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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

JON M. GUNDERSON,

Plaintiff and Appellant,

v.

CALIFORNIA FRANCHISE TAX BOARD,

Defendant and Respondent.

D060516

(Super. Ct. No. 37-2010-00086932-
CU-EN-CTL)

APPEAL from a judgment of the Superior Court of San Diego County, Jeffrey L. Gunther, Judge. (Retired judge of the Sacramento Sup. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Plaintiff Jon M. Gunderson and his codefendant, Christopher Gruys, were prosecuted criminally by the Franchise Tax Board (FTB) for filing false income tax returns. In December 2006, while their criminal case was pending, Gunderson obtained a civil judgment for fraud in the amount of over \$11 million against Gruys, who was Gunderson's attorney and accountant, arising out of the tax evasion scheme. In September 2007, Gruys pled guilty in the criminal case and agreed to forfeit his cash bail

in the amount of \$500,000 to the FTB as partial restitution. About two years later, Gunderson also pled guilty.

The criminal sentencing judge awarded Gruys's bail money to the FTB as partial victims' restitution. Gunderson did not challenge that restitution order in the criminal case. Instead, Gunderson challenged the restitution order in this action against the FTB by asserting he had a priority claim to the bail money. The FTB filed a motion for summary judgment, asserting that it had priority to the bail money, which the court granted.

Gunderson appeals, asserting that he has a superior claim to Gruys's bail money forfeited to the FTB as partial restitution for the harm caused by Gunderson's and Gruys's criminal conduct because (1) he had a prior, perfected lien on that money; (2) awarding the bail money to the FTB violated his right to due process; and (3) even if the FTB had priority, the judgment must be reversed because an "exonerated" bail is not "collected." We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Gunderson was the codefendant of Gruys in a felony prosecution in the Superior Court of San Diego County in case No. SCD189775, filed April 1, 2005. That criminal case was based on a scheme in which Gunderson and Gruys defrauded the state by knowingly filing false returns in 1998, 2000, 2001, 2002 and 2003.

On September 7, 2007, Gruys pleaded guilty to one count each of production of false documents and grand theft by false pretenses. Gruys also agreed to cooperate with the Attorney General and forfeit his \$500,000 bail to the FTB "towards restitution and

that such forfeiture shall reduce the amount of his liability to the [FTB] and the amount of restitution to be determined by the court." Gruys's plea agreement was provided to Gunderson and also provided in open court before all parties, including Gunderson, on July 31, 2008.

More than two years later, on November 20, 2009, Gunderson pled guilty to willfully filing a false tax return for tax year 2000 in violation of Revenue & Taxation Code section 19705, subdivision (a)(1), with a *Harvey* waiver.¹

Nearly three years earlier, on December 11, 2006, in a separate civil proceeding brought by Gunderson against Gruys in the Superior Court of Los Angeles County, a jury found Gruys liable to Gunderson and awarded Gunderson \$11,099,261, plus costs in the amount of \$50,347.43.

Gunderson then made a demand on the clerk of the Superior Court of San Diego County to levy on Gruys's bail in their criminal case. The clerk informed Gunderson that the Honorable Charles R. Gill, the superior court judge to whom the underlying criminal case involving Gunderson and Gruys was assigned, had jurisdiction to make determinations regarding disposition of the bail money. The clerk suggested Gunderson participate in the bail disposition hearing pursuant to Code of Civil Procedure section 708.410.

However, rather than participate in the bail disposition hearing, on March 4, 2010, the day preceding the hearing before Judge Gill on disposition of Gruys's bail, Gunderson

¹ *People v. Harvey* (1979) 25 Cal.3d 754.

filed this action, which was assigned to a different superior court judge naming as defendants the FTB, Gruys, Lorraine Gruys (Gruys's former wife) and the clerk of the superior court. Gunderson's civil suit sought payment of Gruys's bail to Gunderson.²

The next day, March 5, 2010, Gunderson attended the sentencing and bail disposition hearing for Gruys, but did not attempt to make any presentation to Judge Gill regarding his claim to Gruys's bail money. Pursuant to Gruys's plea bargain, and without objection by Gunderson, Judge Gill ordered Gruys's bail forfeited to the victim in the underlying criminal case, the FTB, for payment of restitution.

Thereafter, instead of making a motion for reconsideration or filing an appeal from Judge Gill's order, Gunderson filed an ex parte application in the new civil case he filed, seeking a temporary restraining order and preliminary injunction to block the execution of the restitution order of the judge in the underlying criminal litigation. Gunderson's application to a second judge, the Honorable Rodney L. Walker, failed to disclose his status as a party—a convicted codefendant—in the underlying criminal case.

Judge Walker denied Gunderson's request to enforce a lien on behalf of Gunderson in contravention of Judge Gill's order, finding he did not have the power to overturn an order of another superior court judge. Judge Walker found the appropriate course of action for Gunderson as an alleged third party with an interest in Gruys's bail was to raise the issue before Judge Gill and only the Court of Appeal could disturb Judge Gill's order. However, Judge Walker granted a temporary restraining order against disbursement of

² Gruys and Lorraine Gruys each defaulted in this matter.

the bail funds until April 2, 2010, to assure Gunderson had sufficient time to either file a motion for reconsideration with Judge Gill or to seek relief from Judge Gill's order in the Court of Appeal.

Following the *ex parte* hearing, Gunderson again chose neither to seek reconsideration of Judge Gill's order, nor to appeal that order, and instead challenged *Judge Walker's ex parte* order and petitioned this court for a writ of supersedeas. This court initially granted a temporary stay, which was dissolved on April 22, 2010, after full briefing. The bail in question—\$500,000—was then disbursed to the FTB pursuant to Judge Gill's original, unchallenged order.

On July 22, 2010, the clerk of the superior court filed a motion for sanctions against Gunderson. In response, on August 19, 2010, Gunderson filed a request to dismiss without prejudice the clerk of the superior court as a defendant in this case. On November 1, 2010, after a demurrer was sustained with leave to amend, Gunderson filed an amended complaint, omitting the clerk as a defendant.

On April 29, 2011, the FTB and Gunderson filed cross-motions for summary judgment and/or summary adjudication. The court granted summary judgment in favor of the FTB and denied Gunderson's motion. In doing so, the court stated: "Under the California Constitution, orders of restitution to crime victims take precedence over civil judgments. As set forth in Cal[ifornia] Const[itution,] art[icle] I, [section] 28[subdivision] (C), '[a]ll monetary payments, monies, and property collected from any person who has been ordered to make restitution shall be first applied to pay the amounts ordered as restitution to the victim.'" Here, the bail money was forfeited to Defendant

FTB as restitution. [Citation.] Public policy supports a conclusion restitution should be awarded to crime victims prior to enforcing civil judgments. Plaintiff contends this section simply clarifies victim restitution should be paid prior to government fines[.] However, the statute is not so specific. The ability of crime victims to enforce a restitution order as a civil judgment does not set forth a rule of priority, only procedural collections issues. None of the authority cited by Plaintiff negate the public policy rule of priority set forth in the California Constitution."

On September 13, 2011, Gunderson filed his notice of appeal in this case. Judgment was entered for FTB on November 2, 2011. On November 8, 2011, we exercised our discretion to treat the notice of appeal as being filed immediately after entry of judgment, but ruled the portion of the appeal purporting to be from Judge Walker's March 10, 2011, order granting a temporary restraining order (which had been the subject of an earlier appeal) was untimely and that portion of the appeal was dismissed.

DISCUSSION

I. *STANDARDS GOVERNING SUMMARY JUDGMENT MOTIONS*

The summary judgment procedure is directed at revealing whether there is evidence that requires the fact-weighting procedure of a trial. "[T]he trial court in ruling on a motion for summary judgment is merely to determine whether such issues of fact exist, and not to decide the merits of the issues themselves.' [Citation.] The trial judge determines whether triable issues of fact exist by reviewing the affidavits and evidence before him or her and the reasonable inferences which may be drawn from those facts." (*Morgan v. Fuji Country USA, Inc.* (1995) 34 Cal.App.4th 127, 131.) However, a

material issue of fact may not be resolved based on inferences if contradicted by other inferences or evidence. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 856.)

"The evidence of the moving party [is] strictly construed, and that of the opponent liberally construed, and any doubts as to the propriety of granting the motion [are to] be resolved in favor of the party opposing the motion." (*Branco v. Kearny Moto Park, Inc.* (1995) 37 Cal.App.4th 184, 189.) The trial court does not weigh the evidence and inferences, but instead merely determines whether a reasonable trier of fact could find in favor of the party opposing the motion, and must deny the motion when there is some evidence that, if believed, would support judgment in favor of the nonmoving party. (*Alexander v. Codemasters Group Limited* (2002) 104 Cal.App.4th 129, 139.)

Consequently, summary judgment should be granted only when a moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).)

Because a motion for summary judgment raises only questions of law, we independently review the parties' supporting and opposing papers and apply the same standard as the trial court to determine whether there exists a triable issue of material fact. (*City of San Diego v. U.S. Gypsum Co.* (1994) 30 Cal.App.4th 575, 582; *Southern Cal. Rapid Transit Dist. v. Superior Court* (1994) 30 Cal.App.4th 713, 723.) In practical effect, we assume the role of a trial court and apply the same rules and standards governing a trial court's determination of a motion for summary judgment. (*Lopez v. University Partners* (1997) 54 Cal.App.4th 1117, 1121-1122.) We liberally construe the evidence in support of the party opposing summary judgment (*Wiener v. Southcoast Childcare Centers, Inc.* (2004) 32 Cal.4th 1138, 1142) and assess whether the evidence

would, if credited, permit the trier of fact to find in favor of the party opposing summary judgment under the applicable legal standards. (Cf. *Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th at p. 850.)

II. ANALYSIS

A. *The FTB's Status As A Crime Victim Entitled It to Priority Over Gunderson's Civil Judgment*

In 1982 the People of California enacted Proposition 8, the Victims' Bill of Rights, which amended the California Constitution to codify certain rights of crime victims. (Cal. Const., art. I, § 28.) Among the rights guaranteed was the right to restitution. (Cal. Const., art. I, § 28, subd. (b)(13).) The Victims' Bill of Rights was amended by the People in 2008 with the adoption of Proposition 9 that year. (1C West's Ann. Cal. Const., 2012 Supp., p. 184.) The findings adopted with Proposition 8 in 1982 and Proposition 9 in 2008 confirm the People intended to mandate the paramount importance of the rights of victims to justice. (See Legis. Findings & Declaration; Rights of Victims, Cal. Const., art. I, § 28, former subd. (a), 1C West's Ann. Cal. Const., pp. 375-376) [original language of 1982's Prop. 8]; Prop. 9, § 2, subd. 1 (1C West's Ann. Cal. Const., 2012 Supp., p. 196).)

Article I, section 28, subdivision (b) of the California Constitution provides:

"In order to preserve and protect a victim's rights to justice and due process, a victim shall be entitled to the following rights: [¶] . . . [¶] (13) *To restitution.* [¶] (A) It is the unequivocal intention of the People of the State of California that all persons who suffer losses as a result of criminal activity shall have the right to seek and secure restitution from the persons convicted of the crimes causing the losses they suffer. [¶] (B) Restitution shall be ordered from the convicted wrongdoer in every case, regardless of the sentence or

disposition imposed, in which a crime victim suffers a loss. [¶] (C)
*All monetary payments, monies, and property collected from any
person who has been ordered to make restitution shall be first
applied to pay the amounts ordered as restitution to the victim.*"
(Italics added.)

For purposes of this constitutional provision, a government agency is a crime victim with constitutional restitution rights when it has been defrauded by criminal activity. Indeed, case law has expressly held the FTB, as a governmental agency, is a crime victim entitled to restitution in cases such as this one involving tax fraud. (*People v. Beck* (1993) 17 Cal.App.4th 209, 218-222; Pen. Code, § 1202.4, subd. (k)(2); see also *People v. Crow* (1993) 6 Cal.4th 952, 956-960 [government agency is statutory victim in welfare fraud case].)

Gunderson asserts he has statutory or common law rights under his civil judgment against his criminal codefendant Gruys that take precedence over the constitutional rights of a crime victim. However, his position is unsupported by law and contradicted by the plain language of the Constitution, quoted, *ante*.

The Constitution is the supreme law of the state. (*Playboy Enterprises, Inc. v. Superior Court* (1984) 154 Cal.App.3d 14, 28; *Pooled Money Investment Bd. v. Unruh* (1984) 153 Cal.App.3d 155, 160; *Dye v. Council of Compton* (1947) 80 Cal.App.2d 486, 490.) Constitutional provisions control over other laws (*Apple v. Zemansky* (1913) 166 Cal. 83, 89) and override any statutory or case law in conflict that may have preceded them. (*Silicon Valley Taxpayers' Assn., Inc. v. Santa Clara County Open Space Authority* (2008) 44 Cal.4th 431, 448, citing *Hale v. Bohannon* (1952) 38 Cal.2d 458, 471.)

Moreover, the intent of the electorate in adopting an initiative measure, such as Proposition 8 in 1982 and Proposition 9 in 2008, should be ascertained and effectuated. (*Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205, 212; *People v. Spark* (2004) 121 Cal.App.4th 259, 267.) Even if the original Victims' Bill of Rights enacted as Proposition 8 in 1982 had left any doubt of the primacy of the restitution right over other claims to a criminal's forfeited assets, the amendments enacted as Proposition 9 in 2008—stating that assets collected from anyone under a restitution order are to be applied first to the payment of restitution (Cal. Const., art. I, § 28, subd. (b)(13)(C))—removed any uncertainty.

Gunderson asserts that, because the findings adopted with the Proposition 9 amendments in 2008 do not stress restitution, the provisions of the Victims' Bill of Rights related to restitution are somehow less important than collection of his civil judgment against his codefendant. However, Gunderson provides no authority for this proposition. The findings added in 2008 include an explicit statement in article I, section 28, subdivision (a)(3) of the California Constitution that the rights of victims include "personally held and enforceable rights described in paragraphs (1) through (17) of subdivision (b)." That includes the right to restitution contained in paragraph (13) of article I, section 28, subdivision (b), including the provision in subdivision (C) of that paragraph which was added as part of the same 2008 amendments. This constitutional language makes clear that even if Gunderson were truly a "third party creditor" with clean hands, rather than a convicted defendant in the same set of criminal transactions

which gave rise to the underlying case, he would still not have priority over Gruys's victim and his own criminal activity.

Gunderson contends the bail of his codefendant Gruys was never "collected" because it was "exonerated." Bail was exonerated in the underlying criminal case in the sense the court necessarily found Gruys had made his appearances and bail would therefore not be forfeited to the court. However, Gunderson's assertion that when bail is exonerated it renders a nullity its prior collection is unavailing. The bail *had* to be collected before it could be considered for exoneration.

Consistent with California Constitution article I, section 28, statutory and case law in this state requires that when disposing of claims against bail deposited by a criminal defendant, fines and restitution are deducted from the bail before it is exonerated; only what remains after fines and restitution belongs to the defendant (and is then available to satisfy the claims of third-party creditors). (Pen. Code, § 1297 [fines and restitution to be deducted from bail prior to returning any surplus to defendant]; *Q-Soft, Inc. v. Superior Court* (2007) 157 Cal.App.4th 441, 449 [funds held by court in criminal matter under the "Freeze and Seize Law" (Pen. Code, § 186.11) pay restitution first, and only after distribution of any remainder can third party creditor of distributee levy].) In this case, the deduction of restitution from Gruys's bail left nothing with which to satisfy Gunderson's claim.

Gunderson asserts the trial court conceded he had a fully perfected and superior lien. The record does not support this contention. The court, in accord with the

Constitution and authorities discussed above, did not concede Gunderson's lien to be superior.

Even apart from the constitutional and statutory provisions dealing specifically with a claim for crime victim restitution, Gunderson's claim to priority is unavailing. Generally, property in the custody of the law is not subject to execution without the court's permission. (*Hawi Mill & Plantation Co. v. Leland* (1922) 56 Cal.App. 224, 229-230; *Withington v. Shay* (1941) 47 Cal.App.2d 68, 74; *Phoenix v. Kovacevich* (1966) 246 Cal.App.2d 774, 778-779; *Lea v. Strebe* (1962) 201 Cal.App.2d 227, 230.) Bail money is in the custody of the law and "so long as the money was serving the purpose of cash bail it was *in custodia legis*, and, therefore, incapable of being . . . [subject to] garnishment or levy on the part of the depositor's creditors." (*Credit Bureau of San Diego, Inc. v. Getty* (1943) 61 Cal.App.2d Supp. 823, 832.) Property in the custody of the law only becomes subject to execution when the custody, or reason for the custody, ends. (*Dunsmoor v. Furstenfeldt* (1891) 88 Cal. 522, 527-528; *City of Los Angeles v. Knapp* (1937) 22 Cal.App.2d 211, 212-213; *Credit Bureau of San Diego v. Getty, supra*, at pp. 831-832, 833.)

Thus, Gunderson's claim to priority, even if he made his claim to the bail money with the correct court at the correct time and even if it were not subject to a superior constitutional claim, would have been ineffective as he had purported to levy on his codefendant's bail while it was still being held by the court.

As we have discussed, *ante*, the correct procedure for Gunderson to assert his claim was (as he was advised by the clerk of the superior court) to raise his claim at the bail disposition hearing with the judge who had jurisdiction over the bail money.

Gunderson focuses on the availability of *enforcement* of a restitution order as a civil judgment, to argue that it should be treated for prioritization purposes as *no different than* a civil judgment. In support of this position Gunderson cites two authorities. The first is Penal Code section 1202.4, subdivisions (a)(3)(B) and (i), providing restitution "shall be enforceable as if the order were a civil judgment." Penal Code section 1202.4, subdivision (a)(3)(B) does *not* say, however, that a restitution order is a civil judgment, much less that it has no more priority than any other civil judgment. It merely says that once entered, an unsatisfied restitution order may be *enforced*, in addition to any other means of enforcement, by any means by which a civil judgment can be enforced. As the Court of Appeal stated in *Vigilant Ins. Co. v. Chiu* (2009) 175 Cal.App.4th 438, 444, "While a restitution order is enforceable 'as if [it] were a civil judgment' [citation], it is *not* a civil judgment."

In support of his claim that a restitution order is equivalent to a civil judgment, Gunderson cites *People v. Harvest* (2000) 84 Cal.App.4th 641. But *Harvest* did not address the issue presented here: whether one codefendant in a criminal case could obtain priority over the victim by obtaining a civil judgment against another codefendant while the criminal case was pending. Instead, *Harvest* addressed a claim of double jeopardy when restitution was added to a sentence following remand from the Court of Appeal. The Court of Appeal in *Harvest* concluded because victim restitution was civil

in nature, the defendant's right to avoid double jeopardy rights was not implicated. (*Id.* at p. 650.)

Gunderson also cites *People v. Green* (2004) 125 Cal.App.4th 360 as "declaring that the creditor with a lien on the property had priority over victims who never levied or placed a lien on the property." However, *Green* is distinguishable.

In *Green*, the Court of Appeal held that the property in question was not legitimately held by the court because the People had not complied with legal requirements for its seizure and freezing. Thus, the property was at least arguably subject to levy by a third party creditor because it was lawfully in the possession of the debtor. (*People v. Green, supra*, 125 Cal.App.4th at pp. 369-375.) Here, there is no question that Gruys's bail was properly held by the court.

The superior court properly determined that the FTB as a crime victim entitled to restitution had a priority claim to Gruys's bail money that was superior to that of Gunderson.

B. Equitable Considerations Dictate the FTB Has Priority

Equitable considerations and public policy are taken into account when determining priority of liens. (*Waltrip v. Kimberlin* (2008) 164 Cal.App.4th 517, 525-527.) The first-in-time-of-creation rule of Civil Code section 2897, on which Gunderson relies, is applicable only "[o]ther things being equal." (*Waltrip*, at p. 531.) Equitable considerations take precedence over the "first-in-time" rule. (*Nicoletti v. Lizzoli* (1981) 124 Cal.App.3d 361, 369.)

Unclean hands preclude a successful equitable claim. (*Kendall-Jackson Winery, Ltd. v. Superior Court* (1999) 76 Cal.App.4th 970, 978.) Thus Gunderson's unclean hands in this matter preclude him from asserting his lien over FTB's restitution claim. That Gunderson has unclean hands in this matter is established by his guilty plea in the underlying criminal case. (See *Chadwick v. State Bar* (1989) 49 Cal.3d 103, 110.)

Thus, even in the absence of constitutional considerations discussed *ante*, Gunderson ignores necessary equitable considerations in assuming that asserting a lien on his codefendant's bail prior to his codefendant's conviction automatically gives him a superior right to that asset.

C. *Res Judicata Bars Gunderson's Claim*

"It is black letter law that '[r]es judicata bars the litigation not only of issues that were actually litigated in the prior proceeding, but also issues that could have been litigated in that proceeding.'" (*In re Prather* (2010) 50 Cal.4th 238, 260, citing *Zevnik v. Superior Court* (2008) 159 Cal.App.4th 76, 82.) A "prior judgment is *res judicata* on matters which were raised or could have been raised, on matters litigated or *litigable*." (*Sutphin v. Speik* (1940) 15 Cal.2d 195, 202, final italics added.)

Here, Gunderson waived his right to relitigate the issue of his codefendant's bail disposition because he failed to raise his claim before the court at Gruys's bail disposition hearing, even though Gunderson was a party with actual notice and was present at that hearing. Gunderson's opportunity to litigate his claim in the underlying proceeding precludes Gunderson from raising his claim in a separate action. (*Murray v. Alaska Airlines, Inc.* (2010) 50 Cal.4th 860, 869.)

Gunderson claims he was the real victim in the underlying criminal case. This claim is unavailing in light of his own guilty plea in that case. However, even if he was a victim, he had the right to be heard at his codefendant's sentencing and could have advanced his own claim to the bail not merely on the basis of his separate civil judgment, but on the basis of his own constitutional right to restitution. The California Constitution, article I, section 28, subdivision (b)(8) gives any crime victim the right "[t]o be heard, upon request, at any proceeding, including any . . . plea, sentencing . . . or any proceeding in which a right of the victim is at issue." However, if Gunderson wished to obtain restitution as a "victim," the burden was on him to raise his claim with the sentencing judge in the underlying case. (*People v. Giordano* (2007) 42 Cal.4th 644, 667.) It is undisputed he did not do so.

D. *Reconsideration of Another Judge's Ruling*

In addition to res judicata, Gunderson's claim in this matter is barred by a more specific rule applicable here: "[O]ne trial court judge may not reconsider and overrule a ruling of another judge." (*Curtin v. Koskey* (1991) 231 Cal.App.3d 873, 876.) As we stated in *People v. Goodwillie* (2007) 147 Cal.App.4th 695, 713, "For one superior court judge, no matter how well intended, even if correct as a matter of law, to nullify a duly made, erroneous ruling of another superior court judge places the second judge in the role of a one-judge appellate court.'" The exceptions to this rule are narrow: remand following reversal, a motion for reconsideration in which the original judge is unavailable, and a showing the original order was a result of inadvertence, mistake, or fraud. (*Id.* at pp. 713-714.) The remedy for a legally incorrect ruling is to address a

motion for reconsideration to the judge who made the original order or to appeal the order. (*Curtin*, at p. 877.)

Gunderson cites *Credit Bureau of San Diego v. Getty*, *supra*, 61 Cal.App.2d Supp. 823, as authority for the proposition that he followed the correct procedure here. This contention is unavailing. First, *Getty* states that bail cannot be levied prior to exoneration: "There can, of course, be no question that so long as the money was serving the purpose of cash bail it was *in custodia legis*, and, therefore, incapable of being reached either under section 710, or by any sort of garnishment or levy on the part of the depositor's creditors." (*Id.* at p. 832.)

Credit Bureau of San Diego v. Getty, *supra*, 61 Cal.App.2d Supp. 823 is in accord with cases holding generally that funds held "*in custodia legis*" are not subject to levy until they are actually ordered distributed by the court holding the funds. At that point only, they are available for levy by creditors of the distributee. (See *Estate of Silverman* (1967) 249 Cal.App.2d 180, 185.) Here, the distributee, pursuant to the California Constitution and statutes discussed *ante*, was the FTB, not Gruys. Gruys had lost his right to the money because he was convicted in the Gunderson-Gruys criminal matter in which there was a victim, the FTB, that was owed restitution. As the trial court pointed out, under no theory was Gunderson a creditor of the FTB. Thus, if Gunderson wished to litigate rights to his codefendant's bail money, he needed to do so in the court with jurisdiction over that money before a distribution order was made.

E. *Gunderson Was Not Deprived of Due Process*

Gunderson contends that giving effect to California's constitutional and statutory provisions on restitution in this case would violate his due process rights by "extinguishing his lien—a property interest on the bail" In support of this contention Gunderson cites *Dusenbery v. United States* (2002) 534 U.S. 161. However, that case is inapposite. There, the Supreme Court held that due process rights of a convicted criminal facing forfeiture of property were satisfied by measures reasonably calculated to give notice, even if it was uncertain that actual notice had occurred. (*Id.* at p. 168.) Due process was satisfied here, as Gunderson had *actual* notice of his codefendant's bail disposition hearing.

In making this argument, Gunderson also states that "the trial court determined that Mr. Gunderson's perfected lien in the bail was rendered ineffective as a result of a plea bargain as to the disposition of the bail money as to which (1) Mr. Gunderson had no notice and could not participate, and (2) which occurred in a criminal proceeding as to which Mr. Gunderson was not a party and in which he had no obligation to participate."

Gunderson's claim he was "not a party" in the underlying criminal case is false. It is undisputed Gunderson was not only a party, but was convicted as a result of his own guilty plea in that case. It is also undisputed that he had notice of both the plea agreement and the bail disposition hearing. Moreover, the plea agreement was presented in open court, with Gunderson present.

In arguing his due process rights were violated, Gunderson states "the government and Gruys foreclosed Mr. Gunderson's opportunity to even be considered a victim of

Gruys' scheme by orchestrating the plea deal so that only the government could be considered a victim." However, as we have discussed, *ante*, there was nothing to prevent Gunderson from asserting his claim as a "victim" to Judge Gill in his underlying criminal case if he chose to do so. Gunderson, although on notice of his codefendant's plea agreement in July 2008, made no attempt between then and the March 2010 hearing to raise any claim that the agreement prejudiced his rights as either a "third party creditor" or a "victim."

In sum, there is no authority for the claim that the priority for victim restitution over a third-party civil judgment claimant under the California Constitution and the California Penal Code constitutes a deprivation of due process or is anything other than the state's lawful exercise of its right to enact and enforce laws to determine priority for disposition of bail. Further, there is no factual basis for the claim that Gunderson was deprived of his due process rights, where he had actual notice of, was a party to, and was present for, the hearing at which his codefendant's bail was ordered to be applied to restitution.

DISPOSITION

The judgment is affirmed. Respondent FTB shall recover its costs on appeal.

NARES, Acting P. J.

WE CONCUR:

HALLER, J.

McINTYRE, J.