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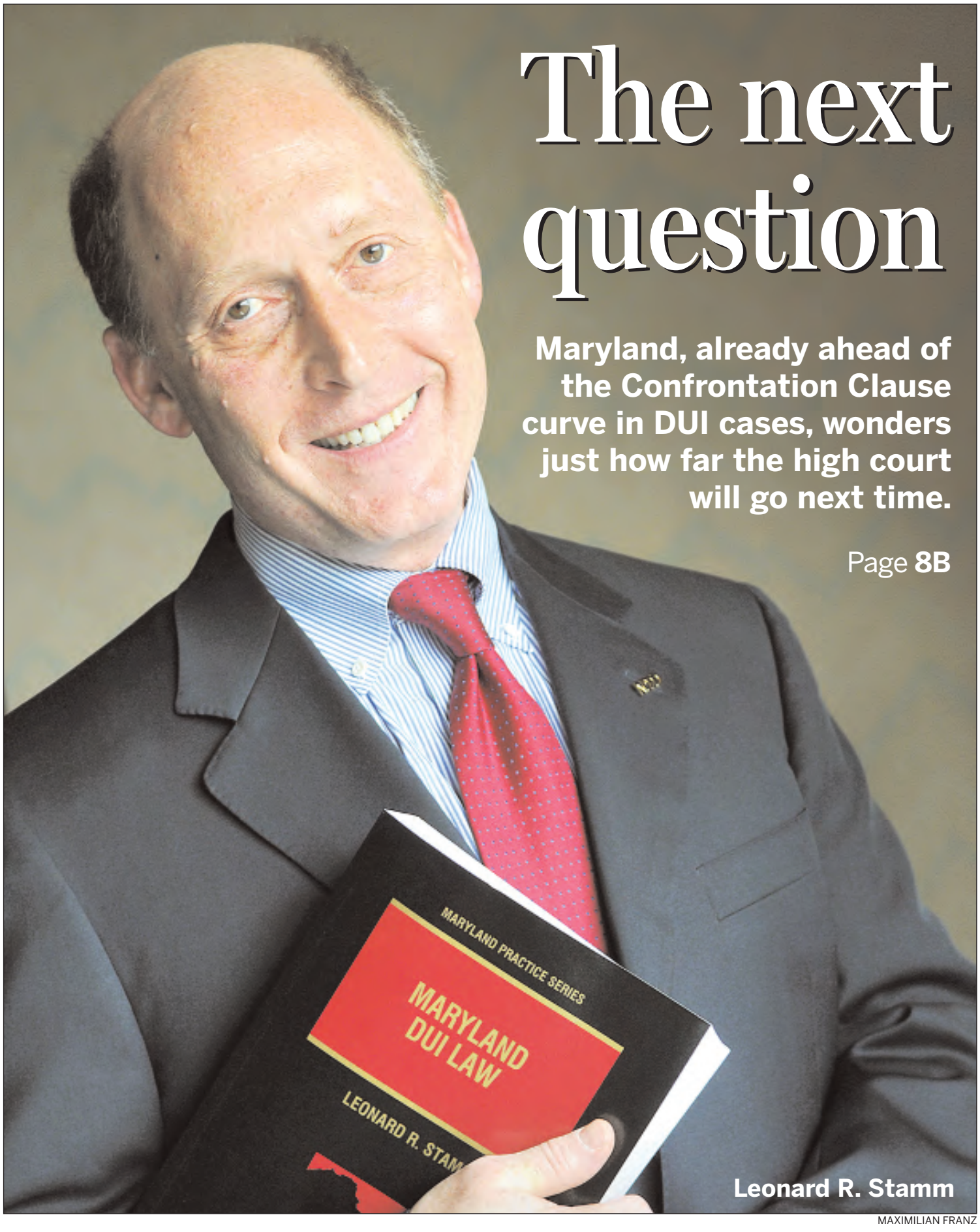

The next question

Maryland, already ahead of the Confrontation Clause curve in DUI cases, wonders just how far the high court will go next time.

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Leonard R. Stamm

MAXIMILIAN FRANZ

By Steve Lash
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In states across the country, the Supreme Court's June decision that the Constitution requires laboratory analysts to be available at trial for cross examination has been hailed as a boon for defense attorneys handling DUI cases.

But here in Maryland, the defense bar already has access to the blood- and breathalyzer-test analysts under Maryland's notice-and-demand statute. The law requires prosecutors to notify a defendant when they intend to introduce written lab results in court and gives defense counsel a chance to demand that the analysts be called to testify at trial.

So defense attorneys and prosecutors in Maryland are focusing on a question left unanswered by the court in *Melendez-Diaz v. Massachusetts*: Must the prosecution also make available the individuals who certified the accuracy of the equipment with which the test was conducted?

Under state law, prosecutors can present the inspector's affidavit that the machine passed inspection; they need not have him or her testify. *Melendez-Diaz* leaves open the question of whether that law is constitutional.

"That's what trial courts and appellate courts will have to decide," said defense attorney Leonard R. Stamm, who specializes in impaired-driving cases. "And ultimately the Supreme Court is going to have to take another look."

The author of "Maryland DUI Law," published last year by West Publishing Co., Stamm said the "primary witnesses" under the notice and demand law are the phlebotomist — the person who takes blood — and the chemist.

"Future cases are going to have to determine if there is a basis for distinguishing these witnesses from other witnesses," such as those who certify the equipment, he said.

When, not if

Prosecutors agree the question is when, not if, the challenge is coming.

"I am sure that we will face that issue," said Montgomery County State's Attorney John J. McCarthy.

His certainty stems from the fact that the Supreme Court justices are already at odds over the implications of their handiwork in *Melendez-Diaz*.

The case arose in 2001, when Luis Melendez-Diaz was charged in Massachusetts with distributing cocaine. At trial, the prosecution placed into evidence three "certificates of analysis" attesting that the material seized during the arrest was cocaine.

Melendez-Diaz objected unsuccessfully on confrontation grounds, and he was convicted. After Melendez-Diaz exhausted his state court appeals, the Supreme Court granted review and reversed.

The high court concluded that each certificate constituted a testimonial statement — a "solemn declaration or affirmation made for the purpose of establishing or proving some fact" — and thus was subject to the Confrontation Clause.

"Absent a showing that the analysts were unavailable to testify at trial *and* that petitioner [Melendez-Diaz] had a prior opportunity to cross-examine them, petitioner was entitled to 'be confronted with' the analysts at trial," Justice Antonin Scalia wrote.

That was also the view espoused in a friend-of-the-court brief joined by the National Association of Criminal Defense Lawyers, the National Association of Federal Defenders, and the National College for DUI Defense. Stamm, of **Goldstein & Stamm** P.A. in Greenbelt, represented the National College for that brief.

But Scalia also addressed, briefly, the question of whether the Sixth Amendment's Confrontation Clause requires more.

He stated in a footnote that "documents prepared in the regular course of equipment maintenance may well qualify as non-testimonial records" which need not be accompanied by in-person testimony from the tester.

Justice Anthony M. Kennedy, in his dissent, seized on Scalia's comment as evidence that the majority opinion sweeps too broadly and "has vast potential to disrupt criminal procedures that already give ample protections against the misuse of scientific evidence."

Not only will defense counsel be allowed to question the individuals who take and analyze blood tests but also those who certify the equipment's accuracy, the dissent said.

"Consider the independent contractor who has calibrated the testing machine," Kennedy wrote.

"At least in a routine case, where the machine's result appears unmistakable, that result's accuracy depends entirely on the machine's calibration," he added. "That calibration, in turn, can be proved only by the contractor's certification that he or she did the job properly… . It is not clear, under the court's ruling, why the independent contractor is not also an analyst."

Baltimore County State's Attorney Scott D. Shellenberger called the issue of whether an equipment tester must testify "a matter of interpretation" for the high court. "I think we're going to find out how much [in-person testimony] is required to get the test in."

Drawing a distinction

Melendez-Diaz represents the latest in a line of Confrontation Clause cases in which the justices have distinguished between "testimonial" and "non-testimonial" evidence.

The high court has said testimonial evidence is evidence that, if found credible, points to the defendant's guilt. Because such evidence is essentially accusatory, the Confrontation Clause applies and testimony must be offered in person, subject to cross-examination, the court has added.

By contrast, non-testimonial evidence does not point to the defendant's guilt and thus does not implicate the accused's right "to be confronted with the witnesses against him." Thus, non-testimonial evidence need not be subject to cross-examination, the court has said.

McCarthy, the Montgomery County prosecutor, cited the court's evidentiary distinction in predicting the justices will eventually conclude that those who certify forensic equipment is in working order need not be required to testify in person.

A written document attesting to the equipment's accuracy, as Maryland law allows, does not point to the defendant's guilt and thus testimony from the person who signed the document is not required under the Confrontation Clause, McCarthy said.

Defense attorney David Martella, of **The Law Offices of Barry H. Helfand** in Rockville, agreed that the Supreme Court is unlikely to extend *Melendez-Diaz* to equipment-testers.

The person who certifies that the equipment works is not pointing to the defendant's guilt and therefore is not a witness whom the defendant has a right to confront in court, he said.

"I'll be waiting for that challenge," Martella said. "But I'm not optimistic."