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PALMER, J., concurring. I agree with the majority that the Appellate Court properly concluded that the trial court had abused its discretion in consolidating for trial the three separate cases against the defendant, Sushil Gupta. In particular, I agree that it was improper for the trial court to consolidate the case involving the victim M with the cases involving the victim J and the victim D.

I reach this conclusion, however, on the basis of reasoning that is different from that of the majority, which concludes that joinder of the case involving M with the cases involving J and D constituted an abuse of discretion primarily because the conduct of the defendant toward M was “markedly different” from and “far more egregious” than his conduct toward J and D. Thus, the majority takes the position that the case involving M was different in kind from the cases involving J and D—and, therefore, not sufficiently similar to justify consolidation—because the former case “reflected significant qualitative differences from those involving D and J that were not merely a matter of degree.” In reaching this conclusion, the majority focuses on what the defendant did and said to the three victims, separate and apart from the fact that the defendant is a physician whose conduct toward each victim occurred during the course of a medical examination.

In determining whether the defendant was entitled to a severance, I do not believe that it is appropriate to view the defendant’s conduct through such a narrow lens. Indeed, I am not persuaded that, when viewed in that narrow manner, the defendant’s conduct toward M was so much more serious than his conduct toward J and D as to render it qualitatively different or different in kind.<sup>1</sup> That is, if we were to put aside the fact that the defendant is a physician who was examining the victims when he allegedly assaulted them sexually and to focus solely on the nature of the defendant’s actions toward the victims, separate trials would not be necessary due merely to any inherent differences in the severity of the defendant’s conduct toward those victims. There nevertheless *is* a real difference between the case involving M, on the one hand, and the cases involving J and D, on the other; with respect to his conduct toward J and D, the defendant has a plausible claim that his conduct was medically legitimate, whereas his conduct toward M, if it occurred, was indefensible by any standard. In other words, the defendant’s conduct toward M was dissimilar to his conduct toward J and D—and, therefore, inadmissible as propensity evidence in the cases involving J and D—not because the defendant’s conduct toward M was significantly more egregious than his conduct toward J and D but because the defen-

dant's conduct toward J and D arguably was justified, whereas his conduct toward M was not. *That* difference is significant for the purpose of determining whether a severance was required because, in the circumstances presented, it is unlikely that the jury, in the joint trial of all three cases, was able to evaluate fairly the defendant's claim that his conduct involving J and D was medically legitimate once it learned of the defendant's conduct toward M. It therefore was unduly prejudicial for the court to consolidate for trial the case involving M with the cases involving J and D.

The majority asserts that, "in concluding that the only significant basis [on] which to distinguish the case involving M from those involving J and D is the difference between the defenses asserted by the defendant in those cases, [I have] overlook[ed] the fact that this difference results from *both* the nature of the relationship between each victim and the defendant and the nature and severity of the alleged conduct directed at each victim." (Emphasis in original.) Footnote 11 of the majority opinion. The majority is incorrect. Although the defendant's conduct toward M was somewhat more serious than his conduct toward J and D, that difference is not the reason why a severance is required. In other words, it is not the reason why his conduct toward M is dissimilar to his conduct toward J and D for the purpose of determining the cross-admissibility of the three incidents as propensity evidence. A severance is necessary, rather, because the defendant's conduct toward J and D supports a colorable claim that that conduct was medically appropriate, whereas his conduct toward M does not. Thus, although it so happens that the severity of the defendant's conduct toward M is somewhat greater than the severity of his conduct toward J and D, a severance would not be required, despite that difference in severity, but for the fact that the defendant has a plausible defense that his conduct toward J and D was medically appropriate and has no such colorable defense with respect to his conduct toward M. Indeed, a severance also would have been required even if the defendant's conduct involving M had been *less* serious than his conduct involving J and D, as long as the defendant's conduct toward M was such that it could not plausibly be deemed to be medically appropriate. In sum, in the particular circumstances of this case, the critical consideration for purposes of severance is not the relative severity of the defendant's conduct toward each of the three victims but, rather, the fact that his conduct toward J and D arguably was defensible and his conduct toward M was not.

Finally, I also agree with the majority that the Appellate Court properly determined that the trial court had abused its discretion in excluding the two videotapes from evidence. For the reasons set forth by the Appellate Court, however; see *State v. Gupta*, 105 Conn. App.

237, 251–52, 937 A.2d 746 (2008); I would conclude that the trial court also abused its discretion in precluding the defendant from introducing excerpts from medical treatises into evidence. I therefore concur in the result that the majority reaches.

<sup>1</sup> In this regard, the other crimes evidence at issue in the present case more closely resembles the facts of *State v. McKenzie-Adams*, 281 Conn. 486, 491–97, 915 A.2d 822 (2007), in which the court concluded that the other crimes evidence was admissible; *id.*, 516–17, 532–33; than the facts of *State v. Ellis*, 270 Conn. 337, 342–51, 852 A.2d 676 (2004), in which the court concluded that the other crimes evidence was inadmissible. *Id.*, 352, 365.