SHELDON SILVER, MEMBER AND SPEAKER, NEW YORK STATE ASSEMBLY and NEW YORK STATE SENATE, Plaintiffs-Appellants. - against - GEORGE E. PATAKI, GOVERNOR, STATE OF NEW YORK, Defendant-Respondent.

No. 171

COURT OF APPEALS OF NEW YORK

2004 NY App. Ct. Briefs 171; 2004 NY App. Ct. Briefs LEXIS 273

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Reply Brief: Appellant-Petitioner

COUNSEL: [*1] To be Argued by: Stewart F. Hancock, Jr.

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TITLE: Reply Brief on Behalf of Plaintiff-Appellant New York State Senate

TEXT: PRELIMINARY STATEMENT

By their decisions, Supreme Court and the Appellate Division - pointing to no provision in the Constitution to justify it - have drastically excised a large segment of the Legislature's "absolute and unlimited" power and transferred that power to the Governor. *People ex rel. Simon v. Bradley*, 207 NY 592, 610(1913). **They have accomplished this by conclnding that Article VII, Section 4 - which by its precise terms applies solely to restrict legislative changes in the Governor's Section 3 appropriations bills - may be used by the Governor, at his option, to restrict the Legislature's right to make changes in the Governor's non-appropriation bills.** The unavoidable consequence of this holding is that the Governor has been given what amounts to a *de facto* line-item "veto" power over whatever legislative changes in a non-appropriation [*2] bill he does not like by simply exercising his judicially created option to strike them out as contrary to Article VII, Section 4.

This new Article VII, Section 4 gubernatorial "veto" power, it must be emphasized, is entirely the creation of the

courts below. To achieve this extraordinary result, the lower courts have simply assumed the validity of the two critical propositions on which their Article VII, Section 4 *de facto* "veto" power necessarily depends:

1. that Article VII, Section 4 - which applies exclusively to the Governor's Section 3 appropriation bills - may be arbitrarily transplanted so that it covers a separate and distinctly different type of legislation to which it does not apply, the Governor's Section 3 non-appropriation bills, and thereby employed to restrict legislative changes in those bills as if they were in appropriation bills; and

2. that the Governor is free, at his option, to treat any of the general legislative measures which he has placed in his non-appropriation bills as "items of appropriation" as if they were in his proposed appropriation bills for the purpose of applying the Article VII, Section 4 "no-alteration" rule so long as the general legislative [*3] measures "specifically relate to" some appropriation in the budget. n1

n1 Although in the first instance this appeal concerns the constitutionality of the Legislature's changes to the Governor's proposed Section 3 non-appropriation bills in the 1998-1999 State budget, because Section 4 by its express terms does not apply to non-appropriation bills the Governor attempted to transform the case into a discussion about his proposed Section 3 appropriation bills.

The Governor's erroneous premise, which the lower courts adopted, is that legislative changes enacting general legislation, including amendments to State laws, to his non-appropriation bills may be treated as if they were actually amendments to the Governor's appropriation bills for purposes of invoking the "no-alteration" rule in Section 4 because these general legislative measures allegedly constitute "items of appropriation" under either: (1) his "when, how or where" test of *Saxton v. Carey*, 44 NY2d 545 (1978) or (2) his "specifically relates to" test of Article VII, Section 6.

As demonstrated in Point I below and in Point I of the Senate's Brief (at pp. 36-51) this premise is erroneous because the measures the Legislature added or altered in the Governor's non-appropriation bills - general legislation, including amendments to existing State laws - could not have been constitutionally embraced in the Governor's proposed Section 3 appropriation bills in the first place under the general scheme and structure of Article VII. Moreover, the Governor's argument also fails because neither *Saxton* nor Article VII, Section 6 provide the criteria for what measures may constitutionally be incorporated in appropriation bills, *i.e.*, items of appropriation. *See* Points II and III below and Points III and IV in the Senate's Brief (pp. 62-89).

[*4]

In its Brief, the Senate has shown that both of these underlying assumptions are contrary to any fair reading of the Constitution, to the governing case law, and to the extensive history of the Executive Budget Amendment when it was adopted in 1927 and. when it was made part of the 1938 Constitution as the present Article VII. In his Answering Brief, the Governor has either completely failed to answer the Senate's arguments or made totally ineffectual efforts to do so. We briefly discuss these efforts.

ARGUMENT

POINT I

THE GOVERNOR MAKES NO EFFORT TO EXPLAIN HOW ARTICLE VII, SECTION 4 CAN BE APPLIED TO LIMIT THE LEGISLATURE'S ABSOLUTE AND UNLIMITED CONSTITUTIONAL RIGHT UNDER ARTICLE III, SECTION 1 TO ENACT GENERAL LEGISLATION, INCLUDING CHANGES AND AMENDMENTS TO THE NON-APPROPRIATIONS BILLS SUBMITTED BY THE GOVERNOR UNDER SECTION 3.

Apparently believing that when there is a proposition which is impossible to uphold it is sometimes best to say nothing about it and claim that it is self-evident, the Governor offers this single sentence as his total response to the Senate's argument that Article VII, Section 4 cannot be interpreted to prevent the Legislature from [*5] changing the general legislation which the Governor has submitted in his non-appropriation bills:

> The fact that those alterations were physically placed into so-called "non-appropriation" bills rather than directly into the appropriation bill that they changed does not avoid the constitutional infirmity.

Governor's Brief at p.29.

The following propositions advanced by the Senate stand completely unrefuted:

1. that Article VII, Section 4, by its terms, applies solely to the Governor's appropriation bills; there is nothing in the text of Section 4 or any other provision of Article VII suggesting that the limitations on legislative changes in Section 4 apply to any other bills;

2. construing Section 4 as applying to legislative changes in non-appropriation bills as well as in appropriation bills obliterates the distinct differences between appropriation bills and non-appropriation bills as demonstrated in the Senate's analysis of Sections 2, 3 and 4 when read together (*see* Senate's Brief at pp. 8-11, 39-50);

3. treating non-appropriation bills as the equivalent of appropriation bills is directly contrary to this Court's recognition of non-appropriation bills as [*6] being different from appropriation bills and containing, for example, "programmatic provisions * * * commonly includ[ing] sources, schedules and sub-allocations for funding provided by appropriation bills, along with provisions authorizing the disbursement of certain budgeted funds pursuant to subsequent legislative enactment." *Silver v. Pataki*, 96 NY2d 532, 535 n1 (2001), *modifying* 274 AD2d 57 (1st Dep't 2000), *reversing* 179 Misc2d 315 (Sup. Ct., N.Y. Co. 1999) ("*Silver I*"). Indeed, in the leading case *of People v. Tremaine*, 252 NY 27 (1929) ("*Tremaine I*"), the Court noted the distinction, stating:

> Nothing, however, contained therein prevents the Legislature from itemizing appropriations or **from enacting general laws, apart from the Governor's budget bill, providing how lnmp sum items of appropriation shall be segregated, subject to the veto power of the Governor and the constitutional limitation of the Constitution, Article III, Section 7.**

Id. at 49 (emphasis supplied); n2

> n2 In discussing Supreme Court's decision in his Brief (at p. 16), the Governor's counsel states that Supreme Court "emphasized that the Speaker had conceded that if the Legislature's amendments had been made directly to the appropriation bills which they affected, they would have violated Article VII, Section 4." While the Senate was not a party at the time of the purported concession, if any, that the Speaker may have made below, it must be respectfully emphasized that the Senate has never made any such concession. As is evident from its Briefs in this case and in *Pataki v. New York State Assembly*, 190 Misc2d 716 (Sup.Ct., Albany Co. 2002), *aff'd* 7 AD2d 74, 774 NYS2d 891 (3d Dep't 2004) (appeal taken and to be argued with this appeal) ("*Pataki*"), the Senate's unequivocal position has been and remains that the Legislature may, consistent with Article VII, Section 4: (1) strike out as void general legislative measures that the Governor unconstitutionally attaches to his proposed appropriation bills (as in *Pataki*); and (2) add or change general legislative measures, including amendments to existing State laws, in the Governor's proposed non-appropriation bills which the Governor cannot selectively line-item "veto" by striking those measures that he does not like while retaining the others (as in *Silver II*).

[*7]

4. the 1938 amendment of Section 3 - which, for the first time, required the Governor to actually submit (rather than just recommend, *see* Section 2) proposed tax legislation as part of his Section 3 non-appropriation bills - makes it logically impossible for Section 4 to be considered applicable to the general legislation contained in the Governor's proposed non-appropriation bills; applying Section 4 to the Governor's non-appropriation bills results in an absurdity since by operation of Section 4 the Governor's tax measures would become law without approval or other action by the Legislature (*see* Senate's Brief at pp. 46-48); and

5. there is not one decision applying Section 4 to non-appropriation bills and all of the relevant precedents, including the leading cases, indicate that it is only intended to limit legislative changes to the Governor's appropriation bills. *See,, e.g., Tremaine I*, supra, *People v. Tremaine*, 281 NY 1 (1939) ("*Tremaine II*"); *New York State Bankers Ass'n v. Wetzler*, 81 NY2d 98, 105 (1993) ("*Bankers*").

POINT II

THE GOVERNOR FAILS TO ANSWER THE SENATE'S ARGUMENTS THAT *SAXTON V. CAREY* PROVIDES [*8] **NO AUTHORITY FOR THE GOVERNOR TO ATTACH GENERAL LEGISLATION TO HIS SECTION 3 APPROPRIATION BILLS**

The Governor attempts to dismiss without explanation or discussion the undisputed facts that:

1. the sole holding in *Saxton v. Carey*, 44 NY2d 545 (1978) is that the "degree of itemization" in an appropriation bill necessary for proper legislative review is a non-justiciable political question for the Governor and the Legislature and that **when the Governor and the Legislature have agreed on the qnestion** "the Constitution is satisfied, and the courts will not disturb that result" (*id.* at 551);

2. **this appeal, as contrasted with *Saxton,*** has nothing to do with the sufficiency of the itemization or detail necessary for legislative review of appropriation bills; this appeal concerns in the first instance the subject matter of what alterations the Legislature may constitutionally make to the Governor's non-appropriation bills; it **concerns the substance of what measures may constitutionally be included in appropriation and non-appropriation bills, not how they are itemized or the detail with which they are described;**

3. **this appeal** [*9] - unlike *Saxton* and *Bankers* where the Governor and the Legislature were in agreement over the legislation and the challenges were from third parties - **presents a quintessentially justiciable question where the Governor and the Legislature are in sharp disagreement over the nature and substantive content of what measures may, under Article VII of the Constitution, be included in the Governor's Section 3 appropriation and non-appropriation bills;**

4. the catch-all words "when, how, or where" from *Saxton* - the words which the lower courts and the Governor have lifted from the *Saxton* opinion and repeat as a sort of incantation for the Governor's authority to declare that virtually any matter, so long as it "relates to" some appropriation constitutes as "item of appropriation" subject to the no-alteration provision of Section 4 - are taken from dictum in *Saxton* having to do with the flexibility of the itemization and detail requirements for legislative review when the Governor and the Legislature are in agreement; the words "when, how, or where" are not part of any holding in *Saxton* - or in Justice Breitel's dissent in *Hidley v. Rockefeller*, 28 NY2d 439 (1971) [*10] upon which *Saxton* relies - establishing the parameters or describing the nature or subject matter of the measures which the Constitution permits the Legislature to alter in the Governor's non-appropriation bills or which the Governor may unilaterally treat as "items of appropriation" in either his Section 3 appropriation or non-appropriation bills;

5. the application of *Saxton* as authority for the Governor to line-item "veto" measures added or changed by the Legislature in non-appropriation bills, including the addition of policy-related general legislation and amendments to existing laws, as allegedly violative of Section 4 because, according to the Governor, they constitute "items of appropriation," is contrary to the holdings of this Court in *Tremaine I* and *Tremaine II*. n3 Both decisions prescribe the

content of an appropriation bill, as the term suggests, as containing "items of appropriation," the amount to be expended and its purpose; nothing in *Saxton* in any way suggests that the Court intended to overrule, modify or limit the holdings in *Tremaine I* or *Tremaine II*.

n3 This Court in *Tremaine I* gave a clear indication of what is not an "item of appropriation." In disapproving of the Legislature's addition of Section 11 to appropriation bills giving the Chairs of the Senate Finance and Assembly Ways and Means Committees co-authority for the approval of segregations of monies, the Court wrote:

> Assuming, however, that section 11 was a proper item for the Legislature to insert in a budget appropriation bill, much force attaches to the contention that such a direction is one which the Governor might veto. It is an item or particular, distinct from the other items of the bill, **although not an item of appropriation.**

252 NY at 49-50 (emphasis supplied).

In *Tremaine II* this Court read the term "items of appropriation" as encompassing only **the amount of the appropriation and its purpose.** As this Court explained:

> The Governor's budget is to be itemized so as to show of what the estimates consist. The information necessarily consists of items. The Constitution means that the budget, and the **appropriation bills** accompanying it, shall be broken down into items sufficient to **show what money is to be expended, and for what purpose.** It is information the Governor must give, and **it is the items giving this information which is embodied in his appropriation bills.**

281 NY at 5 (emphasis supplied).

[*11]

Inexplicably, as purported additional authority to bolster *Saxton* as authority for his all inclusive definition of "items of appropriation," the Governor's Brief (at p. 21) cites two cases which, as fully demonstrated in the Senate's Brief (at pp. 89-90), are totally off the point - *Rice v. Perales*, 156 Misc2d 631 (Sup. Ct., Monroe Co. 1993), *aff'd as modified on other grounds*, 193 AD2d 1135 (4th Dep't 1993) and *Schuyler v. South Mall Constructors*, 32 AD2d 454 (3d Dep't 1969). Neither decision has anything to do with the definition of "items of appropriation," what the Governor may constitutionally include in his Section 3 appropriation and non-appropriation bills or what changes the Legislature can constitutionally make to the Governor's non-appropriation bills. On the contrary, both *Rice* and *Schuyler* - as the Governor recognizes n4 - pertain solely to what the Legislature, not the Governor, may include in appropriation bills under the limitations of the "anti-rider" clause of Article VII, Section 6. n5

n4 *See* Governor's Brief at p. 27, n 6, in which the Governor acknowledges that *Rice* and *Schuyler* "concern the Legislature's conduct, not the Governor's."

[*12]

n5 The Governor quotes selected portions of Speaker Silver's Brief in the First Department in an effort to show that the Speaker supposedly "accepts" the Governor's position on *Saxton* - and on Section 6. *See* Governor's Brief at p. 20 ("The Speaker has conceded that both Saxton and Section 6 support the lower courts' interpretation of what the Governor may permissibly include in proposed items of appropriation. * * * The

Speaker has further acknowledged that whether or not the Governor could include 'when, how or where' provisions in appropriation bills is not at issue in this case.") The Senate does not necessarily agree with the Governor's interpretation of the Speaker's arguments. To the extent that the Speaker's Briefs in the courts below or before this Court can be read as making any such concessions, however, the Senate must respectfully, but clearly, reiterate its disagreement with the Speaker; the Senate has made no such concessions below and clearly disagrees with the Governor's positions with respect to *Saxton* and Section 6.

POINT III

THE GOVERNOR FAILS TO ANSWER [*13] **THE SENATE'S ARGUMENT THAT THE "ANTI-RIDER" CLAUSE OF ARTICLE VII, SECTION 6 DOES NOT PERMIT THE GOVERNOR TO INCLUDE ANY MEASURE IN A SECTION 3 APPROPRIATION BILL SIMPLY BECAUSE IT RELATES TO SOME APPROPRIATION**

It is significant that until the two present actions - *Pataki* and *Silver II*, n6 now on appeal before this Court - there had never been a contention that the "anti-rider" clause of Article VII, Section 6 had any application to the Governor's Section 3 appropriation bills. Section 6 had always been applied solely as a limitation on the Legislature.

n6 *Silver v. Pataki*, 192 Misc2d 117 (Sup. Ct., N.Y. Co. 2002), *aff'd* 3 AD3d 101, 769 NYS2d 518 (1st Dep't 2003), *appeal taken* NY3d (200) ("*Silver II*").

Now, the Governor - apparently having suddenly and conveniently "discovered" Article VII, Section 6 as his authority for the inclusion of measures in his appropriation bills - goes so far as to proclaim that the "anti-rider" clause [*14] is the **"sole constitutional limitation"** (emphasis supplied) on what he may include in his appropriation bills. n7 In his submission to Justice Lehner in this action the Governor, without hesitation, declared:

> Yet Article VII, § 6 is perhaps the most relevant part of the State Constitution when it comes to that issue. **Under Article VII, § 6 any provision that 'relates specifically to some particular appropriation in the bill' and is 'limited in its operation to such appropriation' may be included iu an appropriation bill.**

R.1540 (emphasis supplied).

n7 Brief of Governor Pataki to the Appellate Division, Third Department at p. 31, n 23, in *Pataki v. New York State Assembly*, *supra*, 7 AD3d 74.

There is a fatal flaw in this last minute "unearthing" of the Section 6 "anti-rider" provision as the source of the Governor's virtually unlimited legislative power. **What is now touted as the "sole constitutional limitation" on what measures may be properly treated as part of** [*15] **the Governor's appropriation bills was not included at all by the Framers when the Executive Budget Amendment was adopted in 1927 as Article IV of the 1894 Constitution. And, moreover, the Governor and the Legislature somehow mauaged to enact budgets under the newly adopted Executive Budget Amendment as interpreted by this Court in *Tremaine I* without this purported "sole constitutional limitation" from 1927 until 1938 when the "auti-rider"provision was, for the first time, placed in Section 6 of Article VII in the 1938 Constitution.** n3

n3 This language of Section 6 had previously been found in Article III, Section 22 of the 1894 Constitution

and was moved to Article VII, Section 6 as part of the newly adopted 1938 Constitution.

The Governor does not explain how the Framers of the 1927 Executive Budget Amendment could have conferred on the Governor the then new and highly controversial power to propose appropriation bills - which the Legislature with its limited power to "strike," "reduce" or "add thereto" [*16] (Section 4) could not change - without including what is now said to be the "sole constitutional limitation" on what the Governor could embrace in his appropriation bills. n4 The obvious conclusion is that there is no explanation.

n4 The Governor, although not explaining how the Framers could have made this glaring omission, offers one perplexing comment in response to the obvious conclusion that the Framers could never have conceived of the "anti-rider" provision in Article III, Section 22 of the 1894 Constitution as having any purpose other than limiting the Legislature, let alone the purpose of restricting the Governor's newly authorized appropriation bill. The Governor's comment is as follows: "This ignores the fact that the same policy goals inherent in the 'anti-rider' provision apply to restricting the Governor's conduct - once the Executive Budget System was adopted - as applied to restricting the Legislature's conduct under the old system of legislative budgeting." Governor's Brief at p. 27).

The Framers [*17] in 1927 did not forget to include this "sole constitutional limitation" on the Governor's new legislative powers. The limitations on what the Governor could include in his appropriation bills were, in 1927 as they are now, found in the very structure of the new Executive Budget Amendment. Indeed, this Court, in the leading case of *Tremaine I, supra*, - pertaining to the Executive Budget Amendment as it was in the 1894 Constitution before the "anti-rider" provision was moved from Article III, Section 22 to Article VII, Section 6 - leaves no doubt that the Governor's legislative powers were limited, not by the "anti-rider" clause, which applied only to the Legislature, but by the structure of the Executive Budget Amendment itself. The *Tremaine I* Court, commenting on the newly enacted Executive Budget Amendment, stated:

> The provision for a budget system is a new and complete article of the Constitution to be read in connection with all other provisions contained therein as the latest expression of the popular will. While it in no way limits the ultimate powers of the Legislature to make appropriations (Art. IV-A, § 4) **it regulates the executive aud legislative machinery** [*18] **and defines the method whereby appropriations shall be made.**

252 NY at 49 (emphasis supplied).

Further, alluding to the structural limitations on what the Governor was permitted to include in his appropriation bills, the *Tremaine I* Court stated:

> A fundamental question presents itself in this connection. **If the Legislature may not add segregation provisions to a budget bill, contrary to the provisions of article IV-A, section 3, it would necessarily follow that the Governor ought not to insert such provisions in his bill. He may not insist that the Legislature accept his propositions in regard to segregations without amendment, while denying to it the power to alter them.**

Id. at 50 (emphasis supplied).

Equally significant is this Court's decision in *Tremaine II, supra*, dealing with Article VII of the 1938 Constitution which then contained what the Governor now claims to be the "sole constitutional limitation" on the content of his Section 3 appropriation bills, the "anti-rider" provision in Section 6. Again, despite the actual presence of this so-called

"sole constitutional limitation" in Article VII, the Court [*19] made no reference to it and, as it did in *Tremaine I*, found the only limitations on the content of the Governor's proposed Section 3 appropriation bills in the structure of the Amendment itself. The *Tremaine II* Court stated:

> **When, therefore, we are told that the Legislature may not alter an appropriation bill submitted by the Governor except to strike out or reduce items therein, we expect the appropriation bill to contain items.** As stated before, the items must be sufficient to furnish the information necessary to determine whether in the judgment of the Legislature all that is demanded should be granted or is required.

281 NY at 3 (emphasis supplied); *see also supra*, at p. 9, n 3.

The virtually limitless extent of the Governor's new found "open sesame" for incorporating general legislative measures in his hypothetical appropriation bills - the "anti-rider" provision in Section 6 - is immediately apparent when it is realized that it is even broader than his "anything goes" *Saxton* "when, how, or where" test. For under the "anti-rider" provision, as the Governor would have it, the basic limitation on a measure for inclusion in an appropriation [*20] bill is that it "relate to" some particular appropriation, irrespective of whether it could be considered an "item of appropriation." In this respect, the Governor's Section 6 argument encompasses far more than his "when, how or where" *Saxton* test. The Governor makes no effort to reconcile these obvious contradictions in his arguments.

Finally, the Governor offer no explanation for yet another critical flaw in his Article VII, Section 6 argument. Reading the first sentence of the first paragraph of Section 6 as referring to the Governor's action in submitting his appropriation bills - rather than Legislature's changes to his proposed bills under Section 4 - results in another absurdity, *i.e.*, **the Governor, by the second sentence of Section 6, is given the express power to veto his own bills.** *See* Senate's Brief at 77. n5

> n5 The first two sentences of Section 6 read as follows:
>
> > Except for appropriations contained in the bills submitted by the governor and in a supplemental appropriation bill for the support of government, no appropriations shall be made except by separate bills each for a single object or purpose. All such bills and such supplemental appropriation bill shall be subject to the governor's approval as provided in section 7 of article IV.

[*21]

CONCLUSION

For the foregoing reasons and those set forth in the Senate's Brief, the relief requested in the Senate's Brief should be granted, together with such other and further relief as this Court deems to be appropriate.

Dated: August 20, 2004

Respectfully Submitted,

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