hillery*, 474 U.S. 254 [106 S. Ct. 617, 88 L. Ed. 2d 598] (1986) (racial discrimination in selection of grand jury); *McKaskle* v. *Wiggins*, 465 U.S. 168 [104 S. Ct. 944, 79 L. Ed. 2d 122] (1984) (denial of self-representation at trial); *Waller* v. *Georgia*, 467 U.S. 39 [104 S. Ct. 2210, 81 L. Ed. 2d 31] (1984) (denial of public trial); *Sullivan* v. *Louisiana*, 508 U.S. 275 [113 S. Ct. 2078, 124 L. Ed. 2d 182] (1993) (defective reasonable-doubt instruction))." *Neder* v. *United States*, supra, 527 U.S. 8.

[6] The state also presented other independent, overwhelming evidence of the defendant's guilt. There was uncontested documentary and testimonial evidence that Officer Brian Guerrera was an identifiable employee of the department of correction in the lawful performance of his duty when the assault took place. The state presented the testimony of two eyewitnesses to the assault on Guerrera. Each testified that the defendant spat on Guerrera during the removal of the damaged mattress from the defendant's cell. Also, there was the extensive documentary evidence before the jury, amounting to some sixty plus pages of department of correction reports, detailing the assault on Guerrera and subsequent events involving the defendant's incarceration. See *State* v. *Yates*, 174 Conn. 16, 18–19, 381 A.2d 536 (1977) (potential prejudice of witnesses testifying in prison attire ameliorated by testimony of present incarceration).