STATE OF MINNESOTA

IN SUPREME COURT

A18-0377

Court of Appeals — McKeig, J.
Dissenting, Hudson, Chutich, Thissen, JJ.

State of Minnesota,

Respondent,

vs.

Filed: July 10, 2019
Office of Appellate Courts

Jennifer Marie Rosenbush,

Appellant.

Keith Ellison, Attorney General, Saint Paul, Minnesota; and

James C. Backstrom, Dakota County Attorney, Anna Light, Heather Pipenhagen, Assistant Dakota County Attorneys, Hastings, Minnesota, for respondent.

Jeffrey S. Sheridan, Sheridan & Douglas, P.A., Eagan, Minnesota, for appellant.

Daniel J. Koewler, Ramsay Law Firm, P.L.L.C., Roseville, Minnesota, for amicus curiae Minnesota Association of Criminal Defense Lawyers.

William A. Lemons, Saint Paul, Minnesota, for amicus curiae Minnesota County Attorneys Association.

S Y L L A B U S

The limited right to counsel established in *Friedman v. Commissioner of Public Safety*, 473 N.W.2d 828 (Minn. 1991), does not apply when an individual is asked to submit to a blood test pursuant to a warrant.

Affirmed.

O P I N I O N

MCKEIG, Justice.

In 2017, a sheriff's deputy arrested appellant Jennifer Rosenbush for driving while impaired ("DWI") and obtained a search warrant to take a sample of her blood for alcohol concentration testing. When the deputy presented Rosenbush with the search warrant, he read her the newly enacted implied-consent advisory for blood and urine tests. It informs drivers only that "refusal to submit to a blood or urine test is a crime." *See* Minn. Stat. § 171.177, subd. 1 (2018). Rosenbush allowed her blood to be drawn, and tests showed that she had an alcohol concentration over the legal limit.

The State charged Rosenbush with fourth-degree DWI and Rosenbush moved to have the results of her blood test suppressed. She argued that, under our decision in *Friedman v. Commissioner of Public Safety*, 473 N.W.2d 828 (Minn. 1991), she had a limited right under the Minnesota Constitution to consult with counsel before deciding whether to submit to a blood test and that police failed to vindicate that right. The district court agreed and suppressed the results of Rosenbush's blood test. The court of appeals reversed. We hold that the limited right to counsel established in *Friedman* does not apply when an individual is asked to submit to a blood test pursuant to a warrant, and therefore, we affirm the court of appeals.

FACTS

On July 23, 2017, police stopped Rosenbush on suspicion that she had driven into a ditch, hit a road sign, and left the scene of the accident. When questioned by a Dakota County sheriff's deputy, Rosenbush admitted that she had been in the accident. She also

smelled mildly of alcohol, was crying, and was slow to respond to questions. The deputy questioned Rosenbush further, and she told him that she had consumed "two to three beers" earlier that day. In addition, when asked how intoxicated she felt on a scale from one to ten, she said four. The deputy asked Rosenbush to step out of her vehicle and perform field sobriety tests, but she refused. Eventually, Rosenbush cooperated with a preliminary breath test, and it showed that her alcohol concentration was over the legal limit.

The deputy arrested Rosenbush for DWI. Instead of taking her to jail, however, an ambulance took Rosenbush to a hospital to be placed on a mental health hold because she told the deputy that she was feeling suicidal. While Rosenbush was being transported to the hospital, the deputy's supervisor obtained a search warrant for a blood sample from Rosenbush. The supervisor faxed the warrant to the hospital, and the deputy gave it to Rosenbush when he arrived. After serving Rosenbush with the warrant, the deputy read her the implied-consent advisory for blood and urine tests required by Minn. Stat. § 171.177, subd. 1. The advisory informs drivers that "refusal to submit to a blood or urine test is a crime." Rosenbush let a nurse draw her blood, and chemical testing showed that her alcohol concentration was over the legal limit.

The State charged Rosenbush with fourth-degree DWI, Minn. Stat. §§ 169A.20, subd. 1(1), 169A.27 (2018).[1] Rosenbush moved to suppress the results of her blood test, arguing that she had a limited constitutional right to consult with counsel before submitting

[1] The State also charged Rosenbush for leaving the scene of the accident under Minn. Stat. § 169.09, subd. 2 (2018), and the Commissioner of Public Safety revoked her driver's license under Minn. Stat. § 171.177, subd. 5 (2018). The additional charge and license suspension are not at issue in this appeal.

to the test under *Friedman v. Commissioner of Public Safety*, 473 N.W.2d 828 (Minn. 1991), and that the deputy failed to vindicate that right. The district court agreed and suppressed the results of Rosenbush's blood test.

The State appealed the district court's pretrial suppression order and the court of appeals reversed. The court of appeals reasoned that Rosenbush was not presented with the same "unique choice" as the driver in *Friedman* because the deputy did not "ask[] Rosenbush whether she would *agree* to take a blood test or [tell] her that no test would be given if she *chose* not to submit." *State v. Rosenbush*, No. A18-0377, 2018 WL 3340530, at *4 (Minn. App. July 9, 2018). According to the court of appeals, because the deputy did not give Rosenbush "a choice between alternatives that carried different, significant, legal ramifications," she did not have a limited right to counsel under *Friedman*. *Id.*

We granted Rosenbush's petition for review.[2]

ANALYSIS

The issue before us is whether a driver arrested on suspicion of DWI, read an implied-consent advisory, and presented with a search warrant authorizing a search of her blood has the right "to a reasonable opportunity to obtain legal advice before deciding

[2] This case involves a pretrial appeal by the State of a district court's suppression order. *See* Minn. R. Crim. P. 28.04, subd. 2. To file such an appeal, the district court's pretrial order must have "a critical impact on the State's case." *State v. Stavish*, 868 N.W.2d 670, 674 (Minn. 2015). The exclusion of evidence has a critical impact on the State's case if that evidence "significantly reduces the likelihood of a successful prosecution." *Id.* (citation omitted) (internal quotation marks omitted). An essential element of the fourth-degree DWI charge is that Rosenbush was under the influence of alcohol. *See* Minn. Stat. § 169A.20, subd. 1(1). Because a chemical test showing Rosenbush's alcohol concentration is highly probative of whether she was under the influence of alcohol, the State has established critical impact.

whether to submit to chemical testing" under Article I, Section 6 of the Minnesota Constitution. *Friedman v. Comm'r of Pub. Safety*, 473 N.W.2d 828, 835 (Minn. 1991). This is a question of constitutional law that we review de novo. *State v. Hunn*, 911 N.W.2d 816, 818 (Minn. 2018).

Article I, Section 6, of the Minnesota Constitution provides: "In all criminal prosecutions the accused shall . . . have the assistance of counsel in his defense." We have held that this right applies at all "critical stages" of a criminal prosecution. *Friedman*, 473 N.W.2d at 833. A proceeding or event is a critical stage if " 'the accused require[s] aid in coping with legal problems or assistance in meeting his adversary.' " *Id.* (quoting *United States v. Ash*, 413 U.S. 300, 313 (1973)). In addition, a critical stage "includes 'those pretrial procedures that would impair defense on the merits if the accused is required to proceed without counsel.' " *Id.* (quoting *Gerstein v. Pugh*, 420 U.S. 103, 122 (1975)).

To analyze Rosenbush's right-to-counsel claim, we must first address our case law that sets out when a request for alcohol concentration testing under the implied-consent law is a "critical stage" of a criminal prosecution under the Minnesota Constitution. We must also address recent changes to the implied-consent law that are relevant to Rosenbush's claim. We begin with an explanation of Minnesota's implied-consent law.

The implied-consent law mandates—as a condition of the privilege to drive in Minnesota—that any person who is in physical control of a motor vehicle within the state "consents . . . to a chemical test of that person's blood, breath, or urine for the purpose of determining the presence of . . . an intoxicating substance." Minn. Stat. § 169A.51, subd. 1(a) (2018). If a person does not honor that condition and refuses to permit chemical

testing, the law requires that "a test must not be given." Minn. Stat. §§ 169A.52, subd. 1, 171.177, subd. 13 (2018). But as a consequence of the refusal, the Commissioner of Public Safety must revoke that person's driver's license. Minn. Stat. §§ 169A.52, subd. 3, 171.177, subd. 4 (2018). License revocation is only available if police read a driver the implied-consent advisory when requesting a test. Minn. Stat. §§ 169A.51, subd. 2, 171.177, subd. 1 (2018); *see also Tyler v. Comm'r of Pub. Safety*, 368 N.W.2d 275, 280 (Minn. 1985) ("Compliance with the procedures of the implied consent law is a prerequisite to revocation pursuant to the implied consent law."). This advisory briefly explains some of the consequences of refusal. *See* Minn. Stat. §§ 169A.51, subd. 2, 171.177, subd. 1.

In *Friedman v. Commissioner of Public Safety*, we addressed whether suspected impaired drivers had a right to counsel under the Minnesota Constitution when deciding whether to submit to implied-consent testing. 473 N.W.2d at 833–37. In that case, Friedman was arrested for DWI. *Id.* at 829. Police took Friedman to the police station for a breath test, and while they waited for the breath-testing machine to become available, "Friedman asked what her rights were and whether she could consult an attorney." *Id.* Her request to speak with an attorney was denied, and an officer read her the implied-consent advisory in effect at the time. *Id.* Friedman told the officer that she did not understand the advisory, and the officer deemed her response to be a refusal. *Id.* Friedman's license was revoked for 1 year under the implied-consent statute. *Id.*

We reversed Friedman's license revocation and held that "a driver who has been stopped for a possible DWI violation and has been asked to submit to a chemical test" under the implied-consent law "is at a 'critical stage' in DWI proceedings, thus triggering

the right to counsel" under the Minnesota Constitution. *Id.* at 833.[3] To reach this conclusion, we discussed the unique situation created by the implied-consent statute, *id.* at 832, and our concern that drivers in this situation needed "aid in coping with legal problems or assistance in meeting [their] adversary," *id.* at 833 (citation omitted) (internal quotation marks omitted). In particular, we noted the "critical and binding decision" a driver must make in deciding whether to consent to chemical testing, and a driver's need for an "objective advisor" to explain the different legal consequences implicated by that decision. *Id.* at 832–33. Under the advisory in effect at the time, Friedman "was confused about the legal ramifications of her decision" and "looked to the police for guidance." *Id.* at 833. But an "attorney, not a police officer, is the appropriate source of legal advice." *Id.* Emphasizing "Minnesota's lengthy and historic recognition of human rights, human dignity, and the procedural protection for the rights of the criminally accused," *id.* at 836, we held that "the Minnesota Constitution protects the individual's right to consult counsel when confronted with" a request for chemical testing under the implied-consent law, *id.* at 833.[4]

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[3] In doing so, we interpreted the right to counsel under the Minnesota Constitution more broadly than the Sixth Amendment right to counsel in the United States Constitution. *See United States v. Gouveia*, 467 U.S. 180, 187–89 (1984) (holding that the Sixth Amendment right to counsel does not attach until the commencement of adversary judicial proceedings); *Nyflot v. Comm'r of Pub. Safety*, 369 N.W.2d 512, 515–16 (Minn. 1985) (determining that there is no right to counsel in this context under the Sixth Amendment).

[4] The right to counsel announced in *Friedman* has been coined a "limited" right to counsel because the exercise of this right cannot " 'unreasonably delay the administration of the test.' " 473 N.W.2d at 835 (quoting *Prideaux v. State*, 247 N.W.2d 385, 394 (Minn. 1976)). Given the evanescent nature of alcohol in the blood stream, we held in *Friedman*

Friedman did not, however, provide a limited right to counsel to all suspected impaired drivers who were asked to submit to chemical testing. Instead, "the limited right to counsel recognized by *Friedman* is triggered only when the implied-consent advisory is read." *State v. Hunn*, 911 N.W.2d 816, 820 (Minn. 2018). We reaffirmed in *Hunn* that the driving force behind *Friedman* was the "unique decision" drivers must make when the police request alcohol concentration tests under the implied-consent law. *Id.* at 819–20.

When *Friedman* was decided, the implied-consent law used the same procedure for breath, blood, and urine tests. *See* Minn. Stat. § 169.123, subd. 2 (1990). But in 2017, the Legislature amended the implied-consent statutes after several judicial decisions limited the ability of police to obtain warrantless blood and urine samples from suspected impaired drivers.[5] Act of May 23, 2017, ch. 83, art. 2, §§ 3–10, 2017 Minn. Laws 351, 355–66 (codified at Minn. Stat. §§ 169A.51, .53–.54, .60, 171.177 (2018)). These statutory

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that a driver's right to counsel " 'will be considered vindicated if the person is provided with a telephone prior to testing and given a reasonable time to contact and talk with counsel.' " *Id.* (quoting *Prideaux*, 247 N.W.2d at 394).

[5] *See Birchfield v. North Dakota*, __ U.S. __, 136 S. Ct. 2160, 2184–85 (2016) (holding that warrantless breath testing of suspected impaired drivers was categorically permissible under the search-incident-to-arrest exception to the warrant requirement, but that blood testing was not); *Missouri v. McNeely*, 569 U.S. 141, 156, 165 (2013) (holding that "the natural dissipation of alcohol in the bloodstream does not constitute an exigency in every case sufficient to justify conducting a blood test without a warrant," and that "[w]hether a warrantless blood test of a drunk-driving suspect is reasonable must be determined case by case based on the totality of the circumstances"); *State v. Thompson*, 886 N.W.2d 224, 233 (Minn. 2016) (holding that warrantless urine tests are not permissible searches incident to arrest of suspected impaired drivers), *cert. denied*, 137 S. Ct. 1338 (2017).

changes apply to Rosenbush. *Id.* (stating that these sections are effective July 1, 2017, and apply to acts committed on or after that date).

Under the new law, the procedures for obtaining breath tests and administratively revoking a driver's license based on the failure or refusal of a breath test remain substantively untouched and are codified in the same statutes. *See* Minn. Stat. §§ 169A.51–169A.53 (2018). For blood and urine tests, however, the implied-consent law now requires that such tests "be conducted only pursuant to a search warrant . . . or a judicially recognized exception to the search warrant requirement." Minn. Stat. § 169A.51, subd. 3. In addition, blood and urine tests must now be conducted under the procedures set out in Minn. Stat. § 171.177. *See* Minn. Stat. § 169A.51, subd. 3(a) (stating that blood and urine tests must be conducted according to § 171.177).

The noteworthy differences between the new statutory provisions for blood and urine tests and the previous implied-consent law are the warrant requirement and a new fluid-test advisory. The advisory for breath tests remains the same in all relevant aspects, and continues to require that police inform drivers of the limited right to counsel announced in *Friedman*. Minn. Stat. § 169A.51, subd. 2.[6] The new advisory for blood and urine tests, on the other hand, only requires police to inform drivers "that refusal to submit to a blood or urine test is a crime." Minn. Stat. § 171.177, subd. 1.

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[6] Specifically, the breath-test advisory requires that "[a]t the time a breath test is requested" an officer must inform the person: "(1) that Minnesota law requires the person to take a test . . . ; (2) that refusal to submit to a breath test is a crime; and (3) that the person has the right to consult with an attorney, but that this right is limited to the extent that it cannot unreasonably delay administration of the test." Minn. Stat. § 169A.51, subd. 2.

Rosenbush argues that the consequences of her decision to submit to a blood test under the new statute are identical to those that the driver in *Friedman* faced, regardless of the presence of a warrant. According to Rosenbush, the deputy invoked the implied-consent statute by reading the applicable advisory just as the officer in *Friedman* did. Therefore, Rosenbush asserts, just like the driver in *Friedman*, she had two options: submit to a chemical test and give the police potentially incriminating evidence, or refuse and have her license automatically revoked. Rosenbush argues that, faced with the same choice, she should have the same limited right to counsel as the driver in *Friedman*.[7] The State, on the other hand, argues that the presence of a warrant fundamentally changes Rosenbush's encounter from the one at issue in *Friedman*. We agree with the State.

Even though Rosenbush did have the choice to refuse testing or comply with the warrant,[8] this choice is not enough to justify an extension of *Friedman* to warranted searches. Like Rosenbush, every person who is the subject of a search warrant has a choice

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[7] In the alternative, Rosenbush argues that the new advisory for blood and urine tests is unconstitutional on due process grounds because "it provides only a single crumb of information regarding a driver's rights and obligations." But Rosenbush raised this argument for the first time in her petition for review. Accordingly, it is not properly before us. *See, e.g.*, *Dykes v. Sukup Mfg. Co.*, 781 N.W.2d 578, 584 n.2 (Minn. 2010) ("Generally, issues not presented to the trial court may not be raised for the first time on appeal."); *State v. Engholm*, 290 N.W.2d 780, 784 (Minn. 1980) ("The law is clear in Minnesota that the constitutionality of a statute cannot be challenged for the first time on appeal.").

[8] Although police are generally permitted to use reasonable force in executing a search warrant, *see* Minn. Stat. § 609.06, subd. 1(1) (2018), the Legislature has explicitly instructed that a chemical test "must not be given" if a driver suspected of DWI refuses. Minn. Stat. §§ 169A.52, subd. 1, 171.177, subd. 13. Contrary to the State's assertion, this provision gives drivers a choice in whether they will comply with a warrant. And contrary to the court of appeals' conclusion, this choice exists regardless of the information included in the advisory or given to suspects by the police.

to make: comply with the warrant or be subject to criminal penalties. *See* Minn. Stat. § 609.50, subd. 1(1) (2018) (making it a crime to obstruct, hinder, or prevent a police officer from lawfully executing any legal process). Deciding whether to comply with a warrant, therefore, is not a "unique decision." *Hunn*, 911 N.W.2d at 819–20. Instead, the presence of a warrant makes Rosenbush's encounter like any other situation where a search is conducted pursuant to a warrant. And we have never held that the Minnesota Constitution provides the subject of a search warrant with the right to consult counsel before a warrant can be executed. Accordingly, Rosenbush's statutory right to refuse the blood test does not compel us to extend the limited right to counsel recognized in *Friedman.*

Further, the existence of a search warrant eliminates many of the concerns that led us to expand the right to counsel in *Friedman*. The Fourth Amendment protects "personal privacy and dignity against unwarranted intrusion by the state," by generally requiring that police obtain a search warrant before searching a person or place. *Schmerber v. California*, 384 U.S. 757, 767, 770 (1966). And the presence of a search warrant ensures that drivers are not faced with the unchecked "legal power of the state," *Friedman*, 473 N.W.2d at 834 (citation omitted) (internal quotation marks omitted), because "a neutral and detached magistrate" has been interposed, *Riley v. California*, 573 U.S. 373, 382 (2014) (citation omitted) (internal quotation marks omitted). Therefore, when a suspected impaired driver is presented with a search warrant for a blood or urine test, the driver is not " 'meeting his adversary' " in the same manner as the driver in *Friedman* because a neutral judicial officer

has determined that the police may lawfully obtain a sample of the driver's blood. 473 N.W.2d at 833 (quoting *Ash*, 413 U.S. at 313).[9]

Moreover, changes to the Minnesota Impaired Driving Code have made a driver's choice less meaningful. At the time Friedman was arrested, the consequence for test refusal was immediate license revocation—a civil penalty.[10] *See* Minn. Stat. § 169.123, subd. 4 (1988). Now, test refusal is a crime in its own right and it carries a similar penalty to a DWI conviction. *See* Minn. Stat. § 169A.26 (2018) (making refusal to submit to a chemical test a gross misdemeanor if no aggravating factors are present); Minn. Stat. § 169A.27 (2018) (making driving while impaired a misdemeanor if no aggravating factors are present). The similarity of these penalties under the current law further cuts against the utility of counsel in this situation where little explanation of "the alternative choices" and "legal ramifications" is necessary.[11] *Friedman*, 473 N.W.2d at 833.

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[9] To be clear, however, the presence of a warrant does not guarantee the constitutionality of a search. A driver faced with a warrant still has the opportunity to challenge that warrant's probable cause before trial. *See State ex rel. Rasmussen v. Tahash*, 141 N.W.2d 3, 13 (Minn. 1965) (explaining the procedure for challenging the admissibility of evidence obtained as a result of search and seizure); *see also State v. Yarbrough*, 841 N.W.2d 619, 622–23 (Minn. 2014) (explaining that "a valid warrant must be supported by probable cause" and the standard courts use to review a warrant's validity). And the search conducted pursuant to the warrant must be reasonable. *Schmerber*, 384 U.S. at 771–72.

[10] Drivers also faced the possibility that they would be convicted of driving while impaired if the State had enough evidence to sustain a conviction without a chemical test. *See* Minn. Stat. § 169.121, subd. 1(a) (1988).

[11] The dissent argues that the criminal penalties for refusal and failure are still significantly different. But this is not always true. For example, second-time test refusal and second-time test failure (with no additional aggravating circumstances) are both gross misdemeanors subject to the same 1-year maximum jail sentence. *See* Minn. Stat.

In sum, the presence of a warrant ameliorates the concerns that we articulated in *Friedman*. We are confident that conducting a search pursuant to a lawful warrant adequately safeguards the "human rights [and] human dignity" about which we were concerned in *Friedman* and supplies meaningful "procedural protection for the rights of the criminally accused." *Id.* at 836. Thus, we see no reason to extend the limited right to counsel announced in *Friedman* to the execution of a search warrant for a suspected impaired driver's blood.

We hold that the limited right to counsel under the Minnesota Constitution recognized in *Friedman* does not apply when a driver is presented with the choice to submit—or not to submit—to a blood test pursuant to a search warrant. Accordingly, the district court erred in suppressing the blood-test results on that ground.

CONCLUSION

For the foregoing reasons, we affirm the decision of the court of appeals.

Affirmed.

§§ 169A.25–.26 (2018). Further, these penalties represent the maximum—not the presumptive—jail sentence. Accordingly, the differences between the criminal penalties for refusal and failure are not as stark as the dissent claims.

D I S S E N T

HUDSON, J. (dissenting).

As the court acknowledges today, we recognized a limited right to counsel in *Friedman v. Commissioner of Public Safety* because of the "critical and binding decision" drivers must make when asked to submit to chemical testing under Minnesota's implied-consent law. 473 N.W.2d 828, 832 (Minn. 1991). Although appellant Jennifer Rosenbush was faced with the same decision as the driver in *Friedman*, the court nevertheless holds that Rosenbush did not have the limited right to counsel that we recognized in *Friedman* because police obtained a search warrant to collect a blood sample from her. Because I conclude that *Friedman* applies when an individual is read the implied-consent advisory and asked to submit to a blood test pursuant to a search warrant under Minn. Stat. § 171.177 (2018), I would suppress the results of Rosenbush's blood test.[1] I therefore respectfully dissent from the court's opinion and would reverse the court of appeals.

In *Friedman*, we explained that the right to counsel under Article I, Section 6, of the Minnesota Constitution attaches at all "critical stages" of a criminal prosecution. 473 N.W.2d at 833. Critical stages include events where "the accused require[s] aid in

[1] Although I conclude that the results of Rosenbush's blood test should be suppressed, my conclusion has nothing to do with the behavior of the sheriff's deputy in this case. To the contrary, the deputy followed the correct procedures under the newly enacted law, read the advisory as he was supposed to, and properly responded to Rosenbush's distressed mental state. In particular, he noticed that Rosenbush had recent cuts on her wrists, inquired about them, called a crisis center for advice, and arranged for Rosenbush to be taken to a hospital for a mental health evaluation. Thus, while I would suppress the results of Rosenbush's blood test, I also note that the deputy's behavior in this case appears to have been commendable.

coping with legal problems or assistance in meeting his adversary," and "those pretrial procedures that would impair defense on the merits if the accused is required to proceed without counsel." *Id.* (citations omitted) (internal quotation marks omitted). We determined in *Friedman* that a request for chemical testing under Minnesota's implied-consent law created exactly such a situation. *Id.* at 835. Specifically, we focused on a driver's need for an "objective advisor" to explain "the alternative choices" and different "legal ramifications" arising from the decision to refuse or allow a chemical test in this situation. *Id.* at 833. We reasoned that "[a] driver must make a critical and binding decision regarding chemical testing, a decision that will affect him or her in subsequent proceedings," *id.* at 832, and that when making such a decision, "[a]n attorney, not a police officer, is the appropriate source of legal advice," *id.* at 833. In other words, " '[o]ne's dignity, the dignity of a free citizen to determine one's rights and obligations through consultation with a trusted counselor rather than one's accusers, is gravely intruded upon' " without a limited right to counsel in this context. *Id.* at 834 (quoting *Nyflot v. Comm'r of Pub. Safety*, 369 N.W.2d 512, 521 (Minn. 1985) (Yetka, J., dissenting)).

Just last year, in *State v. Hunn*, 911 N.W.2d 816 (Minn. 2018), we reiterated the scope and rationale of *Friedman*. We first explained that "[t]he legal ramifications of the decision to submit (or not submit) to chemical testing after the advisory reading are significant." *Id.* at 820. While "consenting may provide law enforcement with the evidence necessary to secure a conviction[,] . . . refusing will *automatically* result in a mandatory license revocation, and may still result in a criminal DWI conviction." *Id.* And "it may not be clear to a driver faced with the advisory whether the consequences for

consenting or refusing will be worse." *Id.* We affirmed that this "unique decision" and the "consequences that come with the reading of the advisory" are the reasons that drivers have a limited right to counsel when chemical testing is requested under the implied-consent law. *Id.* at 819–20.

Here, Rosenbush was faced with the "unique decision" required to trigger the limited right to counsel announced in *Friedman*. Like the driver in *Friedman*, Rosenbush was read the applicable implied-consent advisory. *See* Minn. Stat. § 171.177, subd. 1. And like the driver in *Friedman*, Rosenbush had two options: submit to a chemical test and give the police potentially incriminating evidence, or refuse and have her license automatically revoked and potentially be convicted of DWI. *See* Minn. Stat. §§ 169A.20, subds. 1, 2(2), 171.177, subd. 4 (2018). In fact, the stakes for Rosenbush were even higher than those faced by the driver in *Friedman* because test refusal is now a criminal offense in its own right.[2] *See* Minn. Stat. § 169A.26 (2018) (making a first-time test refusal a gross misdemeanor). Thus, because Rosenbush faced the same unique decision as the driver in *Friedman*, she should be afforded the same limited right to counsel.

But today, the court holds that police can deprive drivers of the limited right to counsel whenever they obtain a search warrant for chemical testing. Under the court's reasoning, because every individual who is the subject of a warrant must decide whether to comply with the warrant or suffer a penalty for refusal, deciding whether to comply with

[2] When Friedman was arrested on March 12, 1989, test refusal carried no criminal penalty. *See* Minn. Stat. § 169.121, subd. 1 (1988).

a warrant is not a "unique decision." In the context of our implied-consent law, however, the analysis is not that simple.

It is true that an individual who is the subject of a search warrant faces a consequence for noncompliance. But the implied-consent law is *sui generis*. This is because the implied-consent law explicitly forbids law enforcement from conducting a chemical test if the driver refuses. Minn. Stat. § 171.177, subd. 13 ("If a person refuses to permit a blood or urine test as required by a search warrant . . . then a test must not be given."); *see also* Minn. Stat. § 169A.52, subd. 1 (2018) (same prohibition for breath tests).

In contrast, refusal to submit to a search warrant in any other context does not prohibit the police from executing the warrant and obtaining the evidence they are authorized to seize. In fact, police are permitted to use reasonable force in the face of a refusal to comply with a warrant in every other context. *See* Minn. Stat. § 609.06, subd. 1(1)(b)–(c) (2018). Thus—in a white-collar criminal investigation, for instance—an individual's "choice" in deciding whether to comply with a warrant is not the same as a driver's choice in deciding whether to submit to chemical testing under the implied-consent law. Regardless of the presence of a warrant, the implied-consent law continues to require drivers to make a unique decision and, therefore, should trigger the limited right to counsel announced in *Friedman*. Indeed, as Rosenbush argued to this court, "[i]f ever someone needed the assistance of counsel, it would be to explain that despite a court order compelling a police officer to secure a sample of their blood, they could render the order toothless simply by uttering the word 'no.' "

The court also reasons that the presence of a search warrant ameliorates the concerns that we articulated in *Friedman*. I disagree. Search warrants protect the Fourth Amendment right to be free from unreasonable searches and seizures. U.S. Const. amend. IV. They protect "personal privacy and dignity." *Schmerber v. California*, 384 U.S. 757, 767 (1966); *see also Birchfield v. North Dakota*, ___ U.S. ___, ___, 136 S. Ct. 2160, 2181 (2016) ("Search warrants protect privacy . . . ."); *Winston v. Lee*, 470 U.S. 753, 758 (1985) ("The Fourth Amendment protects 'expectations of privacy . . . .' " (quoting *Katz v. United States*, 389 U.S. 347, 362 (1967))). The right to counsel, on the other hand, "protect[s] the lay person who 'lacks both the skill and knowledge' to defend him- or herself." *Friedman*, 473 N.W.2d at 833 (quoting *Powell v. Alabama*, 287 U.S. 45, 69 (1932)). The guarantee of counsel at all critical stages of a prosecution ensures that an accused's right to a fair trial is not "an empty right." *United States v. Wade*, 388 U.S. 218, 225 (1967). Because the Fourth Amendment and the right to counsel protect fundamentally different interests, the presence of one does not negate the utility of the other. *Cf. Deegan v. State*, 711 N.W.2d 89, 98 (Minn. 2006) ("[O]ur view, under the Minnesota Constitution, [is] that a defendant's access to the other protections afforded in criminal proceedings cannot be meaningful without the assistance of counsel.").

Further, the presence of a search warrant plainly does not address many of the central concerns animating our holding in *Friedman*. We noted that drivers will be confused about the "legal ramifications" of their decisions under the implied-consent law and that an attorney "could explain the alternative choices." *Friedman*, 473 N.W.2d at 833. We were concerned that drivers were being asked to make "a critical and binding

decision regarding chemical testing, a decision that will affect him or her in subsequent proceedings," *id.* at 832, and determined that drivers should be able " 'to determine [their] rights and obligations through consultation with a trusted counselor rather than [their] accusers,' " *id.* at 834 (quoting *Nyflot*, 369 N.W.2d at 521 (Yetka, J., dissenting)).

None of these concerns are resolved or ameliorated simply because the police have secured a search warrant. Drivers will still be left without guidance about the legal ramifications of their decision and will still have to make a critical and binding decision that will affect them in a subsequent DWI prosecution. A search warrant will not give drivers "aid in coping with legal problems," and will not stop their decisions from "impair[ing] defense on the merits" if they submit to testing. *Id.* at 833 (citations omitted) (internal quotation marks omitted). In my view, Rosenbush was in no different position than the driver in *Friedman*, and thus, she was entitled under the Minnesota Constitution to exercise her limited right to counsel.

The court is right that a search warrant aids a driver in " 'meeting his adversary,' " *Friedman*, 473 N.W.2d at 833 (quoting *United States v. Ash*, 413 U.S. 300, 313 (1973)), because a neutral magistrate has determined there was probable cause to issue the warrant. But this concern was not the driving force behind our recognition of a limited right to counsel in *Friedman*. We confirmed in *Hunn* that *Friedman* was premised on the "unique decision" that drivers read the implied-consent advisory face when deciding whether to submit to chemical testing. 911 N.W.2d at 819–20. Accordingly, the presence of a search warrant does not support the court's conclusion that a limited right to counsel is unnecessary when police obtain a search warrant.

Last, the court asserts that changes to the Minnesota Impaired Driving Code have made a driver's choice less meaningful than it was when we decided *Friedman*. According to the court, because test failure and test refusal have similar criminal penalties, drivers no longer need counsel to explain the legal ramifications of either option. This is a faulty premise. There is still a meaningful difference between "the alternative choices," *Friedman*, 473 N.W.2d at 833, and thus, a need for counsel.

As the court notes, first-time test refusal is a gross misdemeanor and first-time test failure is a misdemeanor when no aggravating factors are present. *See* Minn. Stat. §§ 169A.26–.27 (2018). But while these offenses might sound similar, they carry significantly different penalties. A driver found guilty of a misdemeanor may be sentenced to 90 days in jail and given a $1,000 fine. Minn. Stat. § 169A.03, subd. 12 (2018). A driver found guilty of a gross misdemeanor, on the other hand, is subject to *1-year* imprisonment and a $3,000 fine. *Id.*, subd. 8 (2018).

Similarly, the severity of a driver's license revocation is different based on whether that driver failed or refused a test. A driver who submits to a test but fails is subject to a 90-day license revocation if no aggravating circumstances are present. Minn. Stat. § 169A.52, subd. 4(a)(1) (2018). That same driver who refuses a test is subject to a 1-year revocation. *Id.*, subd. 3(a)(1) (2018).

Thus, drivers must make a decision between two meaningfully different choices: comply with a test and risk failing, which could result in up to 90 days in jail and a 90-day license revocation; or refuse and almost certainly receive a test-refusal conviction, which carries a penalty of up to 1 year in jail, as well as a 1-year license revocation under the

implied-consent law. Yet the advisory gives drivers none of this information. Drivers are told only that "refusal to submit to a blood or urine test is a crime." Minn. Stat. § 171.177, subd. 1. But the court's decision today deprives drivers of the ability to consult with an attorney who could explain these different penalties. As we explained just last year in *Hunn*, "[t]he legal ramifications of the decision to submit (or not submit) to chemical testing after the advisory reading are significant." 911 N.W.2d at 820. And "it may not be clear to a driver faced with the advisory whether the consequences for consenting or refusing will be worse." *Id.* These concerns are as real today as they were when we decided *Friedman* and *Hunn*, and therefore, drivers such as Rosenbush should have a limited right to counsel as well.

For the above reasons, I conclude that the presence of a search warrant should not deprive drivers of the limited right to counsel recognized in *Friedman*. Minnesota law explicitly gives drivers the choice to refuse to submit to a warrant, *see* Minn. Stat. § 171.177, subd. 13, but it also criminalizes the exercise of that choice and subjects a driver to automatic license revocation, *see* Minn. Stat. §§ 169A.20, subd. 2(2), 171.177, subd. 4. Thus, drivers read the implied-consent advisory and asked to submit to chemical testing pursuant to a warrant face the same decision as the driver in *Friedman*, and consequently, "the Minnesota Constitution protects the individual's right to consult counsel when confronted with this decision." 473 N.W.2d at 833. Accordingly, I would reverse the court of appeals and affirm the district court's suppression of Rosenbush's blood-test results.

CHUTICH, Justice (dissenting).

I join in the dissent of Justice Hudson.

THISSEN, Justice (dissenting).

I join in the dissent of Justice Hudson.