STATE OF CONNECTICUT *v.* IRVIN D. ROSE
(SC 18323)

Rogers, C. J., and Norcott, Palmer, Zarella, Eveleigh, Harper and Vertefeuille, Js.

*Argued November 30, 2011—officially released July 10, 2012*

*Timothy F. Costello*, assistant state's attorney, with whom, on the brief, was *John C. Smriga*, state's attorney, and *Nicholas J. Bove, Jr.*, senior assistant state's attorney, for the appellant (state).

*Deborah G. Stevenson*, special public defender, for the appellee (defendant).

*Opinion*

PALMER, J. The state appeals from the judgment of the Appellate Court, which reversed the conviction of the defendant, Irvin D. Rose, for assault of public safety personnel in violation of General Statutes (Sup. 2006) § 53a-167c (a) (5).[1] The Appellate Court reversed the defendant's conviction on the ground that the trial court had compelled him to wear identifiable prison clothing at his jury trial in contravention of his constitutional right to a fair trial. We affirm the judgment of the Appellate Court on the alternative ground that reversing the defendant's conviction is warranted in the exercise of this court's inherent supervisory authority over the administration of justice.

The opinion of the Appellate Court sets forth the following facts that the jury reasonably could have found. "On January 15, 2006, the defendant was incarcerated [as a pretrial detainee] at the Bridgeport correctional center (center). While housed in the center's hospital unit in an isolation cell, the defendant removed his hospital gown and pushed it, along with his blanket, under his cell door. Thereafter, he tore the seam of his mattress, created a large hole and removed the mattress' stuffing. He then crawled into the mattress and wrapped it around his body, covering himself entirely.

"Correction Lieutenant Timothy Cox was alerted by a department [of correction] employee that the defendant had crawled into his mattress. Cox instructed uniformed [C]orrection Officers Brian Guerrera and Scott Whiteley to remove the damaged mattress from the defendant's cell. Whiteley was instructed to remove the remains of the mattress while Guerrera served as a 'cover down' officer. Guerrera was assigned to position himself between Whiteley and the defendant, continuously to monitor the defendant and to protect Whiteley as he removed the mattress. While still outside the cell, Cox instructed the defendant to remove himself from the mattress and sit on the bunk frame. The defendant complied with the instruction, and Guerrera and Whiteley entered the cell. Whiteley picked up the damaged mattress and backed out of the cell. Guerrera maintained his position between Whiteley and the defendant and, still facing the defendant, started to exit the cell. The defendant, without leaving his position . . . on the bunk, spat at Guerrera before he exited the cell. Saliva struck Guerrera's face and chest.

"Following department [of correction] protocol for such an incident, Guerrera reported to a department [of correction] nurse at the center. The nurse instructed Guerrera to wipe his face with alcohol pads and [to] complete medical and incident reports. The defendant subsequently was charged with assault of public safety personnel. The defendant represented himself at trial. After a jury trial, the defendant was found guilty and

sentenced to a term of ten years incarceration, execution suspended after six years, and five years probation." *State* v. *Rose*, 112 Conn. App. 324, 326–27, 963 A.2d 68 (2009).

The defendant appealed to the Appellate Court from the judgment of conviction, claiming, inter alia,[2] that the trial court had improperly compelled him to wear prison clothing during trial in violation of his federal constitutional right to a fair and impartial trial[3] and Practice Book § 44-7.[4] Id., 326, 331. With one judge concurring in part and dissenting in part; see id., 342 (*Foti*, *J.*, concurring in part and dissenting in part); the Appellate Court agreed with the defendant's constitutional claim and reversed his conviction, concluding that "it is evident that the defendant did not receive a fair trial."[5] Id., 342.

In resolving the defendant's constitutional claim, the Appellate Court set forth the following additional facts and procedural history that were relevant to its inquiry. "The defendant was arrested on January 15, 2006, for assault of public safety personnel. At that time, he was a pretrial detainee in the center because he was unable to post a $1000 bond for an October 24, 2005 arrest for larceny in the sixth degree . . . . On January 17, 2006, the defendant was arraigned on the charge of assault of public safety personnel in violation of [General Statutes (Sup. 2006)] § 53a-167c and bond was set at $100,000. He remained incarcerated as a pretrial detainee through trial in July, 2006.

"On the morning of July 21, 2006, prior to jury selection, the court stated to the defendant that 'I don't know anything about you . . . besides that information which you have, but based on the charges that I see, I'm concerned and inclined probably to keep the shackles on . . . .' The defendant responded that he was not an escape risk and objected to being tried in shackles. The defendant added that '[a]lso, my attire, Your Honor, this Bozo the Clown suit is not sufficient.' The court replied that 'based on the nature of the charges, the jury is going to know that you are incarcerated anyway . . . . I do feel that the ankle shackles are required, and the attire, sir, based on the nature of the charges, they are going to know you are incarcerated anyway. . . . [T]hat's how that stands.' After the court denied the defendant's request to be tried in civilian clothing, and before the first venire panel was brought in, the defendant again raised concerns that the prospective jurors would not understand that he was a pretrial detainee, rather than an incarcerated convict. The court directed the defendant to confer with his standby counsel about his 'procedural kind of question.' The record discloses that the court made no further inquiry concerning this issue during trial.

"During jury selection, the court instructed the members of each venire panel not to consider the defendant's

attire in assessing the evidence or in the determination of the outcome of the case. The court's entire instruction to the first venire panel was: 'The defendant's attire is not to be considered in assessing the evidence or in a determination of the case.' The court instructed the second panel: 'I would also note that the defendant's attire is not to be considered by you in assessing the evidence or in determining the outcome of the case.' The jury was selected from those two venires. The instructions given by the court prior to the jury's deliberation were completely [de]void of any curative measure concerning the defendant's attire.

"During voir dire, the defendant attempted to determine the [jurors'] assumptions based on his attire. The court repeatedly prevented the defendant from asking jurors about their assumptions about incarcerated persons.

"[During the afternoon session] on July 21, 2006, the defendant brought to the court's attention that he had been seen by one of the potential jurors outside of the courtroom in full restraints. The court responded that '[f]or heaven's sake, sir, you are clearly in restraints. Everyone knows you are in restraints. You are in a prison outfit. This is not a secret. You are walking around with the shackles on approaching the jurors, so, please.' The court began to call in the next prospective juror but stopped and noted on the record that during voir dire, each juror could see the defendant's ankle shackles when he walked to the lectern and that he was sitting in court in a jumpsuit. The court also noted that it had instructed the jurors not to consider his attire.

"The first witness, Guerrera . . . testified in uniform. Guerrera stated that he was in his uniform at the time of the alleged assault. The [state] asked him to identify the defendant, and Guerrera stated that the defendant was wearing '[a] yellow jumper.' " *State* v. *Rose*, supra, 112 Conn. App. 332–34.

Reversing the defendant's conviction, the Appellate Court concluded that the trial court had impermissibly compelled the defendant to stand trial in identifiable prison clothing in contravention of his constitutional right to a fair trial. Id., 338, 342. Relying in part on *Estelle* v. *Williams*, 425 U.S. 501, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976), the Appellate Court reasoned that "it is inappropriate to apply harmless error analysis in cases such as this [one, in which] the defendant clearly [had] objected at trial and the [trial] court [made] no findings with respect to an essential state policy" militating in favor of compelling the defendant to stand trial in prison clothing.[6] *State* v. *Rose*, supra, 112 Conn. App. 340. The Appellate Court also concluded that, "[e]ven if [it] assume[d] that harmless error analysis were appropriate, the state [had] not proven harmlessness beyond a reasonable doubt. . . . [T]he defen-

dant was compelled to wear prison garb during jury selection and the entire three days of evidence, and the court instructed the jurors only once, prior to their individual voir dire and selection, that they should not consider the defendant's attire. There was no further instruction at the end of evidence and before deliberation, nor was there any instruction that would discourage the jurors from assuming that the defendant had been convicted of some prior crime. Furthermore, [the trial court gave] no curative instruction . . . after a potential juror saw the defendant in the hallway in prison garb, belly chains and ankle shackles; this further indicates the court's failure to consider the prejudice to the defendant should he be tried in his 'Bozo the Clown suit . . . .' Finally, the potential prejudice to the defendant in this case was especially great because the jury had to find that he had the mens rea or 'guilty mind' required by the statute. . . . An essential element of the crime—and the only real issue in dispute—was the defendant's intent. Although the evidence was sufficient for the jury to infer that the defendant intended to prevent Guerrera from performing his duties, the evidence of his intent was not so 'overwhelming' that there is no reasonable possibility that the defendant's appearance in prison garb might have contributed to his conviction."[7] (Citations omitted.) Id., 341–42.

Judge Foti agreed with the Appellate Court majority that the trial court had improperly compelled the defendant to stand trial in identifiable prison clothing but disagreed with the majority's two fold conclusion, namely, that the trial court's error was insusceptible to harmless error analysis and that the error was in any event not harmless beyond a reasonable doubt. Id., 342–43 (*Foti*, *J.*, concurring in part and dissenting in part). Judge Foti explained: "The [Appellate Court] majority declares that *Estelle* v. *Williams*, [supra, 425 U.S. 501], 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, [did] a constitutional error [occur] at all. The court concluded that [a]lthough the [s]tate cannot, consistently with the [f]ourteenth [a]mendment, 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. . . . Id., 512–13. The court also found that there was no compulsion in *Estelle* because

the defendant [in that case] did not timely object, and, therefore, there was no error. The court simply did not address the applicability of harmless error analysis because the error was not established." (Internal quotation marks omitted.) *State* v. *Rose*, supra, 112 Conn. App. 343–44 (*Foti*, *J.*, concurring in part and dissenting in part). Judge Foti acknowledged the absence of binding precedent establishing that harmless error analysis applies to cases such as this one but noted that the "state and federal appellate courts confronting this issue have approved of applying such analysis." Id., 344 (*Foti*, *J.*, concurring in part and dissenting in part). Deeming the evidence of the defendant's intent "not only sufficient to support the conviction but overwhelming as well," Judge Foti concluded that the trial court's erroneous decision to compel the defendant to stand trial in identifiable prison clothing was harmless beyond a reasonable doubt. Id., 349 (*Foti*, *J.*, concurring in part and dissenting in part).

On appeal to this court,[8] the state claims that the Appellate Court incorrectly concluded that the doctrine of harmless error does not apply to the defendant's claim that the trial court impermissibly compelled him to wear identifiable prison clothing at his jury trial. The state also claims that the Appellate Court incorrectly concluded that the defendant's appearance in identifiable prison clothing was not harmless beyond a reasonable doubt. The defendant disputes these claims, countering that the trial court's decision to compel him to stand trial in identifiable prison clothing is not properly subject to harmless error analysis because such compulsion amounts to structural constitutional error, which renders his conviction reversible per se.[9]

After hearing argument in the present appeal, we ordered the parties to submit supplemental briefs on the issue of "[w]hether this court should affirm the judgment of the Appellate Court on the [alternative] ground that reversal of the defendant's conviction is warranted in the exercise of this court's inherent supervisory authority over the administration of justice." In its supplemental brief, the state argues that this court should not exercise its supervisory authority because the integrity of the defendant's trial and the fairness of the judicial system have received adequate protection from three sources, namely, the harmless error doctrine, the Appellate Court's decision in this case, which, in the state's view, "already has encouraged a regime that, going forward, affords protections to criminal defendants regarding [their] compelled appearance at trial in identifiable prison garb," and Practice Book § 44-7; see footnote 4 of this opinion; which prohibits a court from compelling an incarcerated defendant to stand trial in prison clothing. The state also argues that, if this court elects to exercise its supervisory authority, it should issue a prospective rule and reinstate the defendant's conviction. In the defendant's supplemental

brief, he repeats his principal constitutional argument, namely, that the trial court's erroneous decision to compel him to wear identifiable prison clothing at his jury trial is not properly subject to harmless error analysis because such compulsion amounts to structural constitutional error, which renders his conviction reversible per se. The defendant also argues that, if this court declines to reach the merits of the constitutional issue, it should uphold the Appellate Court's reversal of his conviction by exercising its supervisory authority in order to send a strong message to trial courts "about upholding the constitutional rights of all defendants, not just those who can afford to post a bond."

As we noted at the outset, we conclude that reversing the defendant's conviction is warranted in the exercise of our inherent supervisory authority over the administration of justice. Pursuant to that authority, we adopt a rule that the conviction of a defendant who is compelled to stand trial in identifiable prison clothing in violation of his or her constitutional rights is reversible per se.[10] Because we decide this case on the basis of our supervisory authority, we need not resolve the issue of whether a trial court's constitutionally erroneous decision to compel a defendant to stand trial before a jury in identifiable prison clothing is susceptible to harmless error analysis, as the state claims, or instead amounts to structural error, as the defendant contends and as the Appellate Court apparently concluded.

Before addressing the state's claim that the Appellate Court improperly reversed the judgment of conviction, we first consider the state's assertion that, because this court "ordinarily invoke[s] [its] supervisory powers to enunciate a rule that is *not constitutionally required* but that [it] think[s] is preferable as a matter of policy"; (emphasis added; internal quotation marks omitted) *State* v. *Marquez*, 291 Conn. 122, 166, 967 A.2d 56, cert. denied, U.S. , 130 S. Ct. 237, 175 L. Ed. 2d 163 (2009); we may exercise our supervisory authority in this case only if we first conclude both that harmless error analysis does apply and that any error was harmless beyond a reasonable doubt. Although it might well be true that we ordinarily invoke our supervisory authority to grant relief to defendants whose constitutional claims are unavailing, we on several previous occasions have declined to address a defendant's constitutional claim precisely because we elected to exercise our supervisory authority. See, e.g., *State* v. *Padua*, 273 Conn. 138, 178–79, 869 A.2d 192 (2005); *State* v. *Coleman*, 242 Conn. 523, 534, 700 A.2d 14 (1997).

Not only is there no ironclad requirement that we refrain from granting a defendant relief pursuant to our supervisory authority unless we first reject any relevant constitutional claim, but such a requirement would function as an improper restraint on that authority. "It is well settled that [a]ppellate courts possess an inherent

supervisory authority over the administration of justice. . . . Supervisory powers are exercised to direct trial courts to adopt judicial procedures that will address matters that are 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. . . . Under our supervisory authority, we have adopted rules intended to guide the lower courts in the administration of justice in all aspects of the criminal process." (Internal quotation marks omitted.) *State* v. *Diaz*, 302 Conn. 93, 106, 25 A.3d 594 (2011). Although prudence dictates that we invoke our supervisory power sparingly; see, e.g., *State* v. *Wade*, 297 Conn. 262, 296, 998 A.2d 1114 (2010) (supervisory power is extraordinary remedy to be used only in rare circumstance when necessary to ensure fair and just administration of courts); we see no reason to limit our use of that authority in the categorical manner advocated by the state. We also disagree with the dissent's assertion that the manner in which we now exercise our supervisory authority "runs counter to this court's and the United States Supreme Court's principle that errors, even of constitutional magnitude, should be reviewed under a harmless error analysis unless such an analysis is not possible." We are aware of no principle that would bar us from exercising our supervisory authority to craft a remedy that might extend beyond the constitutional minimum, and the dissent cites no such principle. Indeed, if the dissent is correct in concluding that the constitution does not require us to reverse the defendant's conviction, then the supervisory rule that we announce today is perfectly in line with the general principle that this court "ordinarily invoke[s] [its] supervisory powers to enunciate a rule that is *not constitutionally required* but that [it] think[s] is preferable as a matter of policy." (Emphasis added; internal quotation marks omitted.) *State* v. *Marquez*, supra, 291 Conn. 166.[11]

Turning to the merits of the state's claim, we are persuaded that this case implicates the core considerations that we previously have identified as prerequisites to the invocation of our supervisory authority. Compelling a defendant to stand trial before a jury in identifiable prison clothing undermines the integrity of the defendant's trial and diminishes the perceived fairness of the judicial system as a whole. See, e.g., *Estelle* v. *Williams*, supra, 425 U.S. 504–505. Specifically, such compulsion compromises the jury's ability to engage in neutral fact-finding and erodes the presumption of innocence. See, e.g., id.; see also id., 518–19 (Brennan, J., dissenting). The United States Supreme Court, in explaining why a defendant's compelled appearance in prison clothing contravenes the fourteenth amendment's guarantee of a fair trial, has observed that "the constant reminder of the accused's condition implicit in such distinctive, identifiable attire may affect a juror's judgment. The defendant's clothing is so likely to be a

continuing influence throughout the trial that . . . an unacceptable risk is presented of impermissible factors coming into play." Id., 504–505. "Unlike physical restraints, [which are] permitted under [*Illinois* v. *Allen*, 397 U.S. 337, 344, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970), when they are necessary to control an unruly defendant], compelling an accused to wear jail clothing furthers no essential state policy. That it may be more convenient for jail administrators, a factor quite unlike the substantial need to impose physical restraints [on] contumacious defendants, provides no justification for the practice." *Estelle* v. *Williams*, supra, 505.

Writing separately in *Estelle*, Justice William J. Brennan, Jr., added: "Identifiable prison garb robs an accused of the respect and dignity accorded other participants in a trial and constitutionally due the accused as an element of the presumption of innocence, and surely tends to brand him in the eyes of the jurors with an unmistakable mark of guilt. Jurors may speculate that the accused's pretrial incarceration, although often the result of his inability to raise bail, is explained by the fact [that] he poses a danger to the community or has a prior criminal record; a significant danger is thus created of corruption of the [fact-finding] process through mere suspicion. The prejudice may only be subtle and jurors may not even be conscious of its deadly impact, but in a system in which every person is presumed innocent until proved guilty beyond a reasonable doubt, the [d]ue [p]rocess [c]lause forbids toleration of the risk. Jurors required by the presumption of innocence to accept the accused as a peer, an individual like themselves who is innocent until proved guilty, may well see in an accused garbed in prison attire an obviously guilty person to be recommitted by them to the place where his clothes clearly show he belongs. It is difficult to conceive of any other situation more fraught with risk to the presumption of innocence and the standard of reasonable doubt." Id., 518–19 (Brennan, J., dissenting).

The gravamen of *Estelle* is that compelling a defendant to stand trial in identifiable prison clothing is unfair not merely because it "inject[s] . . . improper evidence of the defendant's imprison[ment] status into the presentation of the case," as the state observes, but also, more fundamentally, because the defendant's appearance in prison clothing invites and indeed *tempts* jurors to draw highly unfavorable inferences about his character and likely conduct. The state nevertheless contends that compelling a defendant to appear in identifiable prison clothing does not deprive him of a fair trial when, as in the present case, "the defendant was on trial for a crime committed while in jail and [when] the defendant's incarcerat[ion] status would necessarily be made known to the jury through the state's proof and the defendant's exhibits . . . ." The state and the dissent[12] apparently assume that a defendant's yellow

jumpsuit can have no effect on jurors but to inform them that the defendant is currently in custody. This assumption strikes us as unrealistic. When a defendant wears identifiable prison clothing throughout his trial, his very appearance serves as a constant reminder to the jury that he is not only a detainee but perhaps also a flight risk and a threat.[13] We therefore reject the state's attempt to characterize "an appearance in prison garb [as merely] the injection of improper evidence of the defendant's imprison[ment] status into the presentation of the case . . . ." Because prison clothing is a constant and vivid indication that its wearer is a detainee and perhaps also a flight risk and a threat, a defendant's appearance in identifiable prison clothing does something substantially worse than inject improper evidence into the case, namely, it causes jurors to deliberate under a cognitive bias. Because this bias is subtle and ever present, jury instructions may not be adequate to cure it.

In view of these dangers, we believe that announcing a rule of per se reversibility will serve at least two purposes not served by the existing protections that the state deems adequate, namely, the harmless error doctrine and Practice Book § 44-7.[14] First, a rule of per se reversibility will serve to put trial courts on notice that compelling a defendant to stand trial in identifiable prison clothing simply cannot be sanctioned. Unlike a prosecutor who makes improper remarks during closing argument or a judge who makes an erroneous evidentiary ruling, the judge who compels a defendant to stand trial in identifiable prison clothing does not commit an error that plausibly could be excused as occurring in the heat of battle.[15] Second, a rule of per se reversibility will send a strong message to the public that this court and the judiciary that it supervises accord the highest importance to basic fairness and to the presumption of innocence. If we did not always reverse the convictions of defendants who are compelled to stand trial in identifiable prison clothing, we would convey a most damaging message, namely, that we place less value on basic fairness and the presumption of innocence than on sparing the trial court the minimal inconvenience of ensuring that a needy criminal defendant will be provided with civilian clothing.[16] We note in this connection that "compelling the accused to stand trial in jail garb operates usually against only those who cannot post bail prior to trial. Persons who can secure release are not subjected to this condition. To impose the condition on one category of defendants, over objection, would be repugnant to the concept of equal justice embodied in the [f]ourteenth [a]mendment." *Estelle* v. *Williams*, supra, 425 U.S. 505–506. Although it is beyond our power to remove every single obstacle confronting an indigent criminal defendant, we would be remiss if we did not remove those obstacles that we can remove at virtually no cost.[17] Accordingly, in the absence of a

defendant's voluntary decision to stand trial before a jury in prison clothing, a court must ensure that the defendant has civilian clothing to wear at trial, and its failure to comply with this requirement will result in reversal of the defendant's conviction.[18]

Even though the state's case against an occasional defendant might be so overwhelming that he undoubtedly would be convicted at trial regardless of whether he is compelled to appear in identifiable prison clothing, we cannot sanction a legal regime that would afford the state an opportunity to argue on appeal that no harm resulted from so unambiguous and indefensible a constitutional violation. Thus, unlike the dissent, we see no need to inquire as to whether there was "any prejudice in the present case . . . ." We also reject the dissent's contention that our "reasoning, taken to its logical end, suggests that any error, even when harmless, should result in the reversal of a defendant's conviction if the nature of the error is one that implicates a constitutional right." The type of error at issue in this case stands out as especially worthy of per se reversal because no extenuating circumstances are conceivable.[19] First of all, the type of error at issue in the present case is readily avoidable, both because avoidance is virtually costless and because the error is clear-cut and unambiguous, unlike, for example, a judge's erroneous but understandable failure to exclude evidence barred by the intricate and evolving jurisprudence of the confrontation clause. Moreover, the error here, unlike an erroneous evidentiary ruling or an improper remark during closing argument, is not an error of the sort that can be excused as occurring in the heat of battle. Finally, unlike most other constitutional errors, compelling a defendant to stand trial in identifiable prison clothing is not just highly demeaning but also potentially highly prejudicial in a manner the effects of which may be very difficult to measure because they involve a subtle but ever present cognitive bias.[20]

The judgment of the Appellate Court is affirmed.

In this opinion ROGERS, C. J., and NORCOTT, EVELEIGH, HARPER and VERTEFEUILLE, Js., concurred.

[1] General Statutes (Sup. 2006) § 53a-167c (a) provides in relevant part: "A person is guilty of assault of public safety . . . personnel when, with intent to prevent a reasonably identifiable . . . employee of the Department of Correction . . . from performing his or her duties, and while such . . . employee . . . is acting in the performance of his or her duties . . . (5) such person throws or hurls, or causes to be thrown or hurled, any bodily fluid including, but not limited to . . . saliva at such . . . employee . . . ."

[2] The defendant also claimed that the trial court improperly denied his motion for a judgment of acquittal because the state failed to introduce sufficient evidence to establish his guilt beyond a reasonable doubt. *State* v. *Rose*, supra, 112 Conn. App. 327. The Appellate Court rejected this claim; id., 331; and the defendant does not renew it on appeal to this court.

[3] The defendant relied on § 1 of the fourteenth amendment to the United States constitution, which provides in relevant part: "No State shall . . . deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

[4] Practice Book § 44-7 provides in relevant part: "An incarcerated defendant . . . shall not be required during the course of a trial to appear in

court in the distinctive attire of a prisoner or convict."

[5] The Appellate Court declined to review the defendant's claim under Practice Book § 44-7, explaining that, "[a]lthough normally [the court would] dispose of a claim on other than constitutional grounds when possible, [the court addresses] the constitutional claim here because the defendant has raised it and because the [concurring and dissenting judge] relies on *Estelle* v. *Williams*, 425 U.S. 501, 504, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976). Accordingly, [the court] will not separately review [the defendant's] claim under Practice Book § 44-7, which addresses the same protected interest." *State* v. *Rose*, supra, 112 Conn. App. 331–32 n.3.

[6] The Appellate Court's use of the term "essential state policy" stems from *Estelle*, in which the United States Supreme Court indicated that compelling a defendant to appear before a jury in prison clothing offends due process because the practice cannot be justified by an "essential state policy." *Estelle* v. *Williams*, supra, 425 U.S. 505; see also *Carey* v. *Musladin*, 549 U.S. 70, 75, 127 S. Ct. 649, 166 L. Ed. 2d 482 (2006) (quoting *Estelle* and explaining that "some [government sponsored] practices are so inherently prejudicial that they must be justified by an essential state policy or interest" [internal quotation marks omitted]).

[7] Although it reversed the defendant's conviction, the Appellate Court noted that it "[did] not announce a per se rule that trial in prison clothing after an objection requires automatic reversal of a trial court's judgment of conviction. A [trial] court must make a record establishing the 'essential state policy' for such precautions. Furthermore, if such an interest can be shown, the jurors must be instructed adequately that they must not consider the appearance of the defendant in prison attire in any way when determining guilt or innocence. These requirements are necessary to safeguard a defendant's rights to a fair trial and the presumption of innocence." *State* v. *Rose*, supra, 112 Conn. App. 340–41. The Appellate Court also noted that "[t]here may well have been no error if the [trial court] had inquired where [the defendant] had other clothes available and how much time would be required to get those clothes to the courthouse. A fully developed inquiry along [these] lines may have supported a finding that [the defendant] waived his right to appear in non-prison garb . . . . In the interest of justice, however, [the Appellate Court] urge[d] trial courts to utilize reasonable efforts to ensure that defendants who object to wearing prison garb are able to obtain civilian clothing." (Citation omitted; internal quotation marks omitted.) Id., 338 n.11.

[8] We granted the state's petition for certification to appeal limited to the following issues: "Did the Appellate Court properly determine that harmless error analysis does not apply where the trial court has compelled the defendant to appear before a jury in identifiable prison garb? If not, was the defendant's appearance before the jury in identifiable prison garb harmless beyond a reasonable doubt?" *State* v. *Rose*, 290 Conn. 920, 921, 966 A.2d 238 (2009).

[9] The defendant also makes several claims of his own, none of which we need review. The defendant first claims that the Appellate Court improperly determined that he had abandoned his claim that the trial court committed reversible error when it ordered him to appear in shackles during his trial. See *State* v. *Rose*, supra, 112 Conn. App. 340 n.14. We need not review this claim both because it is outside the scope of the certified question and because, even if the defendant were to prevail on the claim, he would garner the very relief that this decision already affords him, namely, a new trial. The defendant also raises what amounts to a claim for conditional relief, namely, that, if this court remands the case to the Appellate Court for further consideration, it should order the Appellate Court to consider and resolve "all issues [that] the defendant raised but [that] were not considered and/or decided previously by the Appellate Court," including the defendant's claim that the trial court improperly denied him the opportunity to present a defense by declining to grant him a continuance after he informed the court that he was not prepared to proceed. We need not review this claim for the simple reason that we do not remand the case to the Appellate Court. Finally, the defendant urges this court to issue a discovery order pertaining to, inter alia, "videotapes of the incident and tapes [and] transcriptions of his trial . . . ." We do not review this claim because it is outside the scope of the certified question.

[10] Under the supervisory rule we adopt, the trial court shall have an obligation to ensure that a criminal defendant is provided with civilian clothing when the defendant, having objected to appearing before the jury in prison garb, can establish that he lacks access to civilian clothing because of his

indigence or his status as an incarcerated person. See, e.g., *Felts* v. *Estelle*, 875 F.2d 785, 786–87 (9th Cir. 1989) (trial court improperly compelled indigent defendant to wear prison garb at his jury trial by failing to ensure that defendant was provided civilian clothing when police had lost all of defendant's clothing and he could not afford to buy new clothing).

[11] Asserting that our "reliance on our supervisory authority . . . runs counter to other jurisdictions that have considered this issue"; footnote 12 of the dissenting opinion; the dissent writes, "I have not found, and the majority does not refer to, *any* jurisdiction that has determined that a defendant's compelled appearance at trial in prison attire should be reviewed under anything other than a harmless error analysis. Nor am I aware of any jurisdiction that has invoked its own supervisory authority to craft the rule that the majority does in the present case." (Emphasis in original.) Id. Assuming for the sake of argument that it matters in this case how courts in other jurisdictions have exercised their supervisory authority, we note that the dissent does not cite a single case in which a court was actually *asked* to exercise its supervisory authority to preclude harmless error review of a defendant's compelled appearance in prison clothing.

[12] The dissent notes that, because "the elements of the crime charged [in the present case] required the state to establish that the victim was a correction officer and was engaged in the line of duty. . . . [I]f the defendant had not been clothed in prison attire, the jury would nonetheless have learned of the defendant's incarceration status. This aspect of the case, coupled with the copious and essentially uncontested evidence of the defendant's guilt, rendered the [trial court's] error harmless."

[13] This reminder is not just constant; it is supremely vivid. As everyone knows, the reason why prison jumpsuits are typically yellow or orange is that these colors have a high degree of visual salience; in short, they command attention.

[14] Because neither Practice Book § 44-7 nor existing precedent provides that a conviction shall be reversed when obtained after a trial court's erroneous decision to compel the defendant to stand trial in identifiable prison clothing, we do not agree with the state's assertion that the "exercise of supervisory power [in this case] would serve only to reiterate [Practice Book § 44-7] and binding precedent."

[15] Because the trial court's erroneous decision in this case lacked any arguable justification, the court having had no reason to depart from Practice Book § 44-7 and unambiguous United States Supreme Court precedent having established that compelling a defendant to appear in identifiable prison clothing violates the defendant's right to a fair trial, and because the state took no action to remedy the trial court's error, we decline the state's invitation to adopt a prospective rule that would require us to reinstate the defendant's conviction.

[16] As we noted previously in this opinion; see footnote 10 of this opinion; under the supervisory rule we adopt, the trial court shall have an obligation to ensure that a criminal defendant is provided with civilian clothing when the defendant objects to wearing prison garb and he can establish that he lacks access to such clothing because of his indigence or his status as an incarcerated person.

[17] Because the supervisory rule we announce in the present case applies only to defendants who are *compelled* to stand trial in identifiable prison clothing, this rule obviously does not apply to a defendant who, for strategic reasons, stands trial in prison clothing voluntarily. Accordingly, we do not agree with the state's contention that "establishing a rule of per se reversibility . . . would be peculiar in the context of the compelled appearance before a jury in identifiable prison garb—the right against which may be waived, and which . . . may serve to garner a defendant sympathy in the eyes of the [jurors]." Contrary to the state's contention, a defendant cannot waive the right not to be compelled to appear before a jury in identifiable prison clothing. The defendant who stands trial in prison clothing *voluntarily* is, by definition, not compelled to do so; thus, his constitutional right simply is not in play.

[18] In contrast to the suggestion of the Appellate Court; see footnote 7 of this opinion; we cannot conceive of a circumstance in which a " 'essential state policy' " would exist to justify the denial of a defendant's right not to be compelled to stand trial before a jury in prison clothing. *State* v. *Rose*, supra, 112 Conn. App. 340; cf. *Deck* v. *Missouri*, 544 U.S. 622, 624, 632–33, 125 S. Ct. 2007, 161 L. Ed. 2d 953 (2005) (use of visible shackles on defendant during guilt or penalty phase of death penalty trial cannot be justified in absence of exceptional circumstances related to security or safety).

[19] The dissent "fail[s] to comprehend how compelling a defendant to stand trial in prison attire is substantially different from compelling a defendant to appear shackled at trial without sufficient justification." Footnote 13 of the dissenting opinion. Although we might well adopt a comparable supervisory rule for improper shackling if asked to do so, we note that improper shackling differs in at least one important respect from a court's improper decision to compel a defendant to stand trial in prison clothing: whereas there is never justification for compelling a defendant to stand trial in identifiable prison clothing, there sometimes is ample justification for compelling a defendant to stand trial in shackles. See, e.g., *State* v. *Tweedy*, 219 Conn. 489, 505, 594 A.2d 906 (1991) ("[a] trial court may employ a reasonable means of restraint [e.g., shackles] upon a defendant if, exercising its broad discretion in such matters, the court finds that restraints are reasonably necessary under the circumstances" [internal quotation marks omitted]). In any event, to the extent that some cases have indicated that improper shackling should be subject to harmless error analysis, in none of the cases that the dissent cites did the defendant ask the court to exercise its supervisory authority.

[20] The ill effects of a defendant's compelled appearance in prison clothing being very difficult to measure, we are loath to engage in the sort of harmless error analysis that the dissent urges. In fact, this very case shows why, even when the state's evidence appears to be strong, it can be so difficult to determine the nature and extent of the harm that results from a defendant's compelled—and, as in this case, prolonged—appearance in prison clothing. Although the manner in which we resolve this case obviates the need to determine whether the error was harmful, we are sympathetic to the view expressed by the Appellate Court that "the potential prejudice to the defendant in this case was especially great because the jury had to find that he had the mens rea or 'guilty mind' required by [General Statutes (Sup. 2006) § 53a-167c (a) (5)]. . . . An essential element of the crime—and the only real issue in dispute—was the defendant's intent [to prevent Guerrera from performing his duties]"; *State* v. *Rose*, supra, 112 Conn. App. 341–42; an issue on which the state's evidence was sufficient but, in the judgment of the Appellate Court, "not so overwhelming that there [was] no reasonable possibility that the defendant's appearance in prison garb might have contributed to his conviction." (Internal quotation marks omitted.) Id., 342. To the extent that the jurors might have mistakenly believed that the defendant, in light of his clothing, was a convicted prisoner rather than a pretrial detainee, any prejudice resulting from the defendant's compelled appearance in prison clothing would only have grown more intense.